

Corporate Compliance: Is Filip A Factor For You?

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Top 10 Corporate Crackdowns:

10. Tax Evasion & Corporate Secrecy

\$2.88 BILLION

* Swiss bank pleaded guilty to criminal charges for helping U.S. citizens evade taxes

9. Misbranding & Hiding Safety Information

\$3.0 BILLION

*Pharmaceutical company pleaded guilty to misbranding drugs and hiding safety information

8. Misrepresenting Toxic Securities

\$5.0 BILLION

* Misleading investors helped ignite the 2008 financial crisis

7. Environmental Contamination

\$5.15 BILLION

*Irony: fine was for trying to avoid paying fines for environmental contamination

6. Bad Mortgages

\$7.0 BILLION

* Settlement does not absolve bank or its employees from facing potential criminal charges

5. Illicit Financial Transactions

\$8.9 BILLION

* Guilty plea for illegally processing transactions in countries under U.S. economic sanctions

4. Bad Mortgages

\$13.0 BILLION

* Questionable loans contributed to 2008 financial crisis

3. Deceptive Emissions Testing

\$14.7 BILLION

* German company settled with U.S. government

2. Financial Fraud

\$16.65 BILLION

*Fraud contributed to 2008 financial crisis

1. Criminal Manslaughter & Environmental Crimes

\$20.8 BILLION

*British company pleaded guilty to eleven counts of manslaughter

Scott Schools
Chief Compliance and Ethics Officer
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Is Filip a Factor for You?



Mark Filip, former
Deputy Attorney General

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?

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.

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

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."

Corporate Cooperation: What's 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?

1. Implementing an adequate and effective corporate compliance program or improving an existing one
2. Replacing responsible management
3. Disciplining or terminating wrongdoers, or
4. Paying restitution

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CAUTION -
We Are Making Facts Now!

John Unice

Assistant Secretary & Senior Counsel

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How In-House Counsel Prepares and Responds to Investigations ...

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

1. In person training
2. CBT training
3. Do's and don'ts..Helpful tips
4. Industry specific: competitor/ad hoc meeting forms; trade show meeting forms
5. Refresh and audit

How Do You Respond to a Visit?

1. Coordination with business unit/litigation counsel, and the business
2. Data preservation best practices: IT partnership is a must
3. More than email . . . broader than most civil cases
4. If internal capacity is limited, identify vendors and have them on standby
5. Establish schedule for communicating with key stakeholders

What Other Factors Should In-House Counsel Consider?

1. E&O insurance
2. Communications - internal/external or both
3. Investor relations
4. Accounting/Controlling (once the time is right)
5. Foreign Affiliates - is this a U.S. or possibly Global Issue
6. Revisit training program (at least annually)

Will You be Ready?

Procedures for points of contact (Wallet Cards!)

Procedures for informing the proper stakeholders

Employee vs. Company Targets: Who is the “client”?

Jamie Stern
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Global Litigation and Americas
Head of Investigations
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Filip Factors

Real-Life Hurdles:

1. Underlying misconduct: analysis and remediation
2. Leadership, oversight, autonomy, and resources
3. Policies, procedures, and training
4. Quality of investigation and reporting
5. Discipline
6. Continuous improvement

Underlying Misconduct: Analysis and Remediation

Who conducted the root cause analysis

Were there prior Indications:

- Whistleblower program and documented investigation results
- Audit findings where internal audit has conducted and audit
- Customer complaints
- MISSED OPPORTUNITIES

Remediation:

- Addressing root cause analysis
- Addressing missed opportunities
- Minimizing risk of repetition going forward

RISK: Inadequacy of scope of analysis and remediation

Leadership, Oversight, Independence, and Resources

Conduct at the top (words and actions of senior leaders)

Commitment of business and control functions:

- Specific actions taken to demonstrate
- Information sharing

Oversight:

- Compliance expertise on board of directors/external auditors
- Private sessions with compliance and control functions
- Reporting

Autonomy/Stature/Resources

RISK: Regulators may require remediation not just in the area where violations occurred but in the organization of, coordination among and reporting by the control functions

Policies, Procedures, and Training

Policies and Procedures:

- Policy/procedure design and implementation and involvement of business
- Policy prohibiting the misconduct at issue
- Clear guidance and training on policy to relevant personnel
- Communication

Training (risk-based):

- Training of control function employees as well as business
- Effectiveness of training and how measured
- Availability of guidance

RISK: If a violation goes on long enough and/or permeates a business or region, the adequacy of policies, training, oversight, reporting and performance of control functions may be called into question and require broader remediation.

Quality of Investigation and Reporting

Investigation:

- Proper scope
- Qualified investigators
- Independence of investigators
- Properly documented

Response to investigation:

- Did root cause analysis consider system vulnerabilities, accountability lapses, and senior manager responsibilities

RISK: If the scope of the investigation is too narrow and/or the response does not appropriately address supervisory responsibility, the quality of the investigation may be deemed inadequate. Proper documentation is key.

Discipline

Who is held accountable:

- Staff members
- Supervisors (malfeasance or nonfeasance)
- Control function personnel

Process for determining discipline:

- Who is involved
- Consistency of discipline

Company record generally on disciplinary action:

- terminations/warnings/financial consequences

Incentives to promote ethical and compliant behavior

Continuous Improvement

Internal Audit:

- Types of audit that would have identified the issue(s) relevant to the misconduct
- Types of audits conducted and reported
- Follow up on audit findings
- Audits in high risk areas

Control testing:

- Audit of compliance program in area of misconduct

Periodic review of compliance policies, procedures, and practices

Updates to risk assessments

Periodic assessment of risks and whether policies, procedures, training, and reporting are sufficient to address them