

**NEW DOJ GUIDANCE FOR  
CORPORATE COMPLIANCE  
PROGRAMS:**

QUESTIONS COUNSEL SHOULD EXPECT  
IN A GOVERNMENT INVESTIGATION

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## INTRODUCTION

- On February 8, 2017, the Fraud Section of the Department of Justice quietly published guidance titled “Evaluation of Corporate Compliance Programs.”
- The Guidance provides a list of “important topics and sample questions that the Fraud Section has frequently found relevant in evaluating a corporate compliance program.”

## INTRODUCTION – THEMES

The Guidance evidences three major themes, as explored in more detail in this presentation:

- I. Consistency with prior guidance from the DOJ
- II. DOJ focus on corporate culture
- III. Continued interest in individual responsibility

## INTRODUCTION – NEW GUIDANCE TOPICS

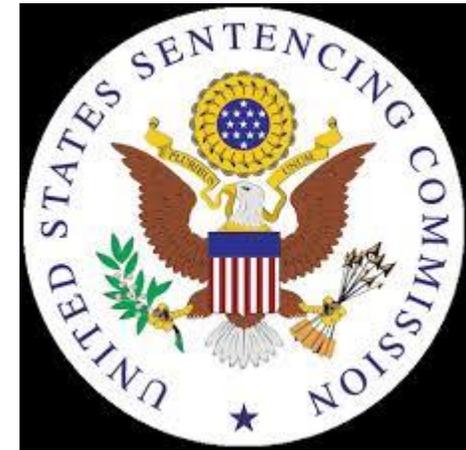
- (1) Analysis and Remediation of Underlying Misconduct
- (2) Senior and Middle Management
- (3) Autonomy and Resources
- (4) Policies and Procedures
- (5) Risk Assessment
- (6) Training and Communications
- (7) Confidential Reporting and Investigation
- (8) Incentives and Disciplinary Measures
- (9) Continuous Improvement, Periodic Testing and Review
- (10) Third Party Management
- (11) Mergers and Acquisitions

# I. PRIOR GUIDANCE

- A variety of DOJ publications set forth how compliance programs have been evaluated and weighed in the context of corporate criminal investigations.
- These include:
  - The Federal Sentencing Guidelines
  - The Holder Memo and subsequent similar memos
  - The U.S. Attorney's Manual
  - A Resource Guide to the U.S. Foreign Corrupt Practices Act
  - The Yates Memo

# I. PRIOR GUIDANCE – THE FEDERAL SENTENCING GUIDELINES

- First issued in 1987, and updated almost yearly, the Sentencing Guidelines assist judges in determining the appropriate sentence after a defendant is convicted.
- The Guidelines include a section that provides particular considerations when sentencing corporations.
- Prosecutors have also considered these Guidelines in determining whether to prosecute a corporation.
- Section 8B2.1 of the Sentencing Guidelines provides that a corporation can obtain credit if it has an “effective” compliance and ethics program.
- Obtaining credit results in lessening the corporation’s culpability measure.



# I. PRIOR GUIDANCE – THE FEDERAL SENTENCING GUIDELINES

Seven elements of an “effective” compliance program:

- 1) established standards and procedures to prevent and detect criminal conduct;
- 2) high-level leadership’s knowledge about the content and operation of the program, the exercise of reasonable oversight with respect to its implementation and effectiveness, and allocation of sufficient resources;
- 3) use of reasonable efforts to avoid placing in a substantial authority position those whom the organization knew or should have known had engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program;
- 4) reasonable steps to communicate the program's standards and procedures throughout the organization, and training that is tailored to each constituency of the organization;
- 5) reasonable steps to ensure that the corporation's compliance program is followed, including monitoring and auditing to detect criminal conduct, periodically evaluating the program's effectiveness, and publicizing a system that allows reporting or the receipt of guidance about potential and actual criminal conduct without fear of retaliation;
- 6) consistent promotion and enforcement of the program with appropriate incentives for proper performance and appropriate disciplinary measures for those who engage in criminal conduct or fail to take reasonable steps to prevent or detect it; and
- 7) reasonable steps to respond appropriately to criminal conduct when detected, and to prevent further similar criminal conduct, including any needed changes to the program.

