

# UPDATING THE UNIVERSITY-WIDE COMPLIANCE PROGRAM FOR NEW DOJ GUIDANCE

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AUDITCON

A HIGHER EDUCATION SUMMIT

  
ASSOCIATION OF COLLEGE & UNIVERSITY AUDITORS



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## TODAY'S AREAS OF FOCUS

- 1 Understand the new topics introduced in this year's guidance.
- 2 Learn how to apply (add) these new topics to your current framework.
- 3 Learn how others are applying (adding) these new subjects and how the DOJ views these within the context of the overall program effectiveness.





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## WHY A COMPLIANCE PROGRAM

Compliance Programs prevent and detect misconduct at an organization



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## University Boards and Stakeholders expect:

- Compliance with applicable laws and regulations
- Senior management promotes ethical culture
- Updates on effectiveness and key milestones
- A consistent approach to risk management that safeguards against key legal and regulatory risks
- An effective governance structure that ensures proper reporting and elevation of key issues
- Timely and objective resolution of all matters requiring internal investigation
- Effective management of relationships with external regulators





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## Every University has different challenges:

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### Internal

- Every Institution has similar, but different compliance objectives
- Every Institution has different compliance risks
- Every Institution has different risk, compliance and assurance structures

### External

- We have a lot of NEW Guidance from the DOJ and the IIA
- Compliance does not have a single governing body like the IIA





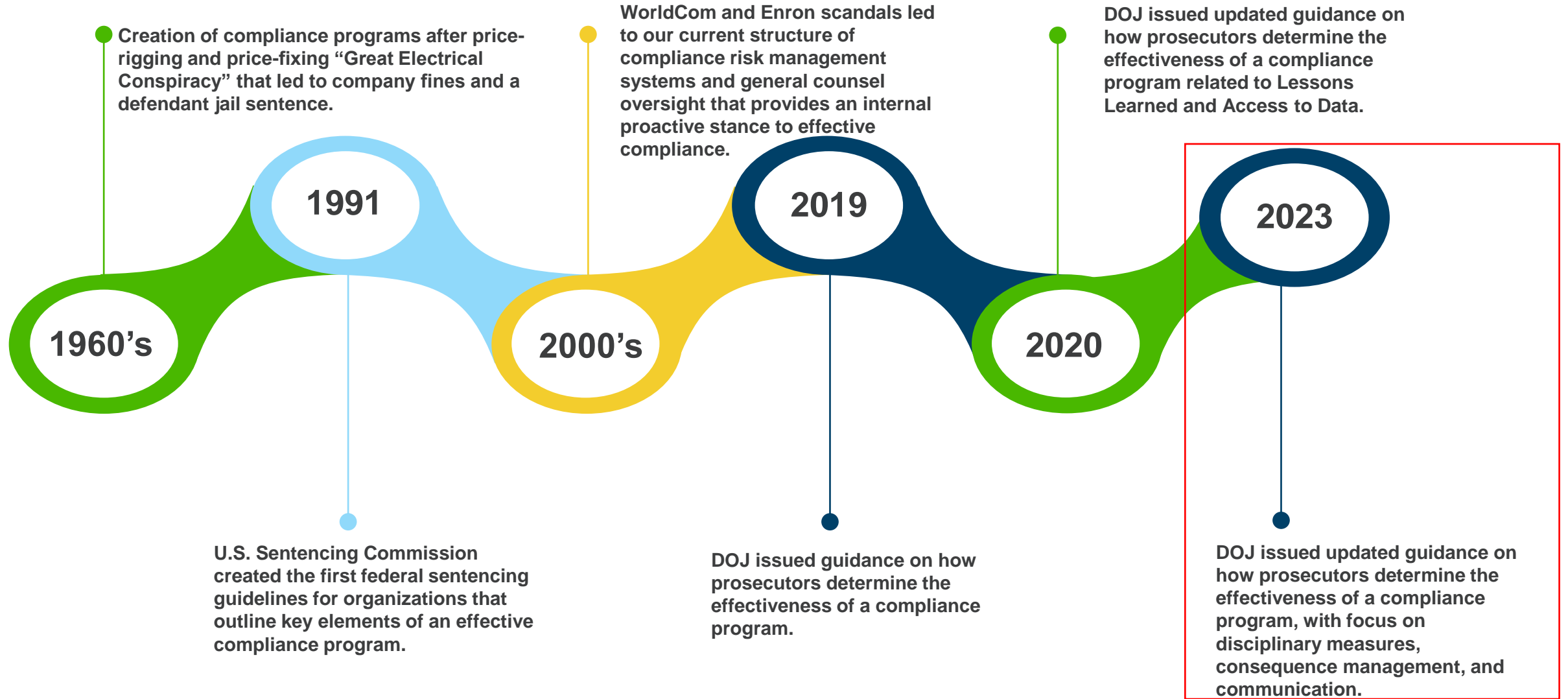
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### TIMELINE OF COMPLIANCE PROGRAMS





