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*Corporate Compliance and
U.S. Sentencing Guidelines*

November 16, 2020

Panelists:

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MCLE Certificate Information

- Most participants should anticipate receiving their certificate of attendance via email approximately four weeks following the webcast.
- Virginia Bar Association members should anticipate receiving their certificate of attendance six weeks following the webcast.
- **Please direct all questions regarding MCLE to CLE@gibsondunn.com.**

Today's Panelists



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Brooker**



**David
Debold**



**Michael
Diamant**



**Patrick
Stokes**



**Chris
Sullivan**

Agenda

- 1. Chapter 8 of the U.S. Sentencing Guidelines Overview**
- 2. The Lifecycle of an Investigation and Corporate Resolution Vehicles**
- 3. Discussion of Sentencing Guidelines Calculation Scenarios**
- 4. Corporate Compliance**

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Chapter 8 of the U.S. Sentencing Guidelines Overview

The Origin of the Sentencing Guidelines

Key Events:

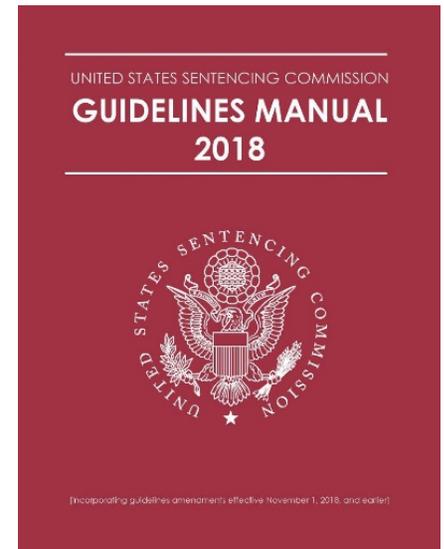
- Sentencing Reform Act of 1984.
 - The purposes for sentencing reform.
- Creation of a Sentencing Commission.
- The addition of Organizational Guidelines in 1991.
- Periodic amendments to the Guidelines Manual over time.



Chapter 8 U.S. Sentencing Guidelines

General Principles

1. The organization should remedy any harm caused by the offense.
2. If the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets.
3. “Carrot and Stick Approach” - The fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization.
 - Chapter 8 allows for substantial sentencing reductions for companies that have established effective compliance programs.
4. Probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct.



Chapter 8 U.S. Sentencing Guidelines

Application

1. Determine from Part B, Subpart 1 the sentencing requirements and options relating to restitution, remedial orders, community service, and notice to victims.
2. Determine from Part C the sentencing requirements and options relating to fines:
 - a. If the organization operated primarily for a criminal purpose, apply § 8C1.1.
 - b. Otherwise, apply § 8C2.1. For such counts:
 - 1) § 8C2.2 – Determine whether an abbreviated determination of the guideline fine range may be warranted.
 - 2) § 8C2.3 – Determine the offense level.
 - 3) § 8C2.4 – Determine the base fine.
 - 4) § 8C2.5 – Determine the culpability score.
 - 5) § 8C2.6 – Determine the minimum and maximum multipliers corresponding to the culpability score.
 - 6) § 8C2.7 – Determine the minimum and maximum of the guideline fine range.
 - 7) § 8C2.8 – Determine the amount of the fine within the applicable guideline range.
 - 8) § 8C2.9 – Determine whether an increase to the fine is required.

