



Failure to Prevent Fraud

Guidance for the financial services sector

February 2025

Disclaimer

This document reflects the views of UK Finance Limited (“UK Finance”) and is aimed to set out non-statutory sector-specific guidance for the purposes of interpretation of the failure to prevent fraud offence and for the purpose of setting out examples of (i) reasonable prevention procedures and (ii) circumstances in which it would not be reasonable for a firm to have prevention procedures in place. This guidance supplements guidance issued by the Home Office under section 204 of the Act (the HO FtPF Guidance). If there is a conflict between this sector-specific guidance and the Home Office guidance, the Home Office guidance will take priority.

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Contents

Introduction	4
Part 1 - Interpretation of the Act.....	5
What is the FtPF offence?.....	5
What is a ‘fraud offence’?	5
What does “aiding, abetting, counselling or procuring” mean?	6
Encouraging or assisting	6
Procurement	7
Who is covered by the FtPF offence?.....	7
In-scope firms	7
Large parent organisations.....	8
General principles	8
Who is a person associated with the firm?	8
Is the firm potentially liable for all fraud offences committed by its associated persons?.....	9
Employees	9
Third party associated persons	10
Can fraud offences committed outside the UK trigger the FtPF offence?	10
Non-UK Firms	11
UK FCA-regulated branches of non-UK headquartered entities	11
UK headquartered international groups.....	11
UK-based employees of non-UK firms or associated persons.....	12
What “benefit” is necessary for the FtPF offence to apply?	12
What does ‘intends to benefit’ mean?	12
What does “subsidiary undertaking” mean?	14
Are there any exceptions to the offence?	14
Are there any defences to the offence?.....	15
Interaction with other financial crime regimes in the UK.....	15
Criminal Finances Act 2017	15
Sections 327-329 of the Proceeds of Crime Act 2002 (PoCA).....	16
The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (ML Regs) and the Joint Money Laundering Steering Group (JMLSG) Guidance .	16
Coordinated resolutions and avoiding “piling on”	16
Part 2 - Reasonable prevention procedures.....	17
The six principles	17

1. Risk assessment	17
2. Proportionate prevention procedures	19
General	19
Subsidiaries within group control environments.....	20
Supply chain	20
Commercial negotiating power	20
Own-account mergers and acquisitions (M&A).....	20
Leveraging existing regulatory requirements	21
3. Due diligence	26
4. Communication (training)	26
5. Monitoring and review	27
Continuous review of framework effectiveness.....	27
Identifying emerging risk	27
6. Top level commitment.....	28
Part 3 - Circumstances where it is not reasonable to expect firms to have prevention procedures in place	29
Risk assessment	29
Risks for which it would not be reasonable in all the circumstances for FCA-regulated firms to have prevention procedures in place	29
In-scope firms providing services entirely outside the UK.....	29
Certain Associated Persons	29
Existing contractual commitments	30
UK listed companies	30
Main market transactions	31
Public M&A transactions	32
Data protection restrictions.....	32
Appendix A – Decision Tree for Part 1 of this Guidance	33
Appendix B – Defined terms.....	34
Appendix C – Examples of third-party relationships which are not “associated persons” of the firm	37
Schedule – Illustrations	41

Introduction

Section 199 of the UK's Economic Crime and Corporate Transparency Act 2023 (the **Act**) sets out a corporate criminal offence for failure to prevent fraud (**FtPF**).

This guidance supplements guidance issued by the Home Office under section 204 of the Act (the **HO FtPF Guidance**). This sector-specific guidance is not statutory guidance and is advisory only. If there is a conflict between this sector-specific guidance and the Home Office guidance, the Home Office guidance will take priority.

It sets out sector-specific guidance for the purposes of interpretation of the FtPF and for the purpose of setting out examples of (i) reasonable prevention procedures and (ii) circumstances in which it would not be reasonable for a firm to have prevention procedures in place, which should be taken into account by a supervisory or enforcement agency when considering and/or prosecuting suspected FtPF offences.

This guidance was developed in conjunction with and for use by UK Finance members of the financial services sector only.

The Government recognises that any regime that is risk-based and proportionate cannot also be a zero-failure regime. This guidance provides a guide to firms (and their legal advisors and representatives) in their understanding and interpretation of the Act [[Part 1](#)], the types of reasonable prevention procedures that might be proportionate in the circumstances [[Part 2](#)], and the circumstances where reasonable prevention procedures would not be reasonable [[Part 3](#)].

This guidance is not intended to be exhaustive, firms do not need to specifically consider this guidance in determining their own approach to either addressing the offence or establishing reasonable prevention procedures – it does not in any way limit the prevention procedures or circumstances that can be evidenced by a firm in defence of the FtPF offence.

A decision tree is included as [Appendix A](#), to support with understanding how to apply the principles described in Part 1 of this guidance.

Defined terms used in this guidance are set out in [Appendix B](#), for ease of reference.

In [Part 2](#), the words “may” or “might” have been used because Part 2 is describing controls which are risk based (i.e. may or may not be applied, depending on the risk). The purpose of the mapping within Part 2 against existing regulatory expectations is to identify certain specific circumstances where these expectations are also relevant to evidencing reasonable prevention procedures. However, as stated above, Part 2 is not exhaustive and does not imply that different or alternative prevention procedures are not also reasonable for the purposes of the defence to the FtPF offence.

This guidance describes the application of the offence based on the law as it stands on the date of this guidance.

Part 1 - Interpretation of the Act

Chapter 2 of the HO FtPF Guidance sets out an Overview of the Offence. This Part 1 provides supplementary information to support financial services firms with understanding the application of the offence in the context of the way in which financial services are delivered.

What is the FtPF offence¹?

The FtPF offence² makes an in-scope firm potentially criminally liable if it fails to prevent a ‘fraud offence’ committed by a person associated with the firm. It is irrelevant whether the firm was unaware of the misconduct. The offence only materialises where a person associated with the firm (as defined) committed the offence with the intention to benefit, directly or indirectly:

- ▶ the firm,
- ▶ those to whom (or to whose subsidiaries) services are provided (the **customer**), or
- ▶ in limited circumstances, a subsidiary of the firm.

The firm is not liable if it is the intended victim of the fraud offence or was the victim of an offence intending to benefit a customer.

The FtPF offence does not have retrospective effect. Only fraud offences commenced after the Act became effective are in scope. In the event that a firm discovers that a fraud offence has been committed before the effective date of the Act, it will not be in scope for the purposes of the FtPF offence.

What is a ‘fraud offence’³?

A ‘fraud offence’ is an act which constitutes:

- ▶ a [listed offence](#), or
- ▶ [aiding, abetting, counselling or procuring](#) the commission of a listed offence.

However, the fraud offence does not have to have been prosecuted before the FtPF offence applies.

If the associated person has not been convicted of the relevant offence, the prosecution must prove (beyond a reasonable doubt) that the associated person could have been convicted of the fraud offence before the FtPF offence can be prosecuted.

These are criminal acts that require intent and (in most cases) dishonesty. As a result, actions solely attributable⁴ to AI or other machine-driven actions (including, for example, trading algorithms) would not be a fraud offence.

See also [Interaction with other financial crime regimes in the UK](#).

¹ This section supplements the opening section of Chapter 2 of the HO FtPF Guidance.

² Sections 199-206 of the ECCT: [Economic Crime and Corporate Transparency Act 2023 \(legislation.gov.uk\)](#)

³ This section supplements Chapter 2.3 of the HO FtPF Guidance.

⁴ i.e. where the AI or machine driven actions have not been deliberately programmed to commit a fraud offence

What does “aiding, abetting, counselling or procuring” mean⁵?

Aiding, abetting, counselling and procuring are secondary (or inchoate) offences.

Secondary offences can be triggered even if the substantive offence has not been committed.

Generally speaking, secondary offences relate to actions taken or agreements made in preparation of a criminal offence.

Although the FtPF offence references aiding, abetting and counselling, rather than the secondary offences that have been introduced more recently into law (encouraging or assisting), it would be reasonable to assume that the Courts would interpret this to refer to secondary offences in their more recent legal framing. The guidance below is based on the newer principles of encouraging or assisting.

Encouraging or assisting

In the context of the FtPF, the associated person in question must have either:

- ▶ intended to encourage or assist, or
- ▶ encouraged or assisted one or more listed offence believing that that/those listed offence(s) will be committed.

For these purposes the mental (or moral) element of the secondary offence requires knowledge of relevant facts in order for the associated person to have criminally encouraged or assisted⁶. It does not, however, require the listed offence(s) to be capable of being prosecuted in practice, what matters is that the associated person believed the activity they were encouraging or assisting is a listed offence.

It is not relevant whether or not the encouragement or assistance had a positive effect on the conduct or outcome of a listed offence⁷. It is also not relevant whether or not the associated person wished or desired that the listed offence be committed⁸. It may, however, be that the conduct of the associated person was so distant in time, place or circumstance from the conduct of the predicate listed offence that it would not be realistic to regard the listed offence as being encouraged or assisted by the associated person⁹.

Where there is evidence of an agreement or mutual arrangement between the associated person and the person who commits the listed offence, this would be evidence of an intention or belief on the part of the associated person.

Intention

In the absence of evidence of an agreement or mutual arrangement, however, there must be evidence that the associated person intended to assist the person committing the listed offence to act with the intent of criminal conduct¹⁰. Providing the tools to commit a listed offence is not sufficient unless there is also an

⁵ This section supplements Chapter 2.3 of the HO FtPF Guidance.

⁶ *National Coal Board v Gamble* [1959] 1 QB 11

⁷ *R v Calhaem* [1985] QB 808

⁸ Crown Court Compendium, Part 1 section 7-4 (*Accessory/secondary liability*), following [Jogee and Ruddock v The Queen \(Jamaica\) \[2016\] UKSC 8 \(18 February 2016\) \(bailii.org\)](#)

⁹ [Jogee and Ruddock v The Queen \(Jamaica\) \[2016\] UKSC 8 \(18 February 2016\) \(bailii.org\)](#), paragraph 12

¹⁰ [Jogee and Ruddock v The Queen \(Jamaica\) \[2016\] UKSC 8 \(18 February 2016\) \(bailii.org\)](#), paragraphs 10 and 90.

intention that those tools be used to commit one or more listed offence¹¹. [See [Illustration 1](#)].

In other words, there must be an intention to assist with the criminal act, not an intention to assist with a legitimate act which is abused for criminal purposes without the knowledge of the associated person. [See [Illustration 2](#)].

The associated person will not be taken to have intended to encourage or assist in the commission of an offence merely because such encouragement or assistance was a foreseeable consequence of their act¹².

Belief

Belief is a state of mind which is more than suspicious. Suspicion in addition with the fact that the associated person shut his eyes to the circumstance is also not enough.¹³ The associated person would need to have believed that the person they were encouraging or assisting may commit one or more of the listed offences.

For example, where a risk disclosure is being made (for example in a risk disclosure made by a customer in a prospectus about potential misstatement in financial or non-financial statements) but:

- ▶ the person is not aware of any other information which would suggest that the risk has in fact crystallised, or
- ▶ the person is aware of counter-indicators that the risk has in fact crystallised, such as the fact that the financial and non-financial statements have been audited and/or the prospectus contains a declaration (such as that required by item 1.2 of Annex 1 and item 1.2 of Annex 11 of the **UK Prospectus Delegated Regulation**),

it is unlikely that there is evidence of belief that the customer may commit one or more listed offences. [See also [Illustration 3](#)]

Procurement

'Procurement' means that the associated person sets out to see that the predicate criminal offence happens and takes appropriate steps to make it happen. Procurement, therefore, requires a causal link between what the associated person does and the predicate criminal offence, but does not require there to be any form of conspiracy or agreement between the associated person and the person committing the predicate criminal offence.¹⁴ [See [Illustration 4](#)].

Who is covered by the FtPF offence¹⁵?

In-scope firms

An **in-scope firm** is a firm which meets two or more of the following criteria in its preceding financial year:

- ▶ Turnover¹⁶ of more than £36 million

¹¹ Crown Court Compendium, Part 1 section 7-4 (*Accessory/secondary liability*)

¹² Section 44(2) of the Serious Crime Act 2007

¹³ *R v Moys* (1984) 79 Cr.App.R.72

¹⁴ [Attorney-General's Reference No 1 Of 1975 \[1975\] EWCA Crim 1 \(25 April 1975\) \(bailii.org\)](#)

¹⁵ This section supplements Chapter 2.1 of the HO FtPF Guidance.

¹⁶ This means income from product and service sales after deduction of (a) trade discounts, (b) taxes (including VAT)

- ▶ Balance sheet total¹⁷ of more than £18 million
- ▶ More than 250 employees¹⁸.