# I. PRIOR GUIDANCE – THE U.S. ATTORNEY’S MANUAL

The “Filip Factors” of the USAM contain the government’s guidelines for prosecuting corporations. The Filip Factors include:

- The pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
- The corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
- The existence and effectiveness of the corporation's pre-existing compliance program; and
- The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies.

# I. PRIOR GUIDANCE – A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012)

- The FCPA Guide provides insight into how the effectiveness of a company's compliance program would be assessed by the DOJ in the event of an investigation.
- It also proposes a baseline for creating compliance policies and turning them into an effective compliance program.



*A Resource Guide to the U.S. Foreign Corrupt Practices Act*

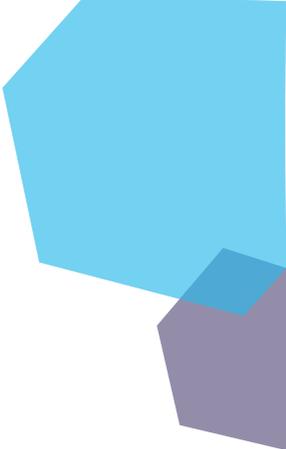
By the Criminal Division of the U.S. Department of Justice and  
the Enforcement Division of the U.S. Securities and Exchange Commission



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## I. PRIOR GUIDANCE – DOJ COMPLIANCE COUNSEL

- In 2015, DOJ hired a full-time compliance expert to “provide expert guidance to Fraud Section prosecutors as they consider the enumerated factors in the United States Attorneys’ Manual concerning the prosecution of business entities, including the existence and effectiveness of any compliance program that a company had in place at the time of the conduct giving rise to the prospect of criminal charges, and whether the corporation has taken meaningful remedial action, such as the implementation of new compliance measures to detect and prevent future wrongdoing.”
- Shortly after the hire, former Assistant Attorney General Leslie Caldwell stated that the compliance counsel “will help us assess a company’s program, as well as test the validity of its claims about its program, such as whether the compliance program truly is thoughtfully designed and sufficiently resourced to address the company’s compliance risks, or essentially window dressing.”



## II. The Importance of Corporate Culture

## II. THE IMPORTANCE OF CORPORATE CULTURE



### DEPARTMENT OF JUSTICE

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**Compliance is a Culture,  
Not Just a Policy**

**Brent Snyder**  
Deputy Assistant Attorney General  
Antitrust Division  
U.S. Department of Justice

“First, it starts at the top. A company's senior executives and board of directors must fully support and engage with the company's compliance efforts. If senior management does not actively support and cultivate a culture of compliance, a company will have a paper compliance program, not an effective one. Employees will pick up on the lead of their bosses. If the bosses take compliance seriously, the employees are far more likely to take it seriously. If they don't, the employees won't. It's as simple as that. “

-Brent Snyder, Deputy Assistant Attorney General, in 2014 remarks to the ICC

## II. THE IMPORTANCE OF CORPORATE CULTURE – BP



- DOJ described BP as having a “culture of corporate recklessness” and charged the company with gross negligence in connection with the Deepwater Horizon explosion. The explosion resulted in the deaths of 11 workers and extensive environmental damage.
- “The explosion of the rig was a disaster that resulted from BP’s culture of privileging profit over prudence.”
  - Former Assistant Attorney General Lanny A. Breuer
- BP pled guilty and paid over \$20 billion in fines.

## II. THE IMPORTANCE OF CORPORATE CULTURE – VOLKSWAGEN

- In 2005, Volkswagen began installing “defeat devices” which contained software designed to provide false emissions data during testing. In total, 11 million vehicles were equipped with the software.
- The New York Times described the corporate culture at Volkswagen as “confident, cutthroat, and insular.”
- Earlier this year, Volkswagen pleaded guilty to three criminal felony counts and agreed to pay a \$2.8 billion penalty. In a separate civil resolution, Volkswagen agreed to pay \$1.5 billion to settle claims from the EPA, CBP and violations of FIRREA.
- According to the Statement of Facts accompanying the plea, Volkswagen supervisors were aware of the misconduct and in some cases concealed the wrongdoing or instructed lower-level employees to conceal it.