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## THE INTERACTION OF DOJ AND OIG :CRIMINAL VS CIVIL MATTER

### **DOJ- Department of Justice**

- Prosecutes federal law offenders and enforce federal criminal and civil laws, including antitrust, civil rights, environmental, and tax laws

### **OIG - Office of the Inspector General (Department of Health and Human Services, Department of Education, etc.)**

- Develop and publish guidance
- Provide proactive advice to applicable industry
- Perform investigations

### **Enforcement - The Tag Team**

- OIG receives complaint regarding behavior which may violate federal statute/regulation
- Coordinates with DOJ to provide information for prosecution
- Both organizations participate in Corporate Integrity Agreements, including fines

### **Corporation penalties vs. Individual penalties:**

- Individuals go to jail, corporations cannot. Corporations are not incentivized to protect employees.
- When convicted under a criminal law, a corporation will face fines, penalties and Corporate Integrity Agreement. **Individuals go to jail.**



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# U.S. DEPARTMENT OF JUSTICE

U.S. Department of Justice



## U.S. Department of Justice Criminal Division

### Evaluation of Corporate Compliance Programs

#### **Guidance Document: April 2019**

\*Created the “3 Questions” methodology or framework





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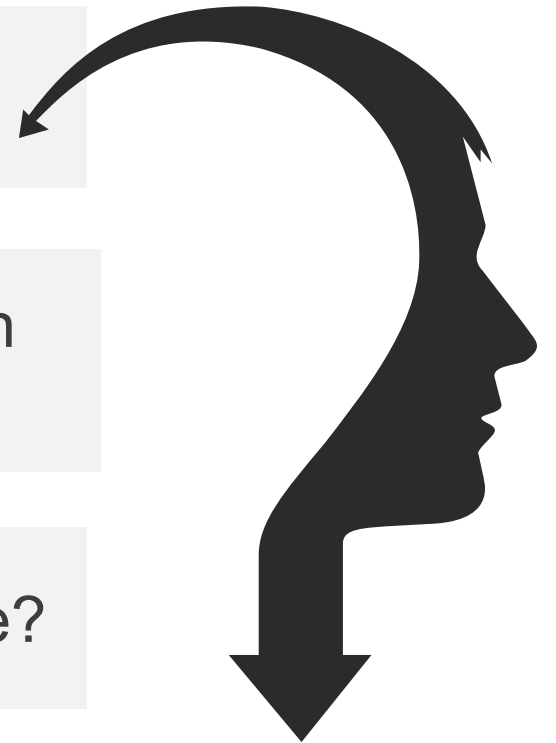


### THREE “FUNDAMENTAL QUESTIONS”:

1. “Is the corporation’s compliance program well designed?”

2. “Is the program being applied earnestly and in good faith?” In other words, is the program being implemented effectively?

3. “Does the corporation’s compliance program work” in practice?





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## U.S DEPARTMENT OF JUSTICE

**U.S. Department of Justice  
Criminal Division**

**Evaluation of Corporate Compliance Programs**

**(Updated June 2020)**

### Introduction

The “Principles of Federal Prosecution of Business Organizations” in the Justice Manual describe specific factors that prosecutors should consider in conducting an investigation of a corporation, determining whether to bring charges, and negotiating plea or other agreements. JM 9-28.300. These factors include “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” and the corporation’s remedial efforts “to implement an adequate and effective corporate compliance program or to improve an existing one.” JM 9-28.300 (citing JM 9-28.800 and JM 9-28.1000). Additionally, the United States Sentencing Guidelines advise that consideration be given to whether the corporation had in place at the time of the misconduct an effective

### **Updated Guidance: June 2020**

Additional Considerations:

1. Lessons Learned
2. Data Resources and Access



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Evaluation of Corporate Compliance Programs

(Updated March 2023)

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### Updated Guidance: March 2023

Additional Considerations:

1. Disciplinary Measures (i.e., clawback)
2. Consequence Management
3. Communication (i.e., bring your own device and communication apps)



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# QUESTION 1: “IS THE CORPORATION’S COMPLIANCE PROGRAM WELL DESIGNED?”