This is calculated on a standalone basis (i.e. without consolidating subsidiaries).

Large parent organisations

But a parent company that does not meet the above criteria would be brought into scope¹⁹ if (when consolidated with its subsidiaries) it meets two or more of the following criteria in its preceding financial year²⁰:

- ▶ Aggregate turnover of more than £36 million net (or £43.2 million gross)
- ▶ Aggregate balance sheet total of more than £18 million net (or £21.6 million gross)
- ▶ More than 250 employees in aggregate

(a **large parent organisation**).

General principles

Branches are considered to be part of their overall legal entity for the purposes of this assessment (and form part of the legal entity for the purposes of the FtPF offence).

The FtPF offence applies to all firms that meet the above criteria – not just UK entities.

A subsidiary that meets the criteria will be an in-scope firm in its own right in addition to being in-scope for the actions of its employees under the large parent organisation principles (if those thresholds are also met).

Who is a person associated with the firm²¹?

An associated person is any of the following:

- ▶ an employee or an agent²² of the firm
- ▶ a subsidiary undertaking of the firm
- ▶ an employee of a subsidiary undertaking of the firm
- ▶ a person who otherwise performs services for or on behalf of the firm²³

A formal agreement (e.g. a written agreement) for the provision of services does not need to be in place for a person to perform services for or on behalf of the firm. The determination as to whether or not a

¹⁷ This means either the aggregate amount of assets shown on its balance sheet at the end of the financial year in question, or equivalent (where the organisation does not have a balance sheet).

¹⁸ This means the average number of employees over the period.

¹⁹ See [What "benefit" is necessary for the FtPF offence to apply ?](#)

²⁰ s202 of the Act.

²¹ This section supplements Chapter 2.3 of the HO FtPF Guidance.

²² Guidance on the meaning of "agent" is set out in the fourth paragraph of Chapter 2.3 of the HO FtPF Guidance. It would be reasonable to expect these principles to include call centre staff and persons performing outsourced services (whether these are outsourced within or outwith the firm's group).

²³ Please note that only the fraud offences of the service provider themselves are in-scope, not fraud offences committed by an employee of a corporate service provider.

person performs services for or on behalf of the firm will depend on facts.

Persons providing services to the (e.g. stationery suppliers or external lawyers, valuers or accountants) are not acting “for or on behalf” of the firm. This means they would not be associated persons for the purposes of the FtPF offence. However, care should be taken with relationships that a firm records as “suppliers” on its internal systems, but which in fact provide services for or on behalf of the firm [See [Illustration 5](#)].

In the context of financial services, third parties may provide a variety of services or functions that do not make them an associated person of the firm. A non-exhaustive list of examples of these is set out in [Appendix C](#).

A person operating independently from the firm would not be performing services for or on behalf of the firm and therefore would not be an associated person. For example, where a third party purchases a product sold by the firm for that third party to distribute the product themselves (such as where the third party ‘white labels’ the product), they are performing their services on their own behalf and not for or on behalf of the firm. As a result, the third party would not be an associated person of the firm or therefore trigger liability for the firm under the FtPF offence.

When a firm purchases a new subsidiary or business the firm is not liable under the FtPF offence for any fraud offence committed prior to the time of such purchase because the new subsidiary or business was not an associated person of the firm at the time the activity took place.

Is the firm potentially liable for all fraud offences committed by its associated persons²⁴?

In its HO FtPF Guidance, the Home Office confirms:

“The corporate offences can only take place if the person commits a base fraud whilst acting in the capacity of a person associated with the relevant body (for example, an employee acting in the capacity of an employee, or an agent acting in the capacity of an agent). Fraud that takes place outside this capacity, for example in the person’s private life, does not give rise to corporate liability.”²⁵

Employees

A Court might determine that a person is not “an employee” for the purposes of creating corporate criminal liability for their employer if the acts are undertaken outside of the scope of their employment.

‘Outside the scope of their employment’ means acts of the employee which are not so closely connected to their employment as to be fairly and properly regarded as done by the employee in the ordinary course of their employment.²⁶

In the context of corporate vicarious liability, Courts have found that even where the mere fact of employment gave the employee the opportunity to commit the wrongful act, this is not sufficient. Rather, the question is whether or not the employee is carrying out acts of the same kind as those which it is within his authority to do.

For example, where the employee has acted outside of the role that they are employed to perform without the implied or direct instruction or sanction of their employer, a Court might find them not to have been acting

²⁴ This section supplements Chapter 2.5 of the HO FtPF Guidance.

²⁵ Third paragraph of Chapter 2.3 of the HO FtPF Guidance.

²⁶ [WM Morrison Supermarkets plc v Various Claimants \[2020\] UKSC 12 \(01 April 2020\) \(bailii.org\)](#)

in the capacity of an employee²⁷. Please note, however, that such sanction could be implied by action or inaction, e.g. turning a blind eye to known activities and the firm should consider this carefully²⁸. [See [Illustration 6](#)].

Third party associated persons

The HO FtPF Guidance explains that third parties are an associated person **while they are providing** the services on behalf of the firm. [See [Illustration 7](#) and [Illustration 8](#)]. As noted in the HO FtPF Guidance, providing goods is not the same as providing a service, although a service may in some circumstances be provided alongside the provision of a product. In the context of the financial services sector, a service could include (but is not limited to) the following:

- ▶ customer relationship management
- ▶ payment services
- ▶ sales and distribution services
- ▶ advisory services
- ▶ fund management services
- ▶ discretionary or execution-only investment services
- ▶ custody services
- ▶ arranging, agent/trustee, underwriting and/or placing services
- ▶ brokerage services
- ▶ trust and fiduciary services

Whereas providing a product (i.e. the financial services equivalent of 'goods') could include, but is not limited to, the following:

- ▶ bilateral counterparty arrangements (such as for wholesale or treasury management purposes)
- ▶ OTC (over the counter) transactions
- ▶ providing lending facilities/loans to borrowers
- ▶ providing receivables financing
- ▶ taking security over the assets of a debtor
- ▶ providing letters of credit or other forms of trade finance
- ▶ providing access for customers to the firm's own technology products or platforms
- ▶ providing and/or underwriting an insurance policy or investment product
- ▶ operating a pension scheme.

Can fraud offences committed outside the UK trigger the FtPF offence²⁹?

If there is jurisdiction to prosecute the underlying fraud offence, there will be jurisdiction to prosecute the FtPF Offence.

As explained in the HO FtPF Guidance this means that, in respect of in-scope firms, the FtPF offence only applies where the fraud offence is committed in whole or in part in the UK (such as where the fraud offence is committed by a UK-based person, is intentionally targeted at a victim in the UK or relates to providing false information to a UK market), or where actual gain or loss occurred in the UK³⁰. [See

²⁷ See, for example, [Luk Wing Yan v CMB Wing Lung Bank Ltd \[2021\] HKCFI 279](#)

²⁸ *Group Seven v Nasir* [2020] sets the test for 'blind eye knowledge' and states that it "requires a suspicion firmly grounded and targeted on specific facts" and a deliberate decision to "avoid obtaining confirmation of facts in whose existence the individual has good reason to believe."

²⁹ This section supplements Chapter 2.5 of the HO FtPF Guidance.

³⁰ Not intended loss or gain – as explained in footnote 16 of the HO FtPF Guidance.

Illustration 9]

The Home Office confirms (in the HO FtPF Guidance): *“The offence will not apply to UK organisations whose overseas employees or subsidiaries commit fraud abroad with no UK nexus. This would be a matter for law enforcement in the country concerned.”*

In the context of financial services sector groups, this means:

Non-UK Firms

A non-UK bank may be liable under the FtPF offence if the fraud offence had a UK nexus, regardless of whether or not that non-UK bank has a UK branch or subsidiary:

Non-UK banks with no UK branch or subsidiary should consider the extent to which their activities are conducted in whole or in part in the UK (including the extent to which they are targeting their activities at UK customers or markets).

Non-UK firms that have UK branches, subsidiaries or affiliates, however, may have the necessary UK nexus if they are targeting UK consumers through those group affiliations [Illustration 10], in respect of activities undertaken by UK-based staff [Illustration 11] and through services targeted (or knowingly or intentionally entered into with) UK-resident customers [Illustration 12].

UK financial services branches of non-UK headquartered entities

Within the financial services sector, it is common for entities to be established as branches rather than subsidiaries. Although a UK branch would be considered to be part of the legal entity as a whole for the purposes of the assessment as to whether or not it is an in-scope firm etc., where it is independently authorised and/or regulated by the PRA and/or the FCA, its activities can be distinguished from those of the rest of its legal entity for the purposes of assessing the necessary UK nexus where the rest of its legal entity is outside of the UK. This is because, under PRA and FCA regulatory principles, the branch is required to operate and record its assets etc. independently, and to be responsible and accountable for its own decision-making.

This means that a fraud offence committed by or intended to benefit the branch would be potentially in-scope of the FtPF offence. Whereas a fraud offence committed entirely outside the UK by another part of its non-UK legal entity (and which is not intended to benefit the branch) would not have a UK nexus for the purposes of assessing the application of the FtPF offence. [See Illustration 13]

Non-UK banks do not, therefore, need to implement reasonable prevention procedures for their activities conducted entirely outside of the UK just because they have a UK Branch (where that Branch is authorised and/or regulated by the PRA and/or FCA). [See Illustration 14]

UK headquartered international groups

UK headquartered firms will not generally be liable for their overseas employees or subsidiaries in relation to fraud that takes place entirely abroad (i.e. with no UK nexus). [See Illustration 15]

This would include fraud offences committed entirely outside the UK by employees based in the non-UK branches, provided that the intended beneficiary of that fraud offence was the branch (e.g. where the resulting income or asset value is booked to the branch) or a customer in their capacity as a customer of the branch. This is for the same reasons as are explained in (ii) above.

UK-based employees of non-UK firms or associated persons

The HO FtPF Guidance states: *“If a UK-based employee commits fraud, the employing organisation could be prosecuted, wherever it is based.”*

It can reasonably be expected that there would need to have a sense of permanence, such as specific placement in the UK, for a person to be considered a UK-based employee. Simply visiting the UK on a business trip would not be sufficient to be considered to be ‘UK-based’ for these purposes.

What “benefit” is necessary for the FtPF offence to apply³¹?

For a firm to have committed the FtPF offence the associated person must have committed the fraud offence with the intention of benefitting the following persons:

Associated Person	Persons who must have been intended to benefit	Who could be prosecuted?
An employee or agent of the firm	The firm Clients of the firm to whom the employee or agent provides services on behalf of the firm Clients of the firm to whom the employee or agent provides services to subsidiaries of those clients on behalf of the firm	The firm
A subsidiary of the firm (acting corporately)	The firm	The firm
A third party associated person	Clients of the firm to whom the associated person provides services on behalf of the firm Clients of the firm to whom the associated person provides services to subsidiaries of those clients on behalf of the firm	The firm except where the firm is the victim or intended victim of the underlying fraud offence
An employee of a subsidiary of a large parent organisation	The subsidiary	The subsidiary
	The parent organisation	The parent organisation

What does ‘intends to benefit’ mean³²?

The onus of proving both intention and benefit lies on the prosecution. They need to prove this to a criminal standard - beyond reasonable doubt.

³¹ This section supplements Chapter 2.5 of the HO FtPF Guidance.

³² This section supplements Chapter 2.5 of the HO FtPF Guidance.

In ordinary language, a person ‘intends’ to cause a result if they act in order to bring it about. In such circumstances it is immaterial that the associated person’s chances of success are small.

Where intention is not actually known, ‘intention’ may be inferred when the associated person foresaw that it was a virtually certain consequence of their actions that the firm or its customer would benefit from their actions, even if it was not their purpose to cause that result³³. Although the HO FtPF Guidance states “*intention to benefit the organisation does not have to be the sole or dominant motivation for the fraud*”, benefit that was not deliberate and that was an uncertain, or unknown, consequence of the act would not be sufficient to create liability for the firm under the FtPF offence. Although the Act refers to indirect benefit (as well as direct benefit), this does not mean that an incidental or accidental benefit is brought into scope – there must be an actual or inferred intent to indirectly benefit.

Therefore, enforcement action for commission of the FtPF offence can only proceed if the prosecution can prove beyond a reasonable doubt that either:

- ▶ a benefit was intended (even if it was unlikely to materialise), or
- ▶ a positive outcome was a virtually certain consequence of the associated person’s actions.