Chapter 8 U.S. Sentencing Guidelines

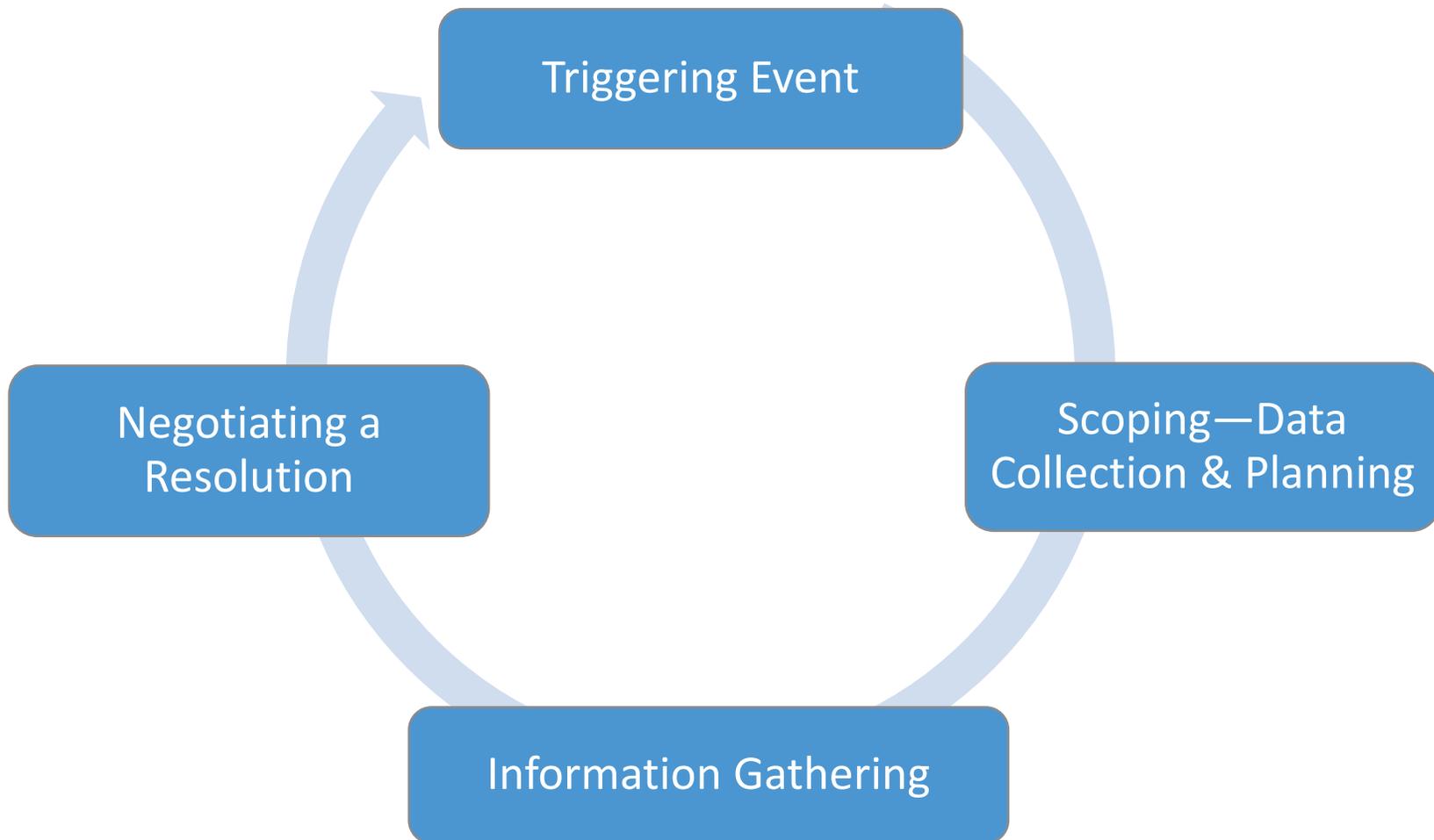
Elements of an Effective Compliance Program

- 
- Implementing written standards of conduct, policies, and procedures.
 - Designating a compliance officer and compliance committee.
 - Conducting effective training and education.
 - Developing effective lines of communication.
 - Conducting internal monitoring and auditing.
 - Enforcing standards through well-publicized disciplinary guidelines.
 - Responded promptly to problems and undertaking corrective action.

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The Lifecycle of an Investigation & Corporate Resolution Vehicles

Lifecycle of Criminal and Regulatory Investigations



What Drives Outcomes?

DOJ & SEC Guidance

- **DOJ: Filip Factors**

- The Justice Manual is intended to steer prosecutors' actions as they weigh potential investigation outcomes. Section 9-28.300 of the Justice Manual provides a list of 10 factors (the "Filip Factors") that should be applied in determining whether to charge a corporation. Factors to be weighed include:

- Nature and seriousness of the offense;
- Pervasiveness of wrongdoing;
- History of similar misconduct;
- Cooperation, including as to potential wrongdoing by individuals;
- Adequacy and effectiveness of the corporation's compliance program;
- Timely voluntary disclosure;
- Remedial actions taken;
- Collateral consequences of prosecution;
- Adequacy of alternative remedies; and
- Adequacy of prosecution of individuals.