## A. Risk Assessment

- Risk Management Process
- Risk-Tailored Resource Allocation
- Updates and Revisions
- Lessons Learned

## B. Policies and Procedures

- Design
- Comprehensiveness
- Accessibility
- Responsibility for Operational Integration
- Gatekeepers

## C. Training and Communications

- Risk-Based Training
- Form/Content/Effectiveness of Training
- Communications about Misconduct
- Availability of Guidance

## D. Confidential Reporting Structure and Investigation Process

- Effectiveness of the Reporting Mechanism
- Properly Scoped Investigations by Qualified Personnel
- Investigation Response
- Resources and Tracking of Results

## E. Third Party Management

- Risk-Based and Integrated Processes
- Appropriate Controls
- Management of Relationships
- Real Actions and Consequences

## F. Mergers and Acquisitions (M&A)

- Due Diligence Process
- Integration in the M&A Process
- Process Connecting Due Diligence to Implementation



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## QUESTION 2: “IS THE PROGRAM BEING APPLIED EARNESTLY AND IN GOOD FAITH?” IN OTHER WORDS, “IS THE PROGRAM BEING IMPLEMENTED EFFECTIVELY?”

### A. Commitment by Senior and Middle Management

- Conduct at the Top
- Shared Commitment
- Oversight

### B. Autonomy and Resources

- Structure
- Seniority and Stature
- Experience and Qualifications
- Funding and Resources
- Data Resources and Access
- Autonomy
- Outsourced Compliance Functions

### C. Compensation Structures and Consequence Management

- Human Resources Process
- Disciplinary Measures
- Consistent Application
- Financial Incentive System
- Effectiveness



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## QUESTION 3: IS THE COMPLIANCE PROGRAM ADEQUATELY RESOURCED AND EMPOWERED TO FUNCTION EFFECTIVELY?

### A. Continuous Improvement, Periodic Testing, and Review

- Internal Audit
- Control Testing
- Evolving Updates
- Culture of Compliance

### B. Investigation of Misconduct

- Properly Scoped Investigation by Qualified Personnel
- Response to Investigations
- Independence and Empowerment
- Communication Channels
- Policy Environment
- Risk Management

### C. Analysis and Remediation of Any Underlying Misconduct

- Root Cause Analysis
- Prior Weaknesses
- Payment Systems
- Vendor Management
- Prior Indications
- Remediation
- Accountability



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QUESTION 2: “IS THE PROGRAM BEING APPLIED EARNESTLY AND IN GOOD FAITH?” IN OTHER WORDS, “IS THE PROGRAM BEING IMPLEMENTED EFFECTIVELY?”

### Consequence Management

- Have clear consequence management procedures (procedures to identify, investigate, discipline and remediate violations of law, regulation, or policy) in place
- Enforce procedures consistently across the organization
- Ensure that the procedures are commensurate with the violations
- Assess the extent to which the communications convey to employees that unethical conduct will not be tolerated and will bring swift consequences, regardless of the position or title of the employee who engages in the conduct
- Make several types of disciplinary actions available to management when it seeks to enforce compliance policies



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## UPDATED DOJ GUIDANCE (MARCH 2023)

### Evaluation of Corporate Compliance Programs - Consequence Management

- Publicize Disciplinary Actions
  - Include general facts about prior misconduct in training
  - Include examples of prior misconduct within Code of Conduct FAQs
  - Spotlight examples of prior misconduct in a compliance and/or faculty newsletter
  - Create videos depicting prior examples of misconduct and share via emails or intranet
  - In examples provided, include ways that situations could have been handled in a compliant manner





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QUESTION 2: “IS THE PROGRAM BEING APPLIED EARNESTLY AND IN GOOD FAITH?” IN OTHER WORDS, “IS THE PROGRAM BEING IMPLEMENTED EFFECTIVELY?”