The HO FtPF Guidance states: “*Intent to benefit the relevant body is to be judged according to the position of the associated person at the time they commit the fraud offence.*”

In the context of financial services, it may not be apparent for many years following the fraudulent act whether the firm has or has not benefitted and so in deciding whether there has been a business advantage, a court or jury would need to consider whether the associated person foresaw that loss or harm would arise in the future. For example, there may be reasonable doubt that an intention to benefit existed where the firm can show that the associated person knew or suspected that:

- ▶ the firm is likely to be required by law or regulation to reimburse an impacted customer,
- ▶ the firm is likely to be left with bad debt as a result of entering into a loan arrangement on the basis of a fraudulent act (e.g. where an employee forges a customer signature on or information in documents in order to obtain lending for a customer to which it would not otherwise be entitled), or
- ▶ the firm is likely to suffer reputational damage that adversely impacts on the value of the firm.

[See [Illustration 16](#) and [Illustration 17](#)]

Generally, there would be no benefit if there is no business advantage. As identified in the HO FtPF Guidance, ‘business advantage’ does not need to be quantified as a financial amount and should consider the broader (overall) position in which the firm finds itself.

The depositing of the proceeds of any such activity into an account held by the associated person with the firm, this is unlikely to be sufficient to imply an intent to benefit the firm. The Courts have held that deposits do not amount to a form of enrichment for the firm because, although they are added to the firm’s stock of assets, they are matched by an immediate balancing liability in the form of the debt that the firm then owes to its customer.³⁴

The Courts have also held that acts such as deposit-taking constitute the receipt of property on behalf of the customer (and not for the firm’s own account), this might similarly apply to client money and assets, custody etc.³⁵ Where the customer is the associated person themselves, however, the benefit will not have arisen in the course of services provided by the associated person to the customer on behalf of the

³³ Crown Court Compendium - Part 1, section 8.1 (*Intention*)

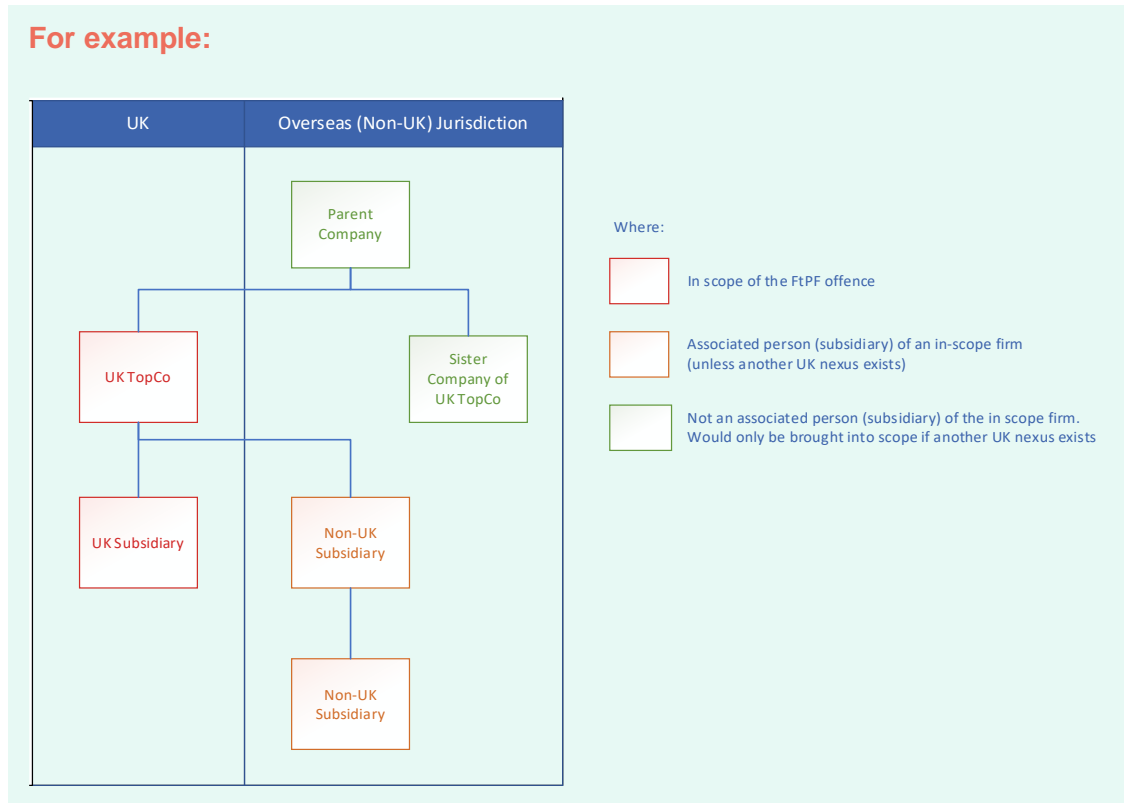
³⁴ [Jeremy D. Stone Consultants Ltd & Anor v National Westminster Bank Plc & Anor \[2013\] EWHC 208 \(Ch\) \(11 February 2013\) \(baillii.org\)](#)

³⁵ In the context of the change of position or ministerial receipt defence (see case cited in footnote above)

firm (as the associated person cannot provide such services to itself).

What does “subsidiary undertaking” mean³⁶?

Subsidiary undertaking has the same meaning as is set out in section 1162 of the Companies Act 2006 for the purposes of the Companies Acts. in the corporate group structure, not entities above³⁷, or sister entities:



Are there any exceptions to the offence³⁸?

A firm will not be guilty of the FtPF offence if the firm itself was, or was intended to be, the victim of a fraud offence intending to benefit a customer³⁹.

This means that the FtPF offence will not apply if:

- ▶ the firm was intended to be a victim (such as in the case of first party lending fraud), whether or not the firm suffered an adverse outcome,
- ▶ the firm was not intended to be a victim, but the firm suffers an adverse outcome as a result of the fraud (either solely/alone, or in conjunction with others).

For example, where the associated person intends to benefit a customer of the firm, to whom the associated person provides services for or on behalf of the firm, but at the expense (or to the detriment) of the firm. Such as, where an employee conspires with the customer to defraud their employer.

³⁶ This section supplements Chapter 2.5 of the HO FtPF Guidance.

³⁷ For the purposes of illustration, this assumes that the parent company does not meet the criteria in s202 of the Act

³⁸ This section supplements Chapter 2.5 of the HO FtPF Guidance

³⁹ s199(3) of the Act

Are there any defences to the offence⁴⁰?

It is a defence if, at the time the fraud offence was committed, either:

- ▶ the firm had in place reasonable prevention procedures (see [Part 2](#)), or
- ▶ it was not reasonable in all the circumstances to expect the firm to have any prevention procedures in place (see [Part 3](#)).

The burden of proof for this defence is on the firm. This means that the firm has to prove that one of the above defences exists, rather than the prosecuting agency having to prove that it does not exist.

The occurrence of a fraud offence does not mean that the firm's prevention procedures were not reasonable, or that it was reasonable in all the circumstances to expect the firm to have some prevention procedures in place. What constitutes 'reasonable' for these purposes is based on the knowledge and understanding that it was reasonable to expect the firm to have at the time the activity representing the fraud offence took place, and not from the basis of hindsight based on information that has been identified as a result of any post-event analysis of any such activity that the firm has identified.

As for other failure to prevent offences in the UK, the firm would need to prove 'reasonableness' on the balance of probabilities⁴¹.

Interaction with other financial crime regimes in the UK⁴²

Criminal Finances Act 2017

In the context of the aiding, abetting, counselling or procuring limb, the offence of cheating the public revenue is a predicate offence for both the FtPF offence and for the offence for failure to prevent the criminal facilitation of tax evasion under section 45(5) of the Criminal Finances Act 2017 (ATEF).

The scope of the FtPF offence is broader than ATEF, however, in that it also applies to the listed offence.

The scope of associated persons is also broader for this FtPF offence than for ATEF⁴³, which means that some will be associated persons for the purposes of both offences, but some will only be associated persons for the purposes of this FtPF offence.

It would not be reasonable to expect firms to have in place reasonable prevention procedures that apply to the same associated person in different ways in respect of the same underlying offence (i.e. aiding, abetting, counselling or procuring the cheating the public revenue).

However, because both FtPF and ATEF only apply to actions taken by the associated person in the course of the services which they provide on behalf of the firm, this enables the firm to take a consistent approach to applying reasonable prevention procedures to associated person relationships that are in scope of both failure to prevent offences.

This means that where the firm has met the reasonable prevention procedure expectations described in

⁴⁰ This section supplements Chapter 2.7 of the HO FtPF Guidance.

⁴¹ Examples of relevant case law to support this is cited in the HO FtPF Guidance, namely: R v Boyesen [1982], R v Lambert [2001] UKHL 37, R v Sheldrake [2003] EHC Crim 273 (Admin).

⁴² This supplements Chapter 4 of the HO FtPF Guidance.

⁴³ Both in terms of the definition of associated persons, and because the risk that tax evasion could be committed through the types of services provided for or on behalf of regulated firms will be much more limited in the context of ATEF than for FtPF.

HMRC or industry guidance relating to ATEF, it will be taken to have met the expectations for the purposes of the aiding, abetting, counselling or procuring limb of the offence of cheating the public revenue. Alternatively, where the firm has met the reasonable prevention procedure expectations described in this guidance (or in any other guidance issued by Home Office in respect of the FtPF offence), this will be sufficient to meet the expectations of the ATEF offence.

Sections 327-329 of the Proceeds of Crime Act 2002 (PoCA)

FtPF does not overlap, amend or otherwise impact on the money laundering offences set out in PoCA.

Activity of a kind described in sections 327-329 of PoCA would not constitute the aiding, abetting, counselling or procuring of a fraud offence for the purposes of the FtPF offence, because aiding, abetting, counselling or procuring relates to actions taken before or as part of the commission of a fraud offence, whereas the money laundering offences under PoCA relate to actions taken after the criminal act has taken place.

The proceeds of the FtPF offence and/or the underlying fraud offence would be the proceeds of crime for the purposes of PoCA.

Where an organisation has identified activity that meets the threshold for suspicion for money laundering and holds the information required to be included in SAR disclosures, the suspicious activity reporting (SAR) regime (Part 7, PoCA) may apply.

Having regard for guidance issued by the National Crime Agency, it is recognised that the SAR threshold may not always be met in the context of suspicions of fraud and the absence of a SAR filing is not to be taken as an indicator of a weakness in or lack of prevention procedures of a firm in relation to the FTFP.

The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (ML Regs) and the Joint Money Laundering Steering Group (JMLSG) Guidance

Activities undertaken by firms to meet the requirements of the ML Regs (including as those requirements may have been clarified in the JMLSG Guidance), will form part of the reasonable prevention procedures for firms in respect of the FtPF. There is no expectation that activities under each regime be performed twice or differently for the purposes of reasonable prevention procedures for the firm's defence to the FtPF offence. This includes the elements of activities such as customer due diligence, ongoing monitoring and terminating business relationships which the firm has identified as being met by its money laundering prevention procedures.

Coordinated resolutions and avoiding “piling on”

The HO FtPF acknowledges:

“In many cases, organisations in scope of the offence are subject to a range of other legislation. In cases where a base fraud offence also constitutes a breach of regulations, we expect that prosecutorial bodies and regulators will continue to work together to deliver coordinated resolutions, taking public interest considerations into account. In some cases, regulators could choose to prosecute the offence of failure to prevent fraud themselves, either under any specific powers, or privately.”

Part 2 - Reasonable prevention procedures

The six principles

In line with Financial Conduct Authority (FCA) expectations for effective control frameworks, the reasonable prevention procedures are informed by six core principles:

1. Risk assessment⁴⁴, that informs:
2. Proportionate policies and procedures commensurate to the risk
3. Due diligence
4. Communication (training)
5. Monitoring and review

each of which is supported by:

6. Top level commitment ('tone from the top').



These principles are necessarily flexible to allow each firm to tailor its prevention procedures so that they are reasonable in all the circumstances, having regard to that firm's risk exposures. Prevention procedures should be proportionate to the risks faced by the firm. No procedures can prevent all fraud. A risk-based approach will, however, serve to focus the effort where it is needed and will have most impact. Firms may already have in place operating models, frameworks, controls, and policies that constitute reasonable prevention procedures – where this is the case, it is not expected that firms will introduce new procedures.

Non-exhaustive examples of what will be considered reasonable prevention procedures within these core principles are described in this Part 2.

1. Risk assessment⁴⁵

It is recognised that the firm's perceived risks of associated persons committing a fraud offence, will inform the extent of the prevention procedures that are reasonably required. A risk-based approach to controls is a feature of existing legal and regulatory expectations for firms⁴⁶. There is no absolute requirement for firms to do anything new or different in approach, frequency etc. for the risk assessment for FtPF than they do already in compliance with other legal and regulatory purposes.

Firms may be able to leverage existing fraud risk assessments or may conduct a risk assessment specific to the FtPF offence. Whatever the approach, the risk assessment should be proportionate to the organisation's size, nature and complexity and should be documented and kept up-to-date.