- **SEC: Seaboard Factors**

- The 2001 "Seaboard Report" identified non-exclusive factors that the SEC will consider in evaluating corporate cooperation, which fall into the four broad measures of cooperation: (1) self-policing prior to the discovery of the misconduct; (2) prompt self-reporting; (3) remediation; and (4) cooperation with law enforcement.

Overview of DOJ & SEC Enforcement Resolution Vehicles

Criminal:

DOJ



- Declination
- Declination w/ Disgorgement
- Non-Prosecution Agreement
- Deferred Prosecution Agreement
- Guilty Plea
- Trial

Civil:

SEC



- Declination
- Civil Injunction
- Cease-and-Desist Orders
- Non-Prosecution Agreement
- Deferred Prosecution Agreement
- Trial

NPAs, DPAs, and Declinations

Use by SEC and DOJ

Agency	DPA	NPA	Declination + Disgorgement
	<ul style="list-style-type: none"> • Filed with court as public record • Accompanies criminal information • Includes statement of facts • Term-limited • Tolls SOLs • Financial penalties • Rarely deniable in collateral litigation • Waiver of the Speedy Trial Act 	<ul style="list-style-type: none"> • Not filed with court, but typically public • No charging documents • Includes statement of facts • Usually term-limited • Tolls SOLs • Financial penalties common • Rarely deniable in collateral litigation • Voluntary disclosure increasingly required • Less likely to include a monitorship than a DPA 	<ul style="list-style-type: none"> • Not filed with court • Public by design • No charging documents • Includes light factual statements • Disgorgement typical • Voluntary disclosure a prerequisite • Leaves door open to future charges
	<ul style="list-style-type: none"> • Not filed with court; typically public • No complaint • Includes statement of facts • Term-limited • Tolls SOLs • Financial penalties 	<ul style="list-style-type: none"> • Not filed with court; typically public • No complaint • May include statement of facts • Agreement to enter future tolling agreement • May include financial penalties 	<ul style="list-style-type: none"> • N/A

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Discussion of Sentencing Guidelines Calculation Scenarios

Overview of Relevant Factors for Guidelines Calculation

Focus on FCPA Cases

- Although the Guidelines require mathematical calculations, applying the Guidelines requires much more interpretation than a mere mechanical application.
- Relevant factors include:
 - Whether the bribery or accounting provisions of the FCPA are used for the underlying charge;
 - Profit amount;
 - The level of a public official;
 - The involvement of high-level personnel or substantial authority personnel;
 - The level and size of the organization or business unit involved in the misconduct; and
 - Placement within the Guidelines range.

These factors are nuanced and provide key opportunities for negotiation in reaching a resolution.

Definitions of Key Terms for Guidelines Calculation

- **“High-level personnel of the organization“**
 - Defined by the Guidelines as “individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization.”
 - Includes: directors; executive officers; individuals in charge of a major business or functional unit of the organization; and individuals with a substantial ownership interest.
- **"Substantial authority personnel"**
 - Defined by the Guidelines as “individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization.”
 - Includes: high-level personnel of the organization; individuals who exercise substantial supervisory authority (e.g., a sales manager); and any other individuals who, although not a part of an organization's management, nevertheless exercise substantial discretion when acting within the scope of their authority (e.g., an individual authorized to negotiate significant contracts).

Base Case Example #1

Violation of FCPA Anti-Bribery Provisions

Offense Level (USSG § 2C1.1)	Culpability Score (USSG § 8C2.5-6)
Base Offense Level = 12	Base Culpability Score = 5
+2 for more than one bribe	+5 for an organization with more than 5,000 employees and an individual within high-level personnel involved in the conduct and/or pervasive tolerance of the conduct by substantial authority personnel
+18 for profits / bribes of between \$3.5 and \$9.5 million	-2 for fully cooperating in the investigation and affirmatively accepting responsibility for the conduct
+ 4 for involvement of public official in a high-level decision-making or sensitive position	Adjusted Culpability Score = 8
Adjusted Offense Level = 36	Culpability Score Multiplier = 1.6 – 3.2
Base Fine = \$80 million (USSG § 8C2.4)	Guidelines Fine = \$128 – \$256 million