## II. THE IMPORTANCE OF CORPORATE CULTURE – FINANCIAL INSTITUTIONS

- “Despite years of admonitions by government officials that compliance must be an important part of a corporation's culture, we continue to see significant violations of law at banks, inadequate compliance programs, and missed opportunities to prevent and detect crimes.”
  - Former Deputy Attorney General James Cole
- According to the Boston Consulting Group, banks across the world have paid approximately \$321 billion in fines since the 2008 financial crisis.



## II. THE IMPORTANCE OF CORPORATE CULTURE – FCPA PILOT PROGRAM

- In the April 5, 2016 FCPA Enforcement Plan and Guidance, DOJ’s Fraud Section announced a Pilot Program to encourage voluntary disclosure of FCPA violations.
- The Program set forth requirements for voluntary self disclosure, cooperation and remediation in FCPA investigations. Companies that meet the requirements are eligible for credit, which may “affect the type of disposition, the reduction in fine, or the determination of the need for a monitor.”
- DOJ emphasized that in evaluating the company’s compliance program under the pilot program, the Fraud Section will consider “[w]hether the company has established a culture of compliance, including an awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated.”
- In March of 2017, DOJ announced it was extending the program while DOJ evaluates its effectiveness.

## II. THE IMPORTANCE OF CORPORATE CULTURE – NEW GUIDANCE

- The New Guidance reflects DOJ’s continued focus on corporate culture and its relation to an effective compliance program, as seen in its focus on Senior and Middle Management.
- Specifically, the New Guidance asks how the board and other company leaders cultivate an ethical culture throughout the organization (“How have senior leaders, through their words and actions, encouraged or discouraged the type of misconduct in question?” “What specific actions have senior leaders . . . taken to demonstrate their commitment to compliance” “How has senior leadership modelled proper behavior to subordinates”).

## II. THE IMPORTANCE OF CORPORATE CULTURE – NEW GUIDANCE

- Relatedly, the New Guidance also focuses on the compliance function’s stature within the company (“Autonomy and Resources”).
- A company should expect to be able to articulate and/or defend:
  - The importance of the compliance function in relation to other “strategic functions” on such measures as compensation levels, rank/title, reporting lines, resources, and access to key decision-makers;
  - The role of compliance personnel in strategic and operational decisions;
  - The level of experience and qualifications of its compliance personnel;
  - Independence of compliance personnel (frequency of meetings with board of directors; access to direct reporting lines to the board);
  - How are funding and personnel decisions made for compliance department;
  - Examples of when compliance has raised concerns or objections to specific transactions and the company’s reaction.

## II. THE IMPORTANCE OF CORPORATE CULTURE – NEW GUIDANCE

- “Training and Communications,” another focus area, highlights that companies must design and develop dynamic risk-based training that is tailored to the specific compliance risks the company faces.
  - Does the company perform analysis to determine which employees should be trained on what topics?
  - Does the company offer its training in a form and language appropriate for its intended audience?
  - Does the company have a means for measuring the effectiveness of its training program?
  - What has company leadership done to communicate to employees its position on detected compliance failures?
  - What guidance is available to employees regarding compliance policies?

## II. THE IMPORTANCE OF CORPORATE CULTURE – NEW GUIDANCE

- “Confidential Reporting and Investigation” is another measure of a robust corporate culture is the effectiveness of a company’s internal reporting system and the associated investigative function.
  - How has the company collected, analyzed and responded to data from its internal compliance reporting mechanism (e.g., hotline, anonymous emails) and what is compliance function’s access to such information?
  - What has the company done to ensure that investigations are conducted by qualified persons, properly scoped, documented and independent?
  - What has the company done with the results of its investigations?
    - Is the information used to assess systemic issues at the company? Determine root causes?
    - Is there an established mechanism for responding to an investigation’s findings?
    - How are the findings reported and how high up are they reported?