⁴⁴ This should include an assessment of risks that emerge from due diligence

⁴⁵ This section supplements Chapter 3.2 of the HO FtPF Guidance.

⁴⁶ For example, under the ML Regs, in respect of which the FCA has provided ongoing guidance as to its expectations

The key elements of the listed offences are that there is dishonest or deceptive conduct involved. It is not expected that risk assessments (or any resulting prevention procedures) will be reliant on a detailed knowledge of the interpretation of the listed offences under criminal law.

It is, however, expected that firms will know the specifics of their own services (and any products such services relate to) and how these are offered or performed; and should use that knowledge to assess the risks of a fraud offence being committed by associated persons.

The purpose of the risk assessment is to focus prevention procedures on areas of highest risk. It is not expected that the risk assessment, and resulting reasonableness of prevention procedures, must prevent all fraud committed by associated persons. The fact of fraud being committed does not invalidate a reasonable risk assessment or the reasonable prevention procedures.

A risk assessment that has the following features would be reasonable:

- ▶ **Areas of risk** – identifying and assessing the risk of activities, departments, and/or roles held by associated persons, to identify which pose a higher (and lower) risk of committing fraud with intention of benefitting the firm or a customer of the firm through the service they perform on behalf of the firm. It may be appropriate for the person conducting the risk assessment to place themselves in the position of an associated person and pose the question “*when conducting the activities of the firm, or when providing services on behalf of the firm, what motives and opportunities would there be for me to commit a fraud offence for the benefit of the firm or a customer?*” It may be appropriate for firms to conduct an initial high-level assessment and then conduct more detailed assessments where it is needed.

Relevant activities, departments and roles may include, but will likely not be limited to, staff selling products directly to customers where remuneration structures may increase the risk of criminal mis-selling, third party product distributors, regulatory and financial reporting, and marketing.

- ▶ **Territorial scope** - consideration of the territorial scope of the FtPF offence, with respect to the corporate criminal offence only triggering when there is a UK nexus to the underlying fraud offence. This will be particularly relevant to UK firms assessing the extent of risk assessment required in relation to their non-UK branches and subsidiaries.
- ▶ **Levels of risk** – a determination of the level of risk exposure across these activities, departments, and/or roles, informed by the effectiveness of the control environment and prevention procedures in place to prevent fraud (e.g. staff vetting and screening, clear anti-fraud message from top-level management).
- ▶ **Ownership** – a clear assignment of ownership and responsibility for the risk assessment framework, the performance of the risk assessments and the delivery of any resulting actions (each of these could be assigned to several different people within the firm, ownership/responsibility does not need to be assigned to just one person). Persons responsible for carrying out the risk assessment should have an appropriate level of seniority and expertise.
- ▶ **Documentation and integration** – the risk assessment process, conclusions and any resulting actions, should be clearly documented. As with existing risk-based control expectations, it is recommended that firms show the link between the risk assessment outcomes and the prevention procedures (or the decision not to apply prevention procedures), to evidence the risk-based application of those procedures.
- ▶ **Review** – the risk assessment should be reviewed on a periodic basis. As for other risk-based controls, ad hoc reviews of the risk assessment (outside of the normal periodic basis) should be performed where new information is discovered which might reasonably be considered material to the basis on

which the assessment was last made; for example, significant change in the size, nature, or complexity of the firm, where the firm identifies that a listed offence has been committed, where the firm has a material ‘near miss’, or where information is available in the public domain on relevant action being taken by the FCA (e.g. under SYSC) or prosecutors (e.g. deferred prosecution arrangements or Court judgments).

[See, for example, [Illustration 18](#) and [Illustration 19](#)]

Having a risk assessment that excludes one or more of the above features, or contains different features, does not preclude it from being reasonable for the purposes of establishing a defence to the FtPF offence. However, firms would be recommended to ensure that their risk assessments, as a minimum, make express reference to the questions that the Home Office recommend that firms ask themselves (as set out in the HO FtPF Guidance). Where any such question is not relevant to that firm, the firm is recommended to document the reasons why it has not considered that question as part of its risk assessment.

Given the complexity of the offence in the context of financial services, and dependent on the nature, scale and complexity of the firm, it may be that the firm conducts a number of separate risk assessments (e.g. one for each business line or separate risk assessments for the taxonomies covered by different risk stewards) rather than a single, centralised risk assessment.

2. Proportionate prevention procedures⁴⁷

General

A firm may find that, after conducting its risk assessment and considering its existing procedures, its risks are sufficiently mitigated through existing controls. This conclusion should be kept under periodic review to assess if the procedures in place continue to be reasonable in relation to the risk it faces at that time.

Reasonable prevention procedures will be proportionate to the risk identified in the risk assessment.

The FtPF offence does not require firms to undertake excessively burdensome procedures in order to eradicate all risk or necessarily to do more than they already do under existing legal or regulatory requirements. Procedures need to be reasonably designed to manage the identified risk, not to address every conceivable risk, no matter how remote. Firms are accountable for demonstrating that their fraud prevention procedures are commensurate with the risk, both as a defence under the Act and to the FCA in respect to existing regulatory obligations to establish and maintain effective systems and controls to manage financial crime risk (SYSC).

Reasonable prevention procedures may be stand alone or form part of a wider framework, for example wider controls to identify and prevent fraud committed with intent to harm the firm. Whatever the chosen approach, the prevention procedures should be documented, practical and realistic.

The reasonableness of prevention procedures should take account of the level of control and supervision the firm is able to exercise over a particular person acting on its behalf, and the proximity of the person to the firm. The HO FtPF Guidance suggests that contractual controls are a minimum expected control standard, stating:

“The level of prevention procedures considered to be reasonable should take account of the level of control and supervision the organisation is able to exercise over a particular person acting on its behalf and the relevant body’s proximity to that person. For example, a relevant body is likely to have greater control over the conduct of an employee than that of an outsourced worker performing services on its

⁴⁷ This section supplements Chapter 26 and Chapter 3.3 of the HO FtPF Guidance

behalf. Nonetheless, appropriate controls should be implemented via the relevant contract.”

Subsidiaries within group control environments

For groups based or headquartered in the UK, the HO FtPF Guidance notes that steps a firm might take to prevent fraud by subsidiaries might include group level policies or training and ensuring that there is a nominated person responsible for fraud prevention in each subsidiary.

Where a firm is a subsidiary of another in-scope firm (the **in-scope parent**) and the in-scope parent has implemented reasonable prevention procedures by way of a group control framework, the firm may not need to establish its own, separate prevention procedures.

The firm should review the group control framework and implement any enhancements if there are elements of the group control framework that the firm concludes are not sufficient to be considered to be reasonable in light of the firm's own risk assessment.

Supply chain

The HO FtPF Guidance recognises:

“The reasonableness of procedures should take account of the level of control, proximity and supervision the organisation is able to exercise over a particular person acting on its behalf. Where a supply chain involves several entities or a project is to be performed by a prime contractor with a series of subcontractors, an organisation is likely only to exercise control over its relationship with its contractual counterparty. Where the prime contractor sub-contracts to persons or organisations that could be associated persons of the relevant body, the relevant body may decide to ... use relevant fraud prevention terms and conditions in the relationship with its contractual counterparty, and request that counterparty to adopt a similar approach with the next party in the chain.”

The ability, expectation or anticipated nature and likelihood of the third party undertaking any such sub-contracting, outsourcing or equivalent should form part of the risk assessment (and resulting proportionate controls) for the third party associated person in question. Through the risk assessment, the firm can identify and document where the outsourced service providers of the third party are providing services to the third party, or where they are providing services (indirectly) on behalf of the firm.

Commercial negotiating power

A firm may need to appoint a counterparty, or be required by law to do so, and may have limited options or choice of counterparties that they can use. This increases the counterparty's negotiating power.

In such situations, where the firm would usually rely on contractual preventative measures but cannot obtain them due to disparate negotiating power, the firm may still appoint the third party associated person but should seek to mitigate the FtPF offence risk by other means.

Own-account mergers and acquisitions (M&A)

When a firm purchases a new subsidiary or business it becomes potentially liable under the FtPF offence for fraud offences committed by its new associated persons after the date of acquisition.

As part of pre-acquisition due diligence, firms should seek to identify risks, such as gaps in the target company's reasonable prevention procedures. This will enable the firm to establish a reasonable implementation plan for remediating any gaps and explaining why it is not reasonable to have prevention procedures in place in the interim. Where the firm is following a reasonable implementation plan the plan

will help the firm to evidence both the reasonable prevention procedures defence, and the defence of it not being reasonable in all the circumstances for it to have prevention procedures (as applicable).

Leveraging existing regulatory requirements

The HO FtPF Guidance recognises that existing regulatory requirements might also be reasonable for the purposes of the FtPF offence. The prevention procedures described below may have been implemented for other reasons, but⁴⁸ these have been identified as equally forming part of reasonable prevention procedures for the purposes of the FtPF offence. For example, firms will likely have proactively sought to address the risk of fraud to them or their customers under existing FCA principles. Firms can rely on any such existing controls or frameworks to demonstrate reasonable prevention procedures; there is no requirement for new prevention procedures to be introduced if the firm assesses its existing prevention procedures to be reasonable for the purposes of the FtPF offence.

This does not mean that other policies and procedures would not also be considered reasonable, but the firm will need to be able to prove that these are reasonable because (unlike the principles set out in this Part 2) it will not be able to evidence this by reference to this guidance.

Associated persons - distributors

Reasonable prevention procedures for managing associated persons who provide distribution services may:

- ▶ Specify the criteria that a distributor must meet in order to be considered to be a suitable provider of distribution services and any expected service standards
- ▶ Include an assessment of the full distribution chain
- ▶ Establish an approval framework
- ▶ Include measures aimed at maintaining customer documentation that is fair, clear and not misleading, and is aligned to the informational needs of the recipient
- ▶ Require sales staff to record evidence that supports the end-to-end sales process
- ▶ Include scheduled and ad hoc reviews and testing of processes to monitor effectiveness and determine where enhancements or substantive changes are required
- ▶ Endeavour to obtain management information from distributors and review this in an appropriate forum.
- ▶ Comparison of distributor performance against internal or independent source data or metrics

Information might also be obtained about the distributor's business, target clients, and key information about its policies and procedures.

The frequency of review of this additional due diligence information is likely to depend on the risk posed by distributors and may form part of a wider review of due diligence, but would not be expected to be any more frequent than annual for distributors assessed as being high risk, and would be less frequent for lower risk distributors (for example, perhaps every 3-5 years).

Contractual documentation may be put in place with the distributor, to explain the scope of the distribution services that the firm expects to be provided and the service standards that the firm expects the distributor to achieve.

It is not expected that firms should need to make express reference in the contract to the distributor being prohibited from committing a fraud offence where the service standards state, or applicable law would

⁴⁸ Having mapped these on an industry-wide basis in line with Chapter 3.3 of the HO FtPF Guidance principles.

imply, that the commission of a criminal offence would be prohibited or otherwise below the expected service standard.

Fund management

The transfer agent relationship would be an associated person of the fund for the purposes of the FtPF offence. Reasonable prevention procedures for managing the transfer agent relationship may include:

- ▶ Specify the criteria that a transfer agent must meet in order to be considered to be a suitable provider of distribution services and any expected service standards
- ▶ Document these arrangements through a written agreement
- ▶ Establish an approval framework for entering into (and continuing/rolling forwards) such relationships
- ▶ Include scheduled and ad hoc reviews and testing of processes to monitor effectiveness and determine where enhancements or substantive changes are required
- ▶ Endeavour to obtain management information from the transfer agent and review this in an appropriate forum.

Information might also be obtained about the transfer agent's reputation and policies and procedures, to assess whether they meet the required standards.

The frequency of review of this additional due diligence information would not be expected to be more than annual (and would be less frequent for low risk relationships, for example perhaps every 3-5 years) unless a material risk emerges between scheduled reviews.

Contractual documentation might be put in place with the transfer agent explaining the scope of the services and the service standards that are expected.

Firms do not need to make express reference in the contract to the transfer agent being prohibited from committing a fraud offence where the service standards state, or applicable law would imply, that the commission of a criminal offence would be prohibited or otherwise below the expected service standard.

The providers of outsourced functions (e.g. the management company and the fund administrator) would also be an associated person of the fund, for the purposes of the FtPF offence. These roles are, however, likely to be in-scope firms or firms which are subject to regulatory authorisation and regulation (see [Part 3](#)).

Reports to the market and reports to regulatory authorities

Firms will likely already have reasonable procedures to prevent a false misstatement from being made to markets (whether in listing particulars or published information) or to the regulatory authorities of the firm may include approval arrangements which are designed to check that the content⁴⁹:

- ▶ is fair, clear, accurate, and not misleading or overstated, and
- ▶ only includes claims that can be substantiated.

