

MEMORANDUM TO THE COMPLIANCE COUNSEL, UNITED STATES
DEPARTMENT OF JUSTICE

Jonathan J. Rusch[†]

Introductory Note

Since 1977, with the enactment of the Foreign Corrupt Practices Act, the United States Department of Justice has played a leading role with the Securities and Exchange Commission in applying the Act's anti-bribery, books and records, and internal controls provisions in enforcement proceedings against numerous companies and individuals worldwide. In November 2015, the Department of Justice took the unprecedented step of hiring a Compliance Counsel with experience in both federal prosecution and corporate compliance. Her role is to guide its prosecutors in decision-making in corporate prosecutions, including the existence and effectiveness of a company's compliance program, and in benchmarking corporate compliance. This Memorandum is composed as an open letter to the Compliance Counsel, focusing on how she and the Department of Justice should go about that critical benchmarking function.

* * *

Dear Compliance Counsel Chen,

Congratulations on your appointment as the Department of Justice's Compliance Counsel.¹ As you know, the Department of Justice (the Department) has earned a global

[†] Senior Vice President and Head of Anti-Bribery & Corruption Governance, Wells Fargo, Washington, D.C.; Adjunct Professor, Georgetown University Law Center; Lecturer in Law, University of Virginia Law School. Formerly Deputy Chief for Strategy and Policy, Fraud Section, Criminal Division, U.S. Department of Justice. The views in this paper—which stem from an October 2, 2015 presentation at the American Society of International Law Anti-Corruption Interest Group Workshop—are solely those of the Author, and do not necessarily represent those of Wells Fargo or the U.S. Department of Justice.

¹ On November 3, 2015, the Department retained Hui Chen, a former federal prosecutor and global

reputation for aggressively pursuing corporate misconduct through the Foreign Corrupt Practices Act (FCPA) and other major corporate investigations such as the London Interbank Offered Rate (LIBOR) and foreign exchange market (FX) investigations.² Its track record in FCPA cases includes successful criminal prosecutions of individuals and companies, record criminal penalties, and substantial civil sanctions by the Securities and Exchange Commission (SEC).³ Contrary to claims “that foreign bribery is committed by salespeople in the field, breaking the law despite strong compliance policies and robust supervision,”⁴ the Department’s prosecution record includes many examples of corruption schemes that senior corporate leadership authorized, and in some cases even directed, including bribery of foreign officials over extended periods.⁵

You are charged with two primary duties: (1) providing expert guidance to the Fraud Section prosecutors regarding the prosecution of business entities, including those entities’ current compliance programs; and (2) assisting prosecutors in establishing ap-

head of anti-bribery and corruption at Standard Chartered Bank, as compliance counsel in the Fraud Section of the Department’s Criminal Division. In addition to her service as a Department of Justice Trial Attorney and an Assistant United States Attorney, Chen also served as an Assistant General Counsel of Pfizer and a senior attorney at Microsoft. *See* Press Release, U.S. Dep’t of Justice, New Compliance Counsel Expert Retained by the DOJ Fraud Section (November 3, 2015), <https://www.justice.gov/criminal-fraud/file/790236/download>.

² *See LIBOR and FX*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/criminal-fraud/libor-and-fx> (last updated June 12, 2015).

³ *See, e.g.*, Press Release, U.S. Dep’t of Justice, VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than \$795 Million; United States Seeks \$850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (February 18, 2016), <https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million>; Press Release, U.S. Dep’t of Justice, Alstom Sentenced to Pay \$772 Million Criminal Fine to Resolve Foreign Bribery Charges (November 13, 2015), <https://www.justice.gov/opa/pr/alstom-sentenced-pay-772-million-criminal-fine-resolve-foreign-bribery-charges>; Press Release, U.S. Dep’t of Justice, Hewlett Packard Russia Agrees to Plead Guilty to Foreign Bribery (April 9, 2014), <http://www.justice.gov/opa/pr/hewlett-packard-russia-agrees-plead-guilty-foreign-bribery>.

⁴ Joel Schectman, *Compliance Counsel to Help DOJ Decide Whom to Prosecute*, WALL ST. J.: RISK & COMPLIANCE J., (July 30, 2015), <http://blogs.wsj.com/riskandcompliance/2015/07/30/compliance-counsel-to-help-doj-decide-whom-to-prosecute/>.

⁵ *See, e.g.*, Press Release, U.S. Dep’t of Justice, Louis Berger International Resolves Foreign Bribery Charges (July 17, 2015), <http://www.justice.gov/opa/pr/louis-berger-international-resolves-foreign-bribery-charges>; Press Release, U.S. Dep’t of Justice, IAP Worldwide Services Inc. Resolves Foreign Corrupt Practices Act Investigation (June 16, 2015), <http://www.justice.gov/opa/pr/iap-worldwide-services-inc-resolves-foreign-corrupt-practices-act-investigation>; Press Release, U.S. Dep’t of Justice, Managing Director of US Broker-Dealer Sentenced for International Bribery Scheme (Mar. 27, 2015), <https://www.justice.gov/opa/pr/ceo-and-managing-director-us-broker-dealer-sentenced-international-bribery-scheme>.

