

Corporate Compliance: Is Filip A Factor For You?

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The B Zone ...

The top ten corporate crackdowns in U.S. history are significant and telling:

10. \$2.88 Billion for tax evasion and corporate secrecy – Swiss bank pleaded guilty to criminal charges for helping U.S. citizens evade taxes.
9. \$3.0 Billion for misbranding and hiding safety information – Pharmaceutical company pleaded guilty to misbranding drugs and hiding safety information.
8. \$5.0 Billion for misrepresenting toxic securities – Misleading investors helped ignite the 2008 financial crisis.
7. \$5.15 Billion for environmental contamination – Hefty fine levied for the attempt to avoid paying previous fines for environmental contamination.
6. \$7.0 Billion for bad mortgages – Settlement did not absolve implicated banks or employees from facing potential criminal charges.
5. \$8.9 Billion for illicit financial transactions – Guilty plea for illegally processing transactions in countries under U.S. economic sanctions accompanied the monetary penalty.
4. \$13.0 Billion for bad mortgages – Questionable loans contributed to the 2008 financial crisis.
3. \$14.7 Billion for deceptive emissions testing – German company settled with the U.S. government.
2. \$16.65 Billion for financial fraud – Mortgage-related fraud contributed to the 2008 financial crisis.
1. \$20.8 Billion for environmental crimes – British company pleaded guilty to eleven counts of manslaughter.

When is a Corporation Responsible for the Criminal Acts of its Employees?

“[C]orporations can be held criminally responsible for any act committed by an employee as long as that act is committed within the scope of employment and with some intent to benefit the employer. . . . In practice, this rule means that a corporation has little legal defense against prosecution when a single rogue employee commits a crime, even if the crime is committed in violation of every rule in the employee handbook and in the face of a strict and well-functioning compliance program.” *Reforming Corporate Criminal Liability to Promote Responsible Corporate Behavior*, Andrew Weissmann, Richard Ziegler, Luke McLoughlin & Joseph McFadden (U.S. Chamber Institute for Legal Reform). And it may be broader. See *United States v. Bank of New England, N.A.*, 821 F.2d 844, 856 (1st Cir. 1987)

What are the Filip Factors?

“Filip” is the final-named iteration of the list of circumstances prosecutors are directed to consider to determine whether to charge a business organization with a crime.

Are the Filip Factors Real?

In short, yes. If the DOJ is contemplating a criminal charge against your company, your outside counsel will be asked for a Filip factor presentation in advance of the prosecution decision.

- A robust compliance program will:
 - Prevent violations
 - Be instrumental in convincing the DOJ not to pursue criminal charges against your company
- In the words of Paul Fishman, former USA in New Jersey:
 - We want to know what you did to prevent the [bad behavior] and what you did to respond

The Justice Manual, Section 9-28.300 ...

1. The nature and seriousness of the offense
2. The pervasiveness of wrongdoing within the corporation, including management involvement
3. The corporation’s history of similar misconduct, including prior enforcement actions
4. The corporation’s willingness to cooperate, including as to potential wrongdoing by its agents
5. The adequacy and effectiveness of the corporation’s compliance program at the time of the offense, as well as at the time of a charging decision
6. The corporation’s timely and voluntary disclosure of wrongdoing
7. The corporation’s remedial actions
8. Collateral consequences
9. The adequacy of remedies such as civil or regulatory enforcement actions
10. The adequacy of the prosecution of individuals responsible for the corporation’s malfeasance

Corporate Cooperation: What is Expected?

In order for a company to receive any consideration for cooperation under this section, the company must:

- Identify all individuals substantially involved in or responsible for the misconduct at issue
- Provide to the Department all relevant facts relating to that misconduct

Is this the Yates memo? No, it's Yates light. Yates: "[T]o be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct."

- A company is not required to waive its attorney-client privilege or attorney work product protection to be eligible to receive cooperation credit

How Will They Evaluate Your Compliance Program? Sources ...

- FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act (DOJ and SEC), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>
- The United States Sentencing Guidelines §8B2.1. Effective Compliance and Ethics Program, <https://www.ussc.gov/guidelines/2018-guidelines-manual/2018-chapter-8#NaN>
- U.S. Department of Justice, Criminal Division, Fraud Section, Evaluation of Corporate Compliance Programs, <https://www.justice.gov/criminal-fraud/page/file/937501/download>
- HHS-OIG, Compliance Guidance: <https://oig.hhs.gov/compliance/compliance-guidance/index.asp>

Elements of an Effective Compliance Program:

1. Tone at the Top
2. Compliance Policies and Procedures
3. Oversight, Autonomy, and Resources
4. Risk Assessments
5. Training and Education
6. Incentives and Disciplinary Measures
7. Third-Party Due Diligence and Payments
8. Continuous Improvement/Monitoring: Periodic Testing and Review
9. Pre-Acquisition Due Diligence and Post-Acquisition Integration
10. Branded, marketed and trusted Integrity Helpline

What Remedial Actions are Helpful?

- Implementing an Adequate and Effective Corporate Compliance Program or to Improving an Existing One
- Replacing Responsible Management
- Disciplining or Terminating Wrongdoers, or
- Paying Restitution

What Can You Do to Prepare for a Visit from the Government?

- In-person Training
- CBT Training
- Do's and Don'ts...Helpful Tips
- Industry Specific: Competitor/Ad Hoc Meeting Forms; Trade Show Meeting Forms
- Refresh and Audit

How Do You Respond to a Visit?

- Coordination with Business Unit/Litigation Counsel, and the Business
- Data Preservation Best Practices: IT Partnership Is a Must
 - More Than Email . . . Broader Than Most Civil Cases
 - If Internal Capacity is Limited, Identify Vendors and Have Them on Standby
- Establish Schedule for Communicating with Key Stakeholders

What Other Factors Should In-House Counsel Consider?

- E&O Insurance
- Communications – Internal/External or Both
- Investor Relations
- Accounting/Controlling (once the time is right)
- Foreign Affiliates - Is This a U.S. or Possibly Global Issue
- Revisit Training Program (at least annually)

Real-Life Hurdles ...

- Underlying Misconduct: Analysis and Remediation
- Leadership, Oversight, Autonomy, and Resources
- Policies, Procedures, and Training
- Quality of Investigation and Reporting
- Discipline
- Continuous Improvement