Marketing material

Firms will likely already have procedures to prevent a false misstatement from being made in marketing material for a firm's products or services may include approval arrangements for new and existing marketing and product material for all sales and distribution channels which are designed to check that the content:

- ▶ is fair, clear, accurate and not misleading, and

⁴⁹ Including the content of any material incorporated by reference into those reports

- ▶ only includes claims that can be substantiated.

Employees and agents

Reasonable prevention procedures for employees or agents might include the following, which firms may already have in place.

- ▶ **Code of conduct** - Firms will likely already have some form of code of conduct, or values framework. In respect of the FtPF offence it may be reasonable for:
 - This to include some form of statement, commitment or endorsement from an appropriate senior manager ([Principle 6](#)).
 - Where it already specifically references the firm's position on other UK failure to prevent offences⁵⁰ or fraud, for it to also include equivalent reference to the FtPF offence.
- ▶ **Screening and vetting** - Risk-based screening, monitoring and/or external vetting at recruitment and on an ongoing basis for employees in roles which are assessed to have a material exposure to the opportunity to commit fraud:
 - Screening and vetting of employees performed in accordance with FCA expectation (SYSC 5) will constitute reasonable prevention procedures for the identification of external risk indicators for employees or agents.
 - Name screening against negative news that firms have in place for third party associated persons as part of financial crime control frameworks may constitute reasonable prevention procedures for the identification of external risk indicators for third party associated persons. Firms may review whether fraud is included as a financial crime factor within the filtering for any such screening software/data feeds.
- ▶ **System and Physical Access Controls** - Assessments of systems and, where appropriate, access on a regular basis to identify where segregation of duties should be applied to mitigate the exposure to opportunities to commit a fraud offence by particular employees (or agents) or roles.
 - Reviewing physical (building) and technology access rights and privileges on a periodic basis to keep these up to date.
 - Monitoring the use of high risk (privileged) accounts.
 - Removing access to building areas, systems and data where this is no longer appropriate (such as where an employee changes roles or leaves the firm).
- ▶ **Unauthorised transactions** - Where the firm has roles which present a risk of unauthorised payments or trading, reasonable prevention procedures may include the following, which firms may already have in place:
 - Requirements for verbal and written instructions to be recorded accurately and correctly.
 - Processes for validating and checking instructions and recording the validation activity once completed.
 - Requirements or processes for handling transaction errors and exceptions consistently, and for conducting root cause analysis to identify trends that might indicate control weaknesses.
 - Requirements to process transactions accurately and maintain records of all processed transactions.

⁵⁰ ATEF and the failure to prevent bribery (Bribery Act 2010)

- Requirement to use independent pricing sources for the valuation of funds and portfolios
- ▶ **Conflicts of interest** - Managing the risk arising through conflicts of interest by:
 - Identifying types of conflicts of interest that might reasonably arise in the context of the activities of the firm
 - Supervising separately those whose principal role involves serving multiple customers whose interests could conflict
 - Requiring employees to report external relationships where there might be a risk that a conflict of interest might arise, and if so identify if any mitigating controls would be appropriate to manage the risk and applying the information about the external relationship within monitoring controls
 - Reviewing pay structures and incentives to identify where improper incentives might encourage them to commit a fraud offence.
- ▶ **Mandatory leave** - For employees or agents in roles which present a notable or high-risk opportunity to commit a fraud offence, a reasonable policy may require them to take mandatory minimum periods of leave (unless prohibited by local law or regulation).

Market abuse controls

Market abuse controls are implemented by firms in accordance with the requirements of the UK's Market Abuse (Amendment)(EU Exit) Regulations 2019 and the Market Conduct section of the FCA's Handbook.

Controls established pursuant to those requirements will also be reasonable prevention procedures for the purposes of the firm's defence to any FtPF predicate offence arising in the context of market abuse.

Controls relating to market abuse can be both prevention and detective in nature. Reasonable prevention procedures may include:

- ▶ Reviews of unusual or unexpected activity to identify if they are acting outside of their trading authority.
- ▶ Suspicious transaction identification and reporting.
- ▶ Audio and e-communications surveillance aimed at identifying misconduct or inappropriate sharing or receipt of price-sensitive non-public information.
- ▶ Post-trade or transactional surveillance aimed at identifying behaviours that could be construed as, or lead to, market abuse or market misconduct. For example, monitoring trades to identify if they are booked at market levels or marked to market appropriately (and investigate deviations outside of a reasonably expected tolerance)
- ▶ Supervisory oversight of risks and controls to prevent and detect inappropriate or unauthorised activity including monitoring of indicators of actions or behaviours that could result in market misconduct such as insider dealing or front running⁵¹.
- ▶ Benchmark and reference rate oversight and approval aimed at mitigating the risk of intentional manipulation of benchmarks or reference rates in respect of which the firm acts as administrator, contributor, submitter or user. This will include identifying, documenting and monitoring products that reference benchmark rates or submissions, and segregating employees or agents who make benchmark submissions or contributions.
- ▶ Personal account dealing checks for staff with access to price-sensitive non-public information. A firm may implement pre-approval requirements, for investments that present a risk of opportunity for

⁵¹ i.e. trading ahead of customers in any financial instruments

committing a fraud offence, and obtaining (and reviewing) trade confirmations.

MiFID and UK MiFIR

False misstatement and dishonesty controls that are implemented in accordance with the requirements of MiFID or MiFIR.

Established market practices for financial reporting

In respect of a firm's own financial reporting, the principles of the Committee of Sponsoring Organisations of the Treadway Commission (**COSO**) 2013 framework (or any successor framework).

Transactions with no prospectus

In respect of capital markets transactions where there is no prospectus to be published, there is a market practice of undertaking management due diligence in relation to the relevant proposed issuer or seller. These will be questionnaires of varying length depending on the deal, and relevant, competent people at the issuer/seller will be expected to answer them on a call.

The aim of this is to test (in a proportionate manner) whether everything in the public domain is accurate or whether there is anything that the issuer / seller or investors should understand / disclose in the context of the deal. Agreements support this for the firm's benefit, to enable them to rely on this process.

Whistleblowing

Whistleblowing procedures established in line with the expectations of the FCA set out in SYSC 18⁵², allowing staff to **raise concerns in confidence or, where possible, anonymously**, with adequate levels of protection. The FCA also expects firms to signpost internal and external whistleblowing arrangements, such as those of the FCA.

SM&CR, remuneration code and conduct rules

Controls implemented to meet the requirements of the Senior Managers and Certification Regime, remunerations codes and conduct rules established by the PRA and FCA provide reasonable prevention procedures for firms in the context of:

- ▶ Vetting and conduct assessment for senior managers and certificated staff, and
- ▶ Conduct and incentivisation of employees or agents.

Three lines of defence

The three line of defence model provides a basis for implementing reasonable, risk-based, periodic testing and review of the effectiveness of the firm's prevention procedures for FtPF.

There must be a clear segregation between risk ownership (First LOD), risk oversight and stewardship (Second LOD) and independent assurance (Third LOD) to help support effective identification, assessment, management, and reporting of risks:

- ▶ The First LOD has ultimate ownership for risk and controls, including read across assessments of identified issues, events and near misses.
- ▶ The Second LOD provides subject matter expertise, advice, guidance and review and challenge of the First LOD's activities to help them deliver risk management decisions and actions that are appropriate and within risk appetite.
- ▶ The Third LOD is Internal Audit which provides independent assurance to management on our risk management, governance and internal control processes.

⁵² This is also identified as a reasonable prevention procedure in the "Whistleblowing" section of Chapter 3.5 of the HO FtPF Guidance.

3. Due diligence⁵³

Due diligence procedures are both a form of fraud risk assessment (see [Principle 1](#)) and a means of mitigating a risk. Due diligence should be applied on a risk-sensitive basis. For example, a firm's risk assessment may identify third party distributors as posing a heightened risk of fraud, with the result that the firm introduces specific FtPF due diligence obligations on prospective and current distributors. In lower risk situations, a firm may conclude that it is not reasonable to introduce any specific fraud prevention procedures.

Due diligence related to fraud prevention will often form part of a wider due diligence framework:

In the context of third party associated persons, firms should apply risk-based due diligence when establishing and reviewing third party relationships, document actions taken to address red flags, take appropriate action in respect of associated persons who do not pass ongoing due diligence or other relevant monitoring checks, and document third party relationships which are terminated due to non-compliance or concerns related to the third party's FtPF control effectiveness. These records will help the firm to evidence that it applies actions and consequences as part of its third party associated person reasonable prevention procedures.

The HO FtPF Guidance suggests that lower risk associated persons (as well as higher risk associated persons) should be identified through due diligence, to enable the firm to apply reasonable prevention procedures on a proportionate basis. The Home Office suggest professional or regulated status may be indicators of lower risk.

Firms may have procedures in place which seek to prevent associated persons who have been exited due to FtPF-related concerns from being re-onboarded without the firm being reassured that these concerns or risks have been allayed or mitigated.

[See also [Illustration 20](#)]

4. Communication (training)⁵⁴

Training and awareness programmes for employees or agents, subsidiaries and employees of subsidiaries should be designed in accordance with FCA expectations. This includes training being risk-based, such as general training on the code of conduct and the firms' fraud prevention policies, supplemented by role-based tailored training and enhanced/supplemental training for higher risk roles, departments and/or activities.

Responsibilities of employees or agents (including directors and senior managers) for the prevention of fraud and the appropriate management of third party associated person risk should be clearly explained and communicated. [See also [Principle 6](#)]

Whistleblowing channels should be clearly described. Policies and procedures should be accessible to employees or agents.

Training on FtPF does not need to be a separate training course. Firms may consider it appropriate to leverage existing training, such as how to identify and manage associated person risk for the purposes of the existing failure to prevent offences relating to bribery and the criminal facilitation of tax evasion.

Firms may include a review of their existing fraud facilitation training and awareness programmes of higher risk third party associated persons as part of their prevention procedures.

⁵³ This section supplements Chapter 3.4 of the HO FtPF Guidance

⁵⁴ This section supplements Chapter 3.5 of the HO FtPF Guidance.

Firms may also consider wider external communication of fraud prevention policies through a policy statement or code of conduct.

5. Monitoring and review⁵⁵

Continuous review of framework effectiveness

The FCA expects firms to operate a cycle of continuous review and enhancement of their compliance programmes, with each component part informing the next.

An organisation should have clear accountability for the management of risk within it ([Principle 1](#)). In practice to support the ‘tone from the top’ ([Principle 6](#)), firms may use their existing oversight structures, including committees and audit functions, to drive forward their programmes via appropriate, regular review

Updates, amendments, adjustments and/or enhancements made to compliance programmes (including the elements of those programmes which may form part of the prevention procedures for the firm’s defence to the FtPF) are not evidence that the prevention procedures were unreasonable and may in fact be evidence of a robust three lines of defence model.

“Reasonableness” is based on what was reasonable having regard to the knowledge and understanding that it was reasonable to expect the firm to have at the time the activity representing the fraud offence took place⁵⁶, and not from the basis of hindsight based on information that has been identified as a result of any post-event analysis of any such activity that the firm has identified.

Identifying emerging risk

Firms may maintain appropriate oversight over monitoring results, and any identified breaches and incidents (including ‘near misses’). This may be split between the oversight of more than one person, group or committee in larger or more complex organisations.

Firms may have in place suitable training and/or awareness so that associated persons (both internal and external) are made aware of how to report any suspected breaches or incidents (or ‘near misses’). Existing mechanisms, such as transaction monitoring (or equivalent risk alerting systems and processes), unusual activity reporting and whistleblowing procedures can be used for these purposes – there is no expectation that firms design bespoke reporting mechanisms for this. However, as noted in the HO FtPF Guidance, existing measures in place (e.g. those for detecting fraud or attempted fraud) may be focussed on fraud against the firm, and so firms should consider how these might be extended to frauds that might be intended to benefit the firm or its customers.

By their nature, incidents are difficult to predict so it is not expected that any procedure for incident management would be overly prescriptive. However, specifying structure and governance for investigation resource can help to ensure:

- ▶ rapid mobilisation,
- ▶ organisation-specific know-how,
- ▶ best practice is already recorded and readily accessible, and

⁵⁵ This section supplements Chapter 3.6 of the HO FtPF Guidance.

⁵⁶ Using both internal data sources (which might include incidents, ‘near misses’ etc) and external data sources (such as communications from Government, regulators or other credible sources)

- ▶ having policy/procedures in place that can improve training and help support the investigation.