propriate benchmarks for corporate compliance.⁶ Both of these functions are important for effective anti-corruption enforcement. As an *ex post* function, the former is of substantial interest to individuals and companies under criminal investigation. As an *ex ante* function, the latter should be of even greater interest to a vast spectrum of companies, here and abroad. As your Section Chief indicated, you are expected to be “benchmarking with various companies in a variety of different industries to make sure we have realistic expectations . . . and tough-but-fair ones in various industries.”⁷

This Memorandum will not offer guidance to the Department on how to exercise prosecutorial discretion in FCPA investigations—not least because the Yates Memorandum⁸ has made clear how substantially the Department has changed its approach to conducting corporate investigations.⁹ Rather, it will provide an outline of how you and the Department could perform the *ex ante* function of benchmarking and guidance. If some of the steps outlined here seem obvious, please consider that elaborating the obvious, along with the subtle, would be beneficial for both the Department and companies in setting clear expectations for corporate compliance programs.

I. Define What the Department Means by “Benchmarking”

⁶ U.S. Dep’t of Justice, *supra* note 1 (explaining that the two primary duties of the Department’s Compliance Counsel are (1) “provid[ing] 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” and (2) “help[ing] prosecutors develop appropriate benchmarks for evaluating corporate compliance and remediation measures and communicating with stakeholders in setting those benchmarks.”); *see also* Leslie R. Caldwell, Assistant Att’y Gen., U.S. Dep’t of Justice, Remarks at the SIFMA Compliance and Legal Society New York Regional Seminar (Nov. 2, 2015), <http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-sifma-compliance-and-legal-society>.

⁷ Schectman, *supra* note 4.

⁸ *See* Memorandum from Sally Quillian Yates to the Assistant Attorney General, Antitrust Division *et al.* on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), <http://www.justice.gov/dag/file/769036/download>.

⁹ *See* Sally Quillian Yates, Deputy Att’y Gen., Dep’t of Justice, Remarks at New York University Law School (Sept. 10, 2015) (stating new requirements that, *inter alia*, (1) “if a company wants any credit for cooperation, any credit at all, it must identify all individuals involved in the wrongdoing, regardless of their position, status or seniority in the company and provide all relevant facts about their misconduct”; and (2) Department attorneys “are to focus on individuals from the start of an investigation, regardless of whether the investigation begins civilly or criminally” and “once a case is underway, the inquiry into individual misconduct can and should proceed in tandem with the broader corporate investigation”), <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>.

Although the term “benchmarking” is commonly used in corporate compliance discussions,¹⁰ it can mean several different types of comparisons, and the choice of benchmarking type can have significantly different effects on the expectations that it creates in the mind of the organization doing the benchmarking.

Department policy states that one of the fundamental questions a prosecutor should ask about a corporation's compliance program is whether it is “well designed.”¹¹ To make that determination, the policy refers prosecutors to five factors:

[T]he comprehensiveness of the compliance program; the extent and pervasiveness of the criminal misconduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program, and revisions to corporate compliance programs in light of lessons learned.¹²

These factors clearly are intended as *ex post* factors to be applied in deciding whether a company's compliance program is so deficient that criminal prosecution may be appropriate. Compliance professionals also need the Department to issue clearly articulated *ex ante* guidance and standards on which companies can rely as examples of responsible corporate conduct. As a 2015 KPMG global survey of corporate risk leaders found, there has been “a sharp increase in the proportion of respondents who say they are highly challenged by the issue of [Anti-Bribery and Corruption]” compared with a survey four years earlier.¹³

Here are some of the principal categories of business benchmarking that the Department should consider:

External Benchmarking. This involves analyzing “best in class outside organisations, providing the opportunity to learn from those at the leading edge.”¹⁴ This is the

¹⁰ See, e.g., KAISER ASSOCIATES, BEATING THE COMPETITION: A PRACTICAL GUIDE TO BENCHMARKING (1988).

¹¹ U.S. DEP'T OF JUSTICE, U.S. ATT'Y'S MANUAL § 9-28.800 (1997 ed., rev. Nov. 2015), <http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>.

¹² *Id.*

¹³ See JIMMY HELM ET AL., KPMG, ANTI-BRIBERY AND CORRUPTION: RISING TO THE CHALLENGE IN THE AGE OF GLOBALIZATION 1, 3 (2015) [hereinafter KPMG Survey], <https://www.kpmg.com/NL/nl/IssuesAndInsights/ArticlesPublications/Documents/PDF/Forensic/Anti-Bribery-and-Corruption.pdf>.

¹⁴ *Types of Benchmarking*, BRITISH QUALITY FOUNDATION, <http://dev.bqf.org.uk/sustainable->

type that probably comes most readily to mind, and seems the most intuitively appealing—“Why not learn from the best?,” so to speak. But three caveats are in order. First, this type of benchmarking can involve implicit decisions about what makes certain organizations “best in class” for certain corporate compliance functions. Second, the Department’s own experiences with corporate investigations show that companies with a general “best in class” reputation (in terms of size or profitability) can still have significant deficiencies in their compliance programs. Third, solutions that work effectively for very large companies may not be practicable for smaller companies that cannot afford the necessary resources or technology to implement them. What is “best in class,” then, may not be intuitively obvious.

Internal Benchmarking. This “involves benchmarking businesses