## II. THE IMPORTANCE OF CORPORATE CULTURE – NEW GUIDANCE

- How a company holds its employees accountable for misconduct and awards ethical behavior demonstrate its commitment to a culture of compliance.
- Accordingly, DOJ aims to ensure that companies:
  - Discipline employees for compliance failures;
  - Hold managers accountable for misconduct perpetrated under their command;
  - Consistently apply discipline and incentives fairly and consistently; and
  - Incentivize compliance and ethical behavior in concrete ways.

## II. THE IMPORTANCE OF CORPORATE CULTURE – DESIGNING A COMPLIANCE PROGRAM

At the initial stages of design, corporate counsel should consider:

- What department or employees have ownership of the program and for supervising implementation of the program?
- How to assess the company's risk profile in order to tailor the compliance program appropriately?
- How will the effectiveness of the program be tested?
- Are there incentives and disciplinary measures in place to encourage compliance and discourage violations?

## II. THE IMPORTANCE OF CORPORATE CULTURE – DESIGNING A COMPLIANCE PROGRAM

- As emphasized in the Guidance, companies should also perform a risk assessment when designing or updating a compliance program in order to ensure the program is sufficiently tailored to the Company’s operations and risks.
- Analyze the company’s operations with a “who, what where, when, how” approach to understand the stresses on the company’s systems and identify potential issue areas.
- After assessing these issues, identify regulatory and compliance concerns and evaluate how the company is currently addressing these risks.
- Prioritize the most critical risks that have not been adequately addressed by the company and implement new policies, procedures, and initiatives as appropriate.

## II. THE IMPORTANCE OF CORPORATE CULTURE – DESIGNING A COMPLIANCE PROGRAM

- Ensure that any additions to the compliance program align with, and where appropriate, are incorporated into, existing company policies and procedures.
- Increasingly, regulators expect that companies hold the third-parties that they do business with accountable for compliance – as a result, companies should ensure that vendor agreements are compatible with their compliance programs and include language that requires vendor compliance with company policies.
- The program should also include procedures for how employees will be educated, when follow-up training will be conducted, and how attendance will be documented.

### III. Individual Responsibility

### III. INDIVIDUAL RESPONSIBILITY: THE YATES MEMO

- In 2015, the Yates Memo was released by former Deputy Attorney General Sally Yates. It directed prosecutors to prioritize individual accountability in corporate investigations.
- “Holding accountable the people who committed the wrongdoing is essential if we are truly going to deter corporate misdeeds, have a real impact on corporate culture and ensure that the public has confidence in our justice system. We cannot have a different system of justice – or the perception of a different system of justice – for corporate executives than we do for everyone else.”
  - Former Deputy Attorney General Sally Q. Yates  
New York City Bar Association White Collar Crime Conference  
Tuesday, May 10, 2016

### III. INDIVIDUAL RESPONSIBILITY: THE YATES MEMO

- Former Deputy Attorney General Yates advised corporations that, when under investigation for wrongdoing, their level of cooperation would, in part, be measured by whether they provide “all” relevant information, including the identification of individuals responsible for violations.
- The Yates Memo amends the Filip Factors to incorporate the new policy of requiring companies to give all relevant information about wrongdoers to prosecutors to qualify for cooperation credit.

### III. INDIVIDUAL RESPONSIBILITY: THE YATES MEMO

The Yates Memo identifies six "key steps" to enable DOJ attorneys "to most effectively pursue the individuals responsible for corporate wrongs":

- 1) Corporations will be eligible for cooperation credit only if they provide DOJ with "all relevant facts."
- 2) DOJ investigations should focus on investigating individuals "from the inception of the investigation."
- 3) Criminal and civil DOJ attorneys should be in "routine communication" with each other, including by criminal attorneys notifying civil counterparts "as early as permissible" when conduct giving rise to potential individual civil liability is discovered.
- 4) DOJ should not agree to a corporate resolution that provides immunity to potentially culpable individuals "absent extraordinary circumstances."
- 5) DOJ attorneys should have a "clear plan" to resolve open investigations of individuals when the case against the corporation is resolved.
- 6) Civil DOJ attorneys should also focus on individual accountability.