Firms will already have in place policies and procedures for responding to staff suspected of misconduct which may include reporting to regulators and/or law enforcement depending on the circumstances. It is not expected that firms should implement policies or procedures which hold employees or agents accountable for misconduct for FtPF which operate to a higher standard than that generally expected by the FCA. Consideration may therefore be given as to whether existing procedures are sufficient to deal with situations where there is potential liability arising to the firm in respect of an associated person committing a fraud offence.

Whilst it is recognised that a proportionate risk-based regime cannot be a zero-failure regime, where failure occurs the lessons from that failure should be considered and processes reviewed to ensure improved performance going forwards.

6. Top level commitment⁵⁷

Senior (executive) management are ultimately responsible for setting the example in terms of integrity, stewardship and appropriate behaviours ('tone from the top').

Senior (executive) managers may wish to issue a statement of commitment to the prevention of associated persons of the firm committing a fraud offence. This may form part of the general senior commitment to preventing financial crime and other wrongdoing as part of the corporate culture.

In large organisations, responsibilities of the board will likely be delegated and therefore, having the risk that associated persons might commit a fraud offence for which the firm is liable "on the agenda" may mean that is the focus of appropriate senior management reporting to the board, rather than the board itself.

The HO FtPF Guidance expects that senior (executive) management responsibility and accountability for reasonable prevention procedures should be documented. Notwithstanding the assertions in the HO FtPF Guidance that the offence does not extend personal liability, for financial services firms, this expectation for documentation of accountability will likely mean making specific reference to failure to prevent fraud in the accountabilities mapping for relevant holders of senior management functions under the FCA's senior managers regime.

⁵⁷ This section supplements Chapter 3.1 of the HO FtPF Guidance.

Part 3 - Circumstances where it is not reasonable to expect firms to have prevention procedures in place

Risk assessment

The HO FtPF Guidance states that, although it might be reasonable in certain circumstances for a firm not to have prevention procedures in place in response to a particular risk, *“it will rarely be considered reasonable not to have even conducted a risk assessment”*. Accordingly, in order to rely on the second defence⁵⁸, the firm must show a clear link between a particular identified risk and its determination that it is not reasonable in all the circumstances to have any prevention procedures in place.

Risks for which it would not be reasonable in all the circumstances for financial services firms to have prevention procedures in place

In-scope firms providing services entirely outside the UK

The HO FtPF Guidance suggest that firms are not expected to implement prevention procedures where the risk assessment identifies that there is no UK nexus for a particular area of its business or group⁵⁹.

Certain Associated Persons

The following types of relationship likely represent no or almost no risk to the firm in the context of the failure to prevent fraud offence, for the reasons explained here. Accordingly, it would not be reasonable in all the circumstances for the firm to have prevention procedures in place:

- ▶ **Distributors who are subject to MiFID II requirements, or equivalent regulatory controls.** This is because MiFID II directly imposes a control framework on the distributor which represents a reasonable prevention procedure for the purposes of the offence (see [Part 2](#)). As a result, there is no control effectiveness benefit to duplication of controls, and costs to consumers, of overlaying the MiFID II requirements with bilateral requirements imposed by the firm on its distributor associated persons.
- ▶ **Persons who perform services for the firm on an execution-only basis at the instruction of the firm,** including those performing the following services:
 - Sub-custody
 - Clearing
 - Correspondent banking

This is because the execution-only nature of these roles means that the service provider is only

⁵⁸ S199(4)(b) of the Economic Crime and Corporate Transparency Act 2023

⁵⁹ See: [Can fraud offences committed outside the UK trigger the FtPF offence ?](#)

entitled to follow the express instruction of the firm and cannot apply any element of discretion etc. on its own account. Consequently, (i) if a fraud offence were to occur as a result of following the instructions of the firm, it would be the activity of the employee of the firm who gave such instruction that would be the relevant activity for determining if the FtPF offence has been committed, whereas (ii) if the fraud offence were to occur as a result of an activity determined by the third party independently of that instruction, that activity would not be being performed on behalf of the firm because it does not form part of the execution-only appointment.

▶ **Single-purpose relationships**, such as:

- Syndicated agents or account banks appointed by lenders
- Parties already appointed to a structured finance transaction prior to the firm joining the deal
- Paying agent/trustee or lead underwriter roles for bond underwriting

This is because these relationships (and the terms and conditions between the parties) are determined by the customer, and not by the firm. For example, the borrower determines who the lenders will be within the loan syndicate and determines who the agent and account banks are, the borrower also sets the terms of appointment between the lenders and the agent/account banks. This prevents the lenders from performing due diligence, putting in place contractual controls etc. Although the agreements between the parties might suggest that they are appointing each other to provide services, in reality such services are performed at the behest of the borrower.

- ▶ **Providers of markets and exchanges.** This is because the services provided by these providers are for the benefit of the market as a whole so that individual firms can execute trades directly with each other. As a result, similarly to the execution-only relationships described above, any fraud activity that is undertaken by firms using the market or exchange in question would be execution-only in nature, so any such activity performed by the provider of the market or exchange itself would be for its own account and not as part of the services provided for or on behalf of any particular firm.
- ▶ **Providers of 'middleware' platforms in global markets.** Middleware platforms are provided for the benefit of users so that individual firms can execute trades directly with each other. As a result, similarly to the execution-only relationships described above, any fraud activity that is undertaken by firms using the market or exchange in question would be execution-only in nature, so any such activity performed by the provider of the market or exchange itself would be for its own account and not as part of the services provided for or on behalf of any particular firm.

Existing contractual commitments

The risk assessment may identify associated persons in respect of whom the firm does not have grounds to terminate or amend existing contracts in order to implement contractual controls or rights to exercise controls for the new FtPF offence. In such circumstances, the firm may be able to establish that it is therefore not reasonable in all the circumstances for it to have reasonable prevention procedures in place, irrespective as to the risk that the third party associated person presents to the firm. To establish this, the firm would need to evidence why the firm cannot mitigate the FtPF offence risk by other means.

UK listed companies

There are rules that govern the content of and responsibility for a prospectus issued by a UK listed company. These are situated in the FCA's Listing Rules and Prospectus Rules, UK Prospectus Delegated Regulation, the AIM Rules for Companies and for Nominated Advisers, and in the FCA's Technical Notes (amongst others). For example, the prospectus rules require all information to be disclosed which is

necessary and is material to enable investors to make an informed assessment of the customer and have many specific content requirements which the customer needs to satisfy.

The rules require that the customer and its directors take responsibility for the prospectus, and this is required to be stated in the document. There are market practices around the creation of prospectuses designed to meet these requirements, which include having lawyers acting for the customer, taking the lead with drafting risk factors and a description of the customer's business and operations, assisting with due diligence (documentary and management due diligence requiring the answering of a questionnaire covering the issuer's business, results of operations and legal regulatory matters), verifying the prospectus and, where issued into the US, issuing a US disclosure defence document called a 10b5 letter.

Underwriting banks also ask a series of due diligence questions of the customer's senior management, to ascertain if there are any matters which need to be disclosed in the prospectus. The issuer of securities is required to disclose in the prospectus all material information necessary to enable investors to make an informed assessment of the assets, liabilities, financial position, profits and losses and prospects of the Issuer, the rights attaching to the securities being issued.

Under the same practices, the customer will have auditors/accountants appointed onto the deal for the purposes of verifying (known as "circling up") financial information included in the prospectus and providing negative assurance on changes in the customer's financial position from the end of the last reporting period to the publication date. These auditors/accountants will provide comfort letters in relation to the same and arrange for industry experts or competent persons to look at relevant aspects.

The exercise is supported by an underwriting agreement which contains representation and warranties from the issuer / seller to the banks as to its due incorporation in the customer's financial position the matters discussed in due diligence and disclosed in the prospectus. These provide comfort that the information in the prospectus is true, accurate and not misleading and that there is no omission. Firms are indemnified by the issuer / seller for any losses that they might suffer as a result of these representations proving to be false.

The legal framework described above is designed to impose reasonable prevention procedures on the listed, selling or issuing company. In particular, it would be unreasonable for the underwriting firm to become liable under the FtPF offence as that would invalidate the indemnity given by the issuer / seller (because an indemnity cannot be provided in respect of a criminal act). Without the indemnity, firms would be unable to act as underwriter. Without an underwriter the prospectus would be unable to be issued. Accordingly, it would be not be reasonable in all the circumstances for the underwriting or placing firm to have reasonable prevention procedures in place.

Main market transactions

Main market transactions in many instances require a sponsor under the Listing Rules. The sponsor is appointed by an issuer to "sponsor" a company through to listing or its transaction. That sponsor also has obligations in relation to certain of these transactions.

The sponsor is required to submit a declaration to the FCA that "all matters known to it which, in its reasonable opinion, should be taken into account by the FCA in considering (a) [the transaction] and (b) whether the admission of the securities would be detrimental to investors' interests have been disclosed with sufficient prominence in the prospectus...".

The FCA places responsibility upon sponsors through the Listing Rules for reviewing and challenging a client's position on matters such as working capital. Whilst the sponsor is expected to do this, applying its own knowledge and experience and taking other factors it considers relevant into account, and cannot simply rely on third party experts, the sponsor is not expected to be an expert in the relevant matters; nor

does a sponsors' role supplant that of the issuers.

The UK is currently intending to make changes to simplify the regime and make the UK listing environment more attractive by reducing the expectations on the sponsor. If the sponsor is expected to implement reasonable prevention procedures for the purposes of the FtPF, this would defeat the purpose of the legal changes that are being made. As a result, it would not be reasonable in all the circumstances for the sponsor to have reasonable prevention procedures in place.

Public M&A transactions

The UK Takeover Code contains specific content requirements for offer documents (i.e., the document in which the offer is explained to shareholders in order that they can decide whether to accept or not). These generally require that all information published in connection with an offer is subject to the highest standards of care and accuracy and are a fair and adequate representation.

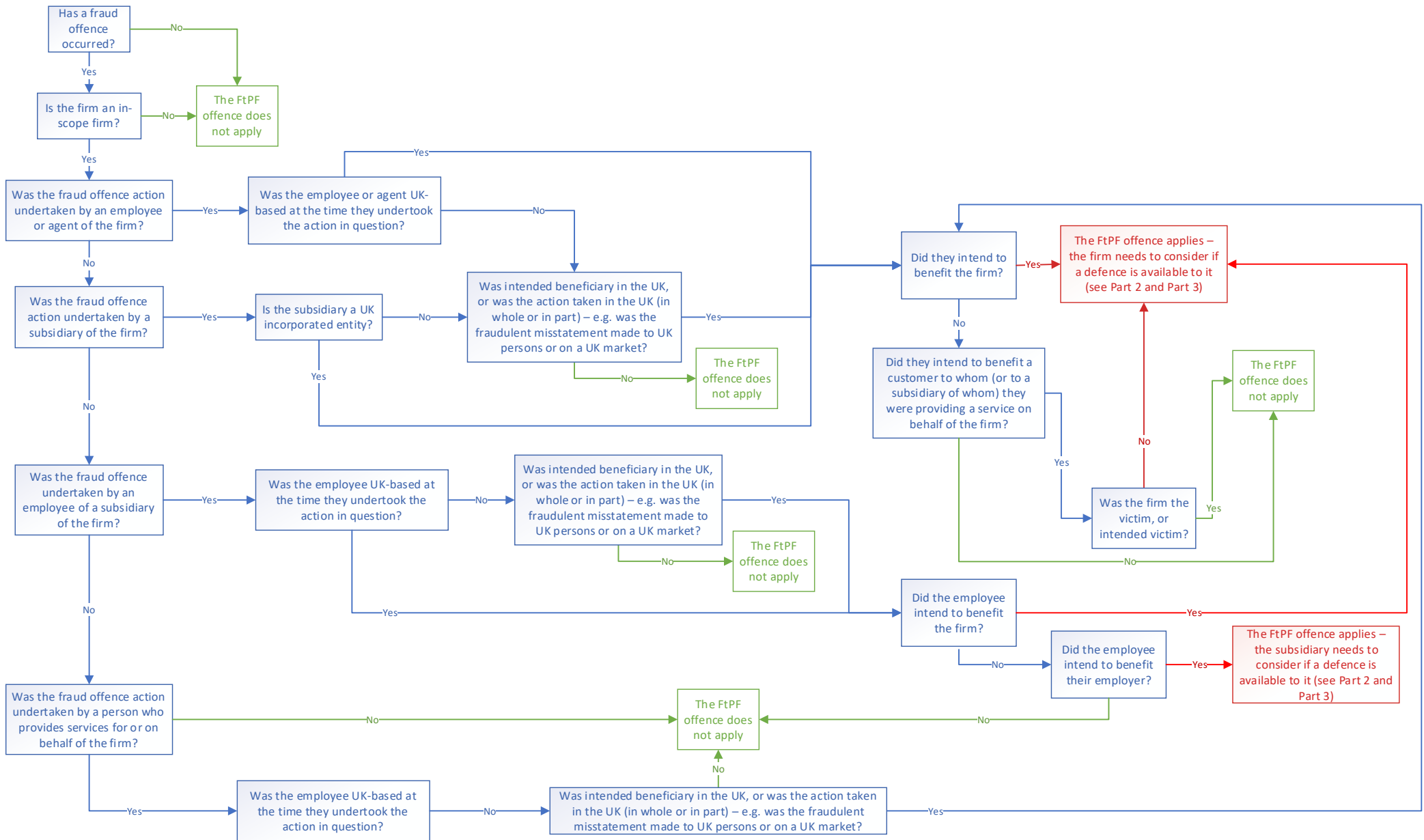
It is the directors' responsibility for the document, and this is stated in the offer document together with directors' confirmation that to the best of their knowledge and belief (having taken all reasonable care to ensure that such is the case), the information contained in the document is in accordance with the facts and that it does not omit anything likely to affect the import of the information.