Offense Level

Impact of Profit / Bribe Amount

Offense Level (USSG § 2C1.1)	Culpability Score (USSG § 8C2.5-6)
Base Offense Level = 12	Base Culpability Score = 5
+2 for more than one bribe	+5 for an organization with more than 5,000 employees and an individual within high-level personnel involved in the conduct and / or pervasive tolerance of the conduct by substantial authority personnel
+14 for profits / bribes of between \$550,000 and \$1.5 million	-2 for fully cooperating in the investigation and affirmatively accepting responsibility for the conduct
+ 4 for involvement of public official in a high-level decision-making or sensitive position	Adjusted Culpability Score = 8
Adjusted Offense Level = 32	Culpability Score Multiplier = 1.6 – 3.2
Base Fine = \$30 million	Guidelines Fine = \$48 – \$96 million

Spotlight on SEC Disgorgement



- In addition to impacting the Sentencing Guidelines calculation, the amount of profit from the alleged misconduct will also determine the amount of **disgorgement** that can be ordered by the SEC.
 - Once a causal link is established between unlawful activity and the profit to be disgorged, the SEC may disgorge illicit profits that stem from violations of the federal securities laws.
- In *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), the Supreme Court held that the SEC’s disgorgement remedy is a penalty and is therefore subject to the five-year statute of limitations in 28 U.S.C. § 2462.
- In *Liu v. SEC*, 140 S. Ct. 1936 (2020), the Supreme Court upheld the SEC’s statutory authority to seek disgorgement but also cabined the remedy in a number of ways:
 - Narrowed to net profits (deducting “legitimate expenses”);
 - Should be imposed only “for the benefit” of victim-investors, not the general public; and
 - Limited the SEC’s ability to seek disgorgement on a joint-and-several basis against codefendants.

Culpability Score

Impact of Company / Business Unit Size

Offense Level (USSG § 2C1.1)	Culpability Score (USSG § 8C2.5-6)
Base Offense Level = 12	Base Culpability Score = 5
+2 for more than one bribe	+3 for a unit with more than 200 employees and an individual within high-level personnel involved in the conduct and/or pervasive tolerance of the conduct by substantial authority personnel
+18 for profits / bribes of between \$3.5 and \$9.5 million	-2 for fully cooperating in the investigation and affirmatively accepting responsibility for the conduct
+ 4 for involvement of public official in a high-level decision-making or sensitive position	Adjusted Culpability Score = 6
Adjusted Offense Level = 36	Culpability Score Multiplier = 1.2 – 2.4
Base Fine = \$80 million	Guidelines Fine = \$96 – \$192 million

Culpability Score

Impact of Voluntary Self-Disclosure and Cooperation

Offense Level (USSG § 2C1.1)	Culpability Score (USSG § 8C2.5-6)
Base Offense Level = 12	Base Culpability Score = 5
+2 for more than one bribe	+5 for an organization with more than 5,000 employees and an individual within high-level personnel involved in the conduct and/or pervasive tolerance of the conduct by substantial authority personnel
+18 for profits / bribes of between \$3.5 and \$9.5 million	-5 for reasonably prompt self-disclosure (prior to imminent threat of disclosure), fully cooperating in investigation and affirmatively accepting responsibility for the conduct
+ 4 for involvement of public official in a high-level decision-making or sensitive position	Adjusted Culpability Score = 5
Adjusted Offense Level = 36	Culpability Score Multiplier = 1.0 – 2.0
Base Fine = \$80 million	Guidelines Fine = \$80 – \$160 million

Culpability Score

Impact of Voluntary Self-Disclosure and Cooperation

Using the prior slide as an example, the below demonstrates the impact of the “extra credit” framework from the FCPA Corporate Enforcement Policy.

Base Guidelines Fine = \$80 – \$160 million

- If the Company voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, and is not a recidivist, the Policy provides for a **50% reduction** off of the low end of the Guidelines range.
 - **Adjusted Range = \$40 million – \$80 million**
- If the Company did not voluntarily self-disclose but later fully cooperated and timely and appropriately remediated, the Policy provides for a **25% reduction** off of the low end of the Guidelines range.
 - **Adjusted Range = \$60 million – \$120 million**
- If a Company received the 50% reduction but was placed in the middle of the range, the Company may still end up with a \$60 million fine.
 - This illustrates the importance of the placement within the Guidelines range.

Voluntary Self-Disclosure Analysis

- Importance of considering voluntary self-disclosure
 - **USSG § 8C2.5(g)** provides a reduction of the culpability score for voluntary disclosure. This penalty reduction is available when the company discloses: (1) prior to imminent threat of disclosure or gov't investigation; and (2) within reasonably prompt time after becoming aware of the offense, disclosed, fully cooperated, and clearly demonstrated recognition and affirmative acceptance of responsibility.
 - The **SEC's Seaboard Factors** also include the following consideration: "Did the company promptly, completely and effectively disclose the existence of the misconduct to the public, to regulators and to self-regulators?"

Factors to consider when assessing whether to disclose:

- Clarity of violation and strength of evidence
- Systemic conduct or isolated incident
- Seniority of culpable employees
- Risk of reputational harms
- Remedial measures undertaken
- Alternative sources of discovery

Base Case Example #2

Violation of FCPA Internal Controls

Offense Level (USSG § 2B1.1)	Culpability Score (USSG § 8C2.5-6)
Base Offense Level = 6	Base Culpability Score = 5
+18 for profits / bribes of between \$3.5 and \$9.5 million	+5 for an organization with more than 5,000 employees and an individual within high-level personnel involved in the conduct and/or pervasive tolerance of the conduct by substantial authority personnel
+2 for conduct outside the United States	-2 for fully cooperating in the investigation and affirmatively accepting responsibility for the conduct
Adjusted Offense Level = 26	Adjusted Culpability Score = 8
	Culpability Score Multiplier = 1.6 – 3.2
Base Fine = \$6.5 million	Guidelines Fine = \$10.4 – \$20.8 million

Other Factors Impacting Fine Amounts

• *Offsets*

- The DOJ’s policy against “piling on” encourages DOJ attorneys to “coordinate with and consider the amount of fines, penalties, and/or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct.”*
 - DOJ will often credit payments made to other regulators to reduce the actual penalty amount that the organization must pay.

• *Inability to Pay*

- USSG § 8C3.3 provides for the reduction of the fine amount below the Guidelines range if “the organization is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum fine required.”
 - In order to for this provision to apply, the payment of the fine would have to substantially jeopardize the continued viability of the organization.
- Example: In September 2020, asphalt company Sargeant Marine pled guilty to conspiracy to violate the anti-bribery provisions of the FCPA. DOJ agreed to reduce the fine amount from \$90 million to \$16.6 million because of the company’s inability-to-pay claims.

Asphalt Company Got \$70 Million Break on Penalty

Sargeant Marine’s criminal penalty could have been \$90 million, but was shorn to \$16.6 million under the Justice Department’s latest guidance on inability-to-pay claims

Key Takeaways

- Key factors to consider in assessing penalty calculations include the profit amount, the size of the company or business unit, the involvement of high-level personnel, and the level of the public official.
- The Guidelines set a baseline in corporate cases, but the many factors that are inputs into the Guidelines calculation are key points for negotiation.
- The Guidelines are also only one component of how the government assesses penalties.
- Voluntary self-disclosure, cooperation, and remediation can significantly reduce fine amounts.

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Corporate Compliance

Corporate Compliance

- Sentencing Guidelines

- The Guidelines provide for a three-point reduction to the culpability score “if the offense occurred even though the organization had in place at the time of the offense an effective compliance and ethics program.” USSG § 8C2.5(f).
- To qualify for the reduction, a company must: 1) exercise due diligence to prevent and detect criminal conduct; and 2) promote an organizational culture that encourages ethical conduct and a commitment to compliance law.
- The Guidelines further mandate that compliance and ethics programs shall be “reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct.”
- However, “[t]he failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.” USSG § 8C2.1.
- Additional guidelines provisions, however, set out exceptions that make it very difficult to qualify for these requirements. USSG § 8C2.5(f)(2) and (3).

Corporate Compliance

- **Additional Guidance**

- Guidance external to the Sentencing Guidelines provides additional details regarding how the government will consider corporate compliance mechanisms at sentencing.
- The Justice Department’s “Evaluation of Corporate Compliance Programs” Memorandum, updated in June 2020, provides a definitive framework for such assessments.
- The Memo sets out a rubric for evaluating compliance program effectiveness for the purposes of determining the form of prosecution/resolution, amount of monetary penalty, and continuing compliance obligations.

Corporate Compliance

- **Additional Guidance**

- The Memo mirrors the Justice Manual in asking three primary questions:

1) Is the corporation's compliance program well designed?

2) Is the program being applied earnestly and in good faith?

3) Does the corporation's program work in practice?