### Compensation Structures

- Incentivize compliance by designing compensation systems that defer or escrow certain compensation tied to conduct consistent with values and policies
- Enforce contract provisions that permit recoupment of previously awarded compensation if the recipient of such compensation is found to have engaged in or to be otherwise responsible for corporate wrongdoing
- Maintain and enforce in accordance with company policy and applicable laws provisions for recoupment or reduction of compensation due to compliance violations or misconduct
- Deter risky behavior and foster a culture of compliance by implementing compensation structures that clearly and effectively impose financial penalties for misconduct



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## UPDATED DOJ GUIDANCE (MARCH 2023)

### Evaluation of Corporate Compliance Programs

- Compensation Structure
  - Review for executive / employee clawbacks
  - Example: [McDonald's CEO's misconduct in 2021](#)
    - McDonald's clawed back \$105 million upon the CEO's departure
    - Publicized disciplinary actions internally
- Who It Might Impact at a University
  - Chancellor
  - Research Professors
  - Athletic Directors / Head Coaches



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## QUESTION 3: IS THE COMPLIANCE PROGRAM ADEQUATELY RESOURCED AND EMPOWERED TO FUNCTION EFFECTIVELY?

Investigation of  
Misconduct

- What electronic communication channels do company employees use and does it vary by jurisdiction and business function?
- What procedures has the company implemented to manage and preserve electronically communicated information?
- What preservation or deletion settings are available to each employee under each channel?

REGULATORY ENFORCEMENT

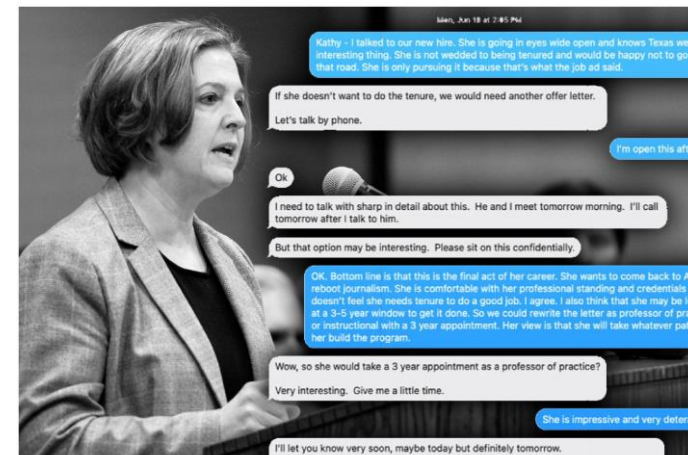
### BNP Paribas nearing settlements with SEC, CFTC over off-channel comms



By Jeff Dale | Fri, Jul 28, 2023 9:00 AM



French bank BNP Paribas disclosed it reached proposed settlements with the Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) regarding alleged use of off-channel communications for business by employees.





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## UPDATED DOJ GUIDANCE (MARCH 2023)

### Evaluation of Corporate Compliance Program

- Messaging Channels
  - Policy on acceptable media formats on which to discuss the organization's business
  - Language in the employment contract that employees must share any communications related to organization business when requested
  - Discipline for failure to comply with a request to obtain communications related to organization business



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## UPDATED DOJ GUIDANCE (MARCH 2023)

### New Pilot Program Regarding Compensation Incentives and Feedback

**Two Parts:** The Pilot Program becomes effective March 15, 2023 and will be in effect for three years.

First, every corporate resolution with the Criminal Division will include a requirement that the resolving company develop compliance-promoting criteria within its compensation and bonus system. These criteria, which will take into consideration the company's existing compensation program, may include:

- (1) no bonuses for employees who do not satisfy compliance objectives;
- (2) disciplinary measures for employees who violate law and those who supervised employees engaged in misconduct and knew of, or were willfully blind to, misconduct; and
- (3) incentives for employees who demonstrate full commitment to compliance.



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## UPDATED DOJ GUIDANCE (MARCH 2023)

### New Pilot Program Regarding Compensation Incentives and Feedback

#### Part Two:

- Resolving companies that seek to claw back compensation from corporate wrongdoers **will be eligible for fine reductions.**
  - Where a criminal resolution is warranted and a company fully cooperates, timely and appropriately remediates, and initiates the process to recover such compensation at the time of the resolution,
    - DOJ will accord a fine reduction **equal to the amount** of any compensation that is recouped within the resolution term.
    - Clawbacks are pursued in good faith but ultimately unsuccessful, the company is still eligible to receive a fine reduction of **up to 25%** of the amount of compensation that has been sought.



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## SUMMARY

### **Policies**

1. Clawback policy
2. Communication Channel Policy, including Third Party Messaging Systems
3. Disciplinary policy

### **Programs**

1. Consequence Management Program
2. Compensation Program



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## FINAL THOUGHTS

- Start a baseline for your organization; take a leadership position on aligned assurance at a minimum.
- Measure: Compliance, Audit, Ethics, Risk and Culture are not stagnant; Are they getting better, or are they getting worse?
- Innovate, experiment; FIND permission to try something new.







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# QUESTIONS?

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