The legal framework described above is designed to impose reasonable prevention procedures on the directors. Accordingly, it would not be reasonable in all the circumstances for the financial services firm supporting the takeover to have reasonable prevention procedures in place.

Data protection restrictions

Where the data protection laws applicable to the associated person limit the data that they are able to provide (such as initial due diligence information and ongoing monitoring information), it would not be reasonable in all the circumstances for the firm to have in place reasonable prevention procedures for the affected parts of its control framework. This might occur, for example, where the associated person is in a different jurisdiction to the firm (or the subsidiary of the firm).

Appendix A – Decision Tree for Part 1 of this Guidance



Appendix B – Defined terms

Term	Meaning
Act	the Economic Crime and Corporate Transparency Act 2023
agent	a worker who is engaged on an agency or contracting basis rather than under a contract of employment
aiding, abetting, counselling or procuring	<p>these terms have the meanings ascribed to them in the Accessories and Abetting Acts 1861, namely:</p> <p>Aiding Any practical assistance given before or after the offence</p> <p>Abetting Any encouragement to commit the offence that is given before or after the offence</p> <p>Counselling Advising to or on the commission of the offence</p> <p>Procuring Producing the offence (e.g. giving the person the tools or means to commit the offence)</p>
associated persons	are the persons described in the Who is a person associated with the firm ? section of this Guidance (which is taken from sections 199(7) and 199(8) of the Act)
customer	<p>a person to whom the associated person provides services on behalf of the firm. It would not include a person who might benefit from the services that are provided to the customer. For example:</p> <p>if a customer requests that the firm arranges something for a family member, that family member has no relationship to the firm and so would not be considered to be a customer; and</p> <p>if the customer is a trust or partnership, the firm’s customer relationship is with the trust or partnership as a body, and not with any beneficiary of the trust or with any trustee or partner in their capacity outside of the trust or partnership body (including, for example, beneficiaries of a deceased’s estate and creditors in an insolvency).</p>
FCA	the UK’s Financial Conduct Authority
fraud offence	an offence described in the What is a ‘fraud offence’ ? section of this Guidance (which is taken from section 199(6) of the Act)
FtPF	the corporate criminal offence for failure to prevent fraud set out in section 199 of the Act

Term	Meaning
in-scope firm	a firm that meets the criteria explained in the Who is covered by the FtPF offence ? section of this Guidance (which is taken from section 201 of the Act)
JMLSG	Joint Money Laundering Steering Group
large parent organisation	a firm that meets the criteria explained in the Who is covered by the FtPF offence ? section of this Guidance (which is taken from section 202 of the Act)
listed offence	<p>any of the following offences (which are taken from Schedule 13 of the Act):</p> <p><i>Common law offences</i></p> <ul style="list-style-type: none"> ▶ Cheating the public revenue ▶ In Scotland: <ul style="list-style-type: none"> ▪ fraud ▪ uttering ▪ embezzlement <p><i>Statutory offences</i></p> <ul style="list-style-type: none"> ▶ Theft Act 1968: <ul style="list-style-type: none"> ▪ s17 (false accounting) ▪ s19 (false statements by company directors etc) ▶ Theft Act (Northern Ireland) 1969: <ul style="list-style-type: none"> ▪ s17 (false accounting) ▪ s18 (false statements by company directors etc) ▶ Companies Act 2006, s993 (fraudulent trading) ▶ Fraud Act 2006: <ul style="list-style-type: none"> ▪ s1 (fraud) ▪ s2 (fraud by false representation) ▪ s3 (fraud by failing to disclose information) ▪ s4 (fraud by abuse of position) ▪ s9 (participating in fraudulent business carried on by sole trader) ▪ s11 (obtaining services dishonestly)

Term	Meaning
middleware	software used to connect applications to a network. It manages the transfer of data between different systems and acts as a bridge between the front-end and back-end of applications providing an opportunity to seamlessly transfer data between each other
ML Regs	The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017
PoCA	Proceeds of Crime Act 2002
PRA	the UK's Prudential Regulation Authority
subsidiary undertaking	has the meaning given to that term in section 1162 of the Companies Act 2006
third party associated person	<p>an associated person who is not:</p> <ul style="list-style-type: none"> ▶ an employee or agent ▶ a subsidiary undertaking ▶ an employee of a subsidiary undertaking
UK Prospectus Delegated Regulation	(Retained EU Legislation) Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004 (Text with EEA relevance)

Appendix C – Examples of third-party relationships which are not “associated persons” of the firm

In the context of financial services, there are a number of different scenarios where the performance of services or functions by a third party does not mean that they are an associated person of the firm. For example:

Non-Associated Person Role	Rationale
Mortgage brokers or conveyancers who are appointed by the customer under their contract of appointment.	Acceptance of any such broker or conveyancer onto an ‘approved panel’ of the firm does not mean that the mortgage broker or conveyancer is appointed by the firm to provide services – the party signing the terms of business with the mortgage broker or conveyancer for the provision of their services would remain the party to whom they provide those services
Surveyors, collateral managers, and consultants engaged by the firm to prepare due diligence reports	These parties are providing services to the firm, and are not providing services to another person on behalf of the firm
Insurance brokers	These parties are engaged by the customer, and not the insurer
Third parties providing comparison sites	These parties are acting on their own behalf, and are not providing services on behalf of any firm whose information they are presenting on their site
Third parties recommended by the firm but appointed by the investor	Where an investor asks for a recommendation for a third party to act on their behalf (e.g. they need to appoint a placing agent) and the firm provides them with a referral to one or more market participants who may be able to assist them, any party who the investor does in fact appoint will at all times be an associated person of the investor (not an associated person of the firm) even if the investor appoints a market participant for whom the firm provided the referral

Non-Associated Person Role	Rationale
The client where the firm has been appointed to act on behalf of a client as advisor, arranger, underwriter, lender, agent	The client is not acting on behalf of the firm. The firm is providing services to the client.
The firm's co-advisors on a M&A deal	The client is given advice by the co-advisors but the co-advisors do not and cannot act or provide services on behalf of the firm.
The firm's co-lead managers, bookrunners, global co-ordinators, underwriters on an equities capital markets or debt capital markets transaction	These persons are not providing services for or on behalf of the firm. The duties and obligations of the co-lead managers, bookrunners, global co-ordinators, underwriters are owed to the client and not to the firm.
The firm's co-lead arrangers or underwriters/ original lenders on a loan financing.	These persons are not providing services for or on behalf of the firm, even if the firm has entered into a contractual arrangement with them. They are performing services for their own account not for or on behalf of the firm - the arrangers or underwriters/ original lenders have no direct influence on the decisions of each other.
Investors	These persons are not providing services for or behalf of the firm. They are making a commercial decision as to whether or not to invest.
The paying agent, trustee, cash manager, registrar, account bank, custodian, common depositary, appointed by the issuer on a debt capital markets issuance when the firm is a lead manager/ underwriter	These persons are not providing services for or on behalf of the firm. The paying agent, trustee cash manager, account bank, custodian, common depositary etc are administrative roles that are instructed to provide services to the firm.
Service providers critical to deal mechanics including but not limited to: registrars, receiving agents, depositaries, listing agents, calculation agents and or conversion agents	The are providing services to the firm or to the customer on their own account, they do not act on behalf of the firm.
The facility agent and/or security agent appointed on a loan transaction when the firm is a lead arranger/underwriter	The facility agent and security agent take instructions from the lenders but would not act on behalf of the firm.

Non-Associated Person Role	Rationale
Any third parties who have been appointed by the client to provide due diligence reports in the context of a M&A or financing transaction (whether or not the firm can rely on that report)	The third parties owe their primary obligation to the client and do not take instructions from or act on behalf of the firm.
Any third parties who have been appointed by our client to provide a sustainable financing framework or second party opinion in the context of a sustainable bond or loan (whether or not the firm can rely on those documents)	The third parties owe their primary obligation to the client and do not take instructions from or act on behalf of the firm.
Any auditors/accountants appointed by our client who issue comfort letters in the context of a capital markets transaction or as part of regular agreed upon procedures	The third parties owe their primary obligation to the client and do not take instructions from or act on behalf of the firm.
External counsel appointed by the firm (incl. legal counsel, tax advisors) <i>but expressly excluding</i> where such external counsel has been appointed to make official statements or filings on behalf of the firm, such as where they are appointed to complete tax submissions on behalf of the firm and submit these to HMRC.	External counsel provide a service/advice to the firm and are not providing services on behalf of the firm. Even if they hold the firm's power of attorney to finalise the documentation, for example, they are not providing a service to another person on behalf of the firm.
External counsel acting for the client and or other advisors to the client (incl. legal counsel, tax advisors)	External counsel/advisors appointed by the client owe their primary obligation to the client and do not take instructions from or act on behalf of the firm.
The tender and information agent appointed by the issuer for a tender offer in a capital markets or debt markets transaction	The tender and information agent provides a service to the firm and has an obligation to obtain all necessary financial information but no obligation to ensure the accuracy of the information provided. They do not act on behalf of the firm.
Rating Agencies (credit, ESG, etc)	Ratings Agencies assign credit, ESG or other ratings and have an obligation to provide ratings accurately. They are independent to the firm and do not act on their behalf.

Non-Associated Person Role	Rationale
Sub-custodians in a capital markets transaction	Sub-custodians have an administrative role and are instructed to provide services to the client.
Co or sub security agents or trustees in a capital markets transaction	Co or sub security agents or trustees owe an obligation to multiple secured parties. They do not act on behalf of the firm.
A receiver appointed by the firm	A receiver owes a duty of good faith to the entity that is insolvent separate to any obligation to the firm. They do not act on behalf of the firm.
Any agents (e.g. paying agent) appointed by the firm in its capacity as the trustee on an enforcement	The agent has an administrative role and provides a service to the trustee on enforcement. They do not act on behalf of the firm.
Debt recovery agents and debt assignees	Any service provided is provided to the firm, not on behalf of the firm.
Others eg. PR agents, data room providers, printers, roadshow coordinators	All are providing services to the firm or to the customer on their own account. They do not act on behalf of the firm.

Schedule – Illustrations

ILLUSTRATION 1

Firm A is placing a bond for Customer B. Customer B has included a risk disclosure in the prospectus that states “We have had problems in the past with false misstatement in our accounts, as a result there is a risk that the accounts in this Prospectus include false misstatements.”. The employee (C) of Firm A who is placing the bond has no knowledge that there is actually any such false misstatement. Employee C is aware that the purpose of risk disclosures within a prospectus is to ensure that investors can assess risk, and therefore the likely value of the investment, before investing. As a result, the disclosure is designed to prevent any loss or gain from occurring.

It is unlikely that employee C is encouraging or assisting Customer B in the commission of a listed offence, because they do not have knowledge of facts that indicate an intention on the part of Customer B to commit a listed offence.

ILLUSTRATION 2

An employee provides a customer with a service that the customer subsequently uses to commit a fraud offence. The employee had no grounds to suspect that the customer intended to use the service to commit fraud. The employee, therefore, has not assisted the customer to commit a fraud offence.

If the employee helped the customer in question to gain access to the service in the knowledge that the customer intended to use the service to commit fraud, the case may be in scope of aiding, abetting, or counselling; meaning that the FtPF offence may trigger.

ILLUSTRATION 3

Where the firm has access to information which might indicate that a particular statement being made (such as in a prospectus or a due diligence report for a syndicated loan) is false, but the employee reviewing that statement has not seen that information or is otherwise not in a position to understand that the information is false, the employee is unlikely to be encouraging or assisting in the belief that one or more listed offences will be committed.

In such circumstances, the employee is also unlikely to have knowledge of facts that indicate an intention on behalf of the customer to commit a listed offence.