### III. INDIVIDUAL RESPONSIBILITY – CONTINUITY IN NEW ADMINISTRATION

“The Criminal Division will continue to prioritize prosecutions of individuals who have willfully and corruptly violated the FCPA. ... Indeed, our partnerships with foreign authorities are increasingly allowing us to ensure that even individuals living abroad are held accountable for their actions.”

- Trevor N. McFadden, recently installed by the Trump administration as Deputy Assistant Attorney General in the Criminal Division of the Department of Justice.

“The Department of Justice will continue to emphasize the importance of holding individuals accountable for corporate misconduct. It is not merely companies, but specific individuals who break the law.”

- Attorney General Jeff Sessions.

### III. INDIVIDUAL RESPONSIBILITY – NEW GUIDANCE

The New Guidance contains several topics and questions that prosecutors may ask when evaluating a compliance program that focus on individual responsibility; some examples:

- “How have senior leaders, through their words and actions, encouraged or discouraged the type of misconduct in question?”
- “What specific actions have senior leaders. . .taken to demonstrate their commitment to compliance, including their remediation efforts?”
- “Who reviewed the performance of the compliance function and what was the review process?”

### III. INDIVIDUAL RESPONSIBILITY – NEW GUIDANCE

- Given the specific references to senior leadership in the Guidance, compliance officers have even more reason to meet and discuss the issues raised by the Guidance with company management and the board.
- In the event of an investigation, management should be able to articulate answers to the questions outlined in the Guidance on the prior slide, and demonstrate that management has thoughtfully considered the issues raised by the Guidance.

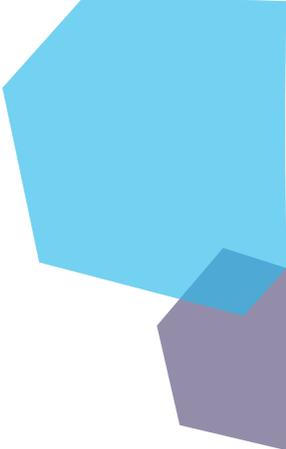


## TAKEAWAYS

- The Guidance centralizes and consolidates existing relevant information regarding compliance programs.
- While questions asked by the Guidance are not novel, it is undeniably essential that a responsible company official be able to provide satisfactory answers to them in the face of enforcement scrutiny.
- The Guidance also highlights DOJ's emphasis on the operation, rather than the appearance, of compliance programs.

## TAKEAWAYS

- The Guidance provides a sharper lens into how DOJ evaluates the effectiveness of corporate compliance programs.
- Only time will tell the extent to which DOJ treats the Guidance as a checklist (which it explicitly denies it does or will) when it subjects a compliance program to close scrutiny and even then, whether DOJ's approach will be publicly discernable in resolved cases.



Questions?

# PRESENTERS



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Glen Kopp is a former assistant United States attorney in the Southern District of New York. Since joining Bracewell, Glen has taken his prosecutorial skills and applied them to a number of areas of interest for the firm's clients, including cybersecurity, foreign corruption, government contracting fraud, securities fraud, corporate fraud, corporate compliance, and criminal antitrust. He has consulted with financial firms on cybersecurity policies and procedures and cyber incident response readiness, and has helped clients in actual breach situations manage regulators and law enforcement.



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### **About Phil**

Phil Bezanson helps clients navigate some of the most complicated litigation, regulatory and enforcement challenges. He primarily represents companies, senior management and boards of directors as well as individuals in internal investigations, regulatory enforcement, criminal defense, and related civil litigation. Phil regularly conducts internal investigations and defends corporations and executives facing allegations of securities fraud, antitrust violations, environmental crimes, bribery, insider trading, mail/wire fraud, tax offenses and other business crimes or regulatory violations. He also assists national and international corporate clients with a wide variety of compliance matters including anti-bribery and corruption, insider trading and antitrust enforcement practices at publicly traded companies, and trading desks at financial institutions.

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