Corporate Compliance

- **Sentencing Credit for Effective Compliance Program**

- The Memo notes that “prosecutors may credit the quality and effectiveness of a risk-based compliance program that devotes appropriate attention and resources to high-risk transactions, even if it fails to prevent an infraction.”
- So too does that guidance suggest that proactive corporate efforts—like the continuous improvement, periodic testing, and review of compliance programs—may be rewarded through remediation credit or a lower applicable fine range under the Sentencing Guidelines.
- In practice, corporations receive credit for an effective compliance program in multiple ways. These include factoring into the penalty amount (often in a manner not identified as an explicit reduction), whether prosecutors require a monitorship as part of a resolution, and the tone and content of the ultimate charging decision.

Corporate Compliance

- **Compliance Programs and Prosecutorial Discretion**

- Given the infrequency with which formal sentencing credits are afforded companies, the most meaningful “enforcement” advantage of an effective compliance program may be on prosecutorial decision-making, including in whether to grant a declination or requiring a corporate monitor.
- The Foreign Corrupt Practices Act (“FCPA”) Corporate Enforcement Policy, for example, mandates that companies receive a declination when they voluntarily self-disclose misconduct, fully cooperate, and provide “timely and appropriate[]” remediation.
 - In turn, the FCPA policy defines timely and appropriate remediation to include: “Implementation of an effective compliance and ethics program” measured by, among other items, a culture of compliance, the dedication of resources, the authority and independence of the compliance function, and the effectiveness of a company’s risk assessment, auditing and reporting functions.

Corporate Compliance

- **Core Components for Effective Compliance**

- Domestic and international authorities previously mentioned and provided below consistently stress the same core components of a corporate compliance program.

- U.S. Sentencing Guidelines
- FCPA Resource Guide
- U.K. Bribery Act Guidance
- U.K. Financial Conduct Authority Financial Crime Guide
- ISO 37001 – Anti-Bribery Management Systems
- World Bank Group Integrity Compliance Guidelines
- DOJ DPAs and Plea Agreements
- OFAC Compliance Framework
- DOJ Antitrust Division Guidance



- Clearly Defined and Enforced Policies and Procedures
- Culture of Compliance and Management Commitment
- Periodic Risk Assessment
- Sufficient Resources
- Appropriate Training and Guidance
- Reporting and Investigations
- Periodic Review, Monitoring and Testing
- Remediation and Lessons Learned

Corporate Compliance

- Examples

- JP Morgan (2020): JPMorgan paid \$920 million in penalties to the CFTC, DOJ and SEC and entered into a DPA with DOJ related to a years-long spoofing scheme by its traders. DOJ recognized JPMorgan's compliance efforts, including its "systematic effort to reassess and enhance their market conduct compliance program and internal controls," leading to the determination that an independent compliance monitor was not necessary.
- TechnipFMC plc (2019): Technip paid \$296 million and entered into a DPA with DOJ in 2019 to resolve FCPA bribery allegations in Iraq and Brazil. The company received a 25 percent reduction off the applicable U.S. Sentencing Guidelines for the company's full cooperation and remediation, which included discipline against current and former employees, compliance training and other enhancements to compliance programs.



J.P.Morgan



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Closing Remarks & Upcoming White Collar Group Webcasts

Upcoming Gibson Dunn Webcasts

- **November 18** | SEC Enforcement Focus on COVID-19 Issues and Key Areas of Risk | 12:00 – 1:15 pm EST [REGISTER](#)
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- **December 10** | International Anti-Money Laundering and Sanctions Enforcement | 12:00 – 1:30 pm EST [REGISTER](#)

Publications and Recorded Webcasts

Recorded Webcasts (CLE credit available)

- [Managing Internal Audit](#)
- [Spoofing What it is, where it's going](#)
- [The False Claims Act: Updates for Health Care Providers](#)
- [In-house Guidance for Managing Non-U.S. Antitrust Investigations](#)
- [The False Claims Act: Updates for Drug & Device Manufacturers](#)
- [Trends in Government Investigations into Foreign Influence in the Private Sector: A discussion of FARA and related provisions](#)
- [The False Claims Act: Updates for the Government Contracting Sector](#)
- [The False Claims Act: Updates for the Financial Services Sector](#)
- [Negotiating Closure of Government Investigations: NPAs, DPAs, and Beyond](#)

Publications

- Gibson Dunn COVID-19 Resources: <https://www.gibsondunn.com/category/publications/>
- Gibson Dunn White Collar Defense and Investigations: <https://www.gibsondunn.com/practice/white-collar-defense-and-investigations/>

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