ILLUSTRATION 4

An employee completes customer application documentation with false information in order to help the customer to obtain a product or service from the firm. The customer has no knowledge of this. The employee has likely procured the predicate offence of fraud by false representation because they have endeavoured to bring about the predicate offence.

In this case, however, because the intention is to benefit the customer (and not the firm), the victim exemption is likely to apply (see [Are there any exceptions to the offence?](#)).

ILLUSTRATION 5

The firm uses a third party to perform customer onboarding vetting and due diligence services on behalf of the firm. The firm onboards the third party through its supplier procurement processes and manages the relationship as a supplier relationship.

In such case, however, it might be determined that the third party is in fact providing services on

behalf of the firm for the purposes of the FtPF offence.

ILLUSTRATION 6

An employee of an Investment Manager is employed as a team personal assistant. They start helping out with customer relationship calls. The manager of the team is aware of this but does not take any steps to make it clear to the employee that they should stop doing so, or to prevent them from doing so. The employee assists a customer with falsifying documents in order to make an investment in a Fund for which they would not be an eligible investor.

In such a case, it might be determined that the employee was engaged, however misguided, in furthering their employer's business and was therefore acting in their capacity as an employee of the Investment Manager, and so the Investment Manager would only be able to avoid criminal liability if it can establish a reasonable prevention procedures defence.

Noting, however, that in the case the Investment Manager was the intended victim of the fraud – see [Are there any exceptions to the offence ?](#).

ILLUSTRATION 7

Intermediary A is appointed by Bank B to provide advisory services on Bank B's behalf to Bank B's customers. Intermediary A is also appointed by Bank C to provide advisory services on Bank C's behalf to Bank C's customers. Bank B and Bank C share the same customer. Intermediary A commits a fraud offence as part of the advisory services that it provides on behalf of Bank C.

In respect of Bank B, the fraud offence was committed by Intermediary A outside of the service it provides on behalf of Bank A. However, Bank C could be liable under the FtPF offence.

ILLUSTRATION 8

Intermediary D is appointed by Bank E to provide advisory services on Bank E's behalf to Bank E's customers. Intermediary D provides mortgage-related services to Bank E's customer. Intermediary D and the customer collude to falsify the customer's tax returns to the local tax authority. Intermediary D does not have an agreement in place with Bank E for the provision of tax-related services. Here, the fraud offence was not committed as part of services provided by Intermediary D on behalf of Bank E.

ILLUSTRATION 9

A false statement made by a director of a firm that is registered in the United Kingdom will be conduct that triggers the FtPF offence even if the company director is outside of the United Kingdom at the time they make that false statement. This is because the company is a UK entity.

However, an example of a fraud offence which takes place entirely outside of the UK would be: a false statement made outside the United Kingdom by an overseas-based director of a non-UK company (regardless of whether the director is a UK person) unless it was intentionally targeted at UK "victims", for example, if the shares were publicly traded in the UK.

ILLUSTRATION 10

Non-UK Bank A utilises UK Branch authorisations to conduct cross-border business with UK customers. Even though Bank A books the transaction outside the UK, the use of UK Branch authorisations in order to effect the customer transactions is likely to be sufficient evidence that this particular activity is intentionally aimed at UK consumers, for the purposes of establishing a UK nexus should a fraud offence occur during the performance of that activity.

ILLUSTRATION 11

Non-UK Bank A operates a ‘hub and spoke’ model where both Bank A, and its non-UK subsidiaries, utilise UK-based operations staff in its UK subsidiary to confirm and settle non-UK transactions. If a fraud offence occurs during the performance of that activity, the fact that the employee in question is based in the UK is likely to be sufficient UK nexus.

This does not bring the whole of Bank A’s operations into scope, however. For example, if the fraud offence is committed by non-UK traders entirely outside the UK, without the knowledge of the UK-based confirmation or settlements staff, it is unlikely that there would be sufficient UK nexus. If the UK-based confirmation or settlements staff were aware that the fraud offence had been committed, UK nexus for the aiding, abetting, counselling or soliciting limb might be established.

ILLUSTRATION 12

Non-UK Bank A provides mortgages to UK residents to support them with buying homes abroad. Bank A does not advertise these services in the UK, and advertising outside of the UK is generic (i.e. targeting all potential borrowers, not just those who are UK-resident). Because Bank A knowingly provides the mortgage to a UK resident, any fraud activity undertaken by an associated person of Bank A during the provision of the mortgage is likely to have sufficient UK nexus for the purposes of the FtPF offence.

However, if non-UK Bank B issues a regulated product in a non-UK market and a UK-resident purchases that product, because Bank B is not targeting UK customers, and is not knowingly/intentionally entering into a business relationship with a UK customer, there is unlikely to be sufficient UK nexus for the purposes of the FtPF offence.

Likewise, if non-UK firm C sells non-UK life insurance products to non-UK customers and, upon the death of the non-UK customer, a UK-resident becomes the beneficiary of that policy, there is unlikely to be sufficient UK nexus should a fraud offence occur during the performance of the sales activity of firm C (including any fraud occurring during any settlement or vestment of benefit activity).

ILLUSTRATION 13

Branch A has been established in the UK by non-UK Bank B. Branch A is authorised and regulated by the FCA. A UK-based employee of Branch A intentionally assists a UK customer of Bank B to defraud another person.

The activity is potentially an FtPF offence.

ILLUSTRATION 14

Branch C has been established in the UK by non-UK Bank D. Branch C is authorised and regulated by the FCA. An employee of Bank D (not employed or based in Branch C) commits a fraud offence outside of the UK with the intention of benefitting Bank D, but not with the intention of benefitting Branch C.

As this activity took place entirely outside the UK there is no UK nexus for the fraud offence, including for the purposes of assessing this element of the FtPF offence.

ILLUSTRATION 15

A UK national based overseas and employed within a non-UK subsidiary of a UK headquartered firm, helps their customer (a non-UK registered entity) submit fraudulent annual account statement to the local (non-UK) tax authorities. In this scenario, given that the fraud is targeted at the foreign tax authority, no aspect of the fraud offence took place in the UK.

There would, however, be potential liability for failing to prevent the facilitation of foreign tax evasion offence under the Criminal Finances Act 2017 – please refer to the separate guidance issued by HMRC and supporting the Industry Guidance issued by UK Finance for information about the applicability of that offence.

ILLUSTRATION 16

An employee missells a product of the firm and there is no evidence of intent to benefit the firm or its customer (i.e. intent would need to be inferred to prove this part of the FtPF offence).

The first issue to consider is whether in the circumstances of the case the employee was:

- ▶ engaged, however misguidedly, in furthering their employer’s business interests such that they were acting within the scope of their employment, OR
- ▶ were engaged solely in pursuing their own interests, for example, if they were acting deliberately to harm the firm (which could not then reasonably lead to an inference of intent to benefit their employer).

If they were acting within the scope of their employment, then consideration of the following will be relevant in determining whether the employee foresaw an adverse outcome (as distinct from a benefit) as the virtually certain consequence of their actions, for the purpose of inferring intent:

- ▶ If the firm receives a small product fee, is the product fee (under FCA regulatory principles for fees and fair customer outcomes) designed to cover the administrative costs of the application for the product, rather than represent a benefit to the firm?
- ▶ Is the income stream (the benefit) from the product generally achieved through the interest income from the product over its lifetime, such that any benefit to the employee (such as remuneration for higher sales) is linked to the firm’s expectation of income across the lifetime of the product?
- ▶ Is the employee outside of the Remuneration Code and aware that there are no means for the employer to unwind such remuneration based on customer complaints, the unwinding of such sales, the imposition of any regulatory fines or penalties etc.?
- ▶ Is the employee aware that FCA regulatory principles require firms to reimburse customers to whom products have been missold?
- ▶ Is the employee aware that there are many channels available to customers to raise complaints in order to be reimbursed for any such misselling – for example, the firm’s complaints teams, the FCA’s whistleblowing hotline and the Financial Ombudsman Service? I.e. to what extent it is likely that, although the employee might feel confident that they can hide their personal culpability for the misselling, the employee will nevertheless be aware that customers of the firm are likely to identify the misselling and complain about this to either the firm, the Ombudsman or the FCA?
- ▶ Is the product sold in a competitive/liquid market (such that there would be little or no impact on competitors/conference of business advantage)?

ILLUSTRATION 17

An employee colludes with a customer or the broker of a customer to obtain loan finance based on false representation and there is no evidence of intent to benefit the firm (i.e. intent would need to be inferred to prove this part of the FtPF offence).

The first issue to consider is whether in the circumstances of the case the employee was:

- ▶ engaged, however misguided, in furthering their employer's business interests such that they were acting within the scope of their employment, OR
- ▶ were engaged solely in pursuing their own interests, for example, if they were acting deliberately to harm the firm (which could not then reasonably lead to an inference of intent to benefit their employer).

Here, the firm is the recipient of a representation that both the employee and the customer know to be false, intending to make a gain for themselves or another (i.e. the capital drawdown of the loan) and/or to expose the firm to the risk of loss – i.e. the firm is the victim of the offence under section 2 of the Fraud Act 2006.

Also, as the employee is in a position where they can deliver benefit to the customer and/or their broker through collusion, they are likely to be in a position where they are expected to safeguard (and not act against) the financial interests of the firm. The collusion with a third party indicates a deliberate dishonest abuse of that position – i.e. the firm is the victim of the offence under section 4 of the Fraud Act 2006.

However, if the particular facts indicate that they were instead acting within the scope of their employment, the second issue to consider is whether intent to benefit the firm can be inferred.

The following factors that might also indicate both an intention to deliberately harm the firm, and that a positive outcome was not the virtually certain consequence of the employee's actions:

- ▶ The employee is aware that the income stream (the benefit) from loan finance is generally achieved through the interest income received during the lifecycle of the loan, AND:
 - The employee is aware that the firm will rely upon the statements made by the customer in order to assess the appropriateness of the loan to the firm from a risk and harm perspective (e.g. credit risk, or harm arising from failing to meet ESG deliverables), and/or
 - The employee is aware that the firm's assessment procedures are designed to ensure that the loan is repaid in full, and that circumventing them is likely to result in firm not receiving all of the income stream element (even if some repayments are made, this is unlikely to continue for the duration of the loan) and will instead be likely to face a bad debt on its loan book, and/or
 - The employee is aware that the firm will rely upon the statements made by the customer in order to assess the suitability of the loan (in line with FCA expectations).

ILLUSTRATION 18

A comprehensive risk management framework outlines the overall approach to managing risk. A standard set of risks are used, known as a risk taxonomy. Each risk has an assigned individual who is responsible for the holistic assessment and oversight of that risk. There are defined Risk Owners for each risk instance, who are accountable for identifying, assessing, managing and reporting key existing and emerging risks that they own for their business area or function in line with the risk appetite. The firm assesses the extent and effectiveness of their controls to manage non-financial risks on an ongoing basis. Such assessments are expected to be reviewed in response to trigger events to perform risk assessments on a timely basis in areas where the risk and control environment has changed (based on internal / external factors) and to refresh or enhance the controls, where appropriate. Trigger events include "near miss" events where losses were narrowly avoided. In addition, time based back-stop reviews can be completed where there is no trigger event.

ILLUSTRATION 19

Retail services provided on standard terms generally provides limited risk of an associated person (likely an employee in the case of a retail business) to commit a fraud offence that benefits the firm or a customer to whom (or to whose subsidiary) those services are provided. This will particularly be the case for services relating to cash savings and current accounts, mortgages, general insurance and unsecured lending to individual customers (including credit cards and personal loans).

However, many retail businesses will offer a wide range of services and will identify whether any service provided is at higher risk of providing opportunities for an associated person to commit a fraud offence with the stated intent. For example, retail businesses may consider the channels through which its associated persons deliver these higher risk services and whether engagement with particular customer segments increases the risk.

ILLUSTRATION 20

In respect of external third parties:

- ▶ This would relate to the areas of risk presented by both third party associated persons and any expected or anticipated sub-contractors or outsourced services providers (onward supply chain relationships) of that third party.
- ▶ The assessment of the areas of risk across any such multi-party relationships should be used to determine an overall risk assessment for third party associated persons. (See [Supply Chains](#).)
- ▶ It would consider effectiveness of controls, such as due diligence (both pre and post contract stage)
- ▶ It would be assessed by someone who understands the services provided by the associated person and the nature of the firm's relationship with them.

In respect of multi-jurisdictional engagements⁶⁰, where a regional or global master services agreement is in place it would be reasonable for the firm to complete a single risk assessment and due diligence exercise based on the risks associated with the services being provided across all geographies.

⁶⁰ E.g. where the group of a third party associated person is engaged to provide services to various entities across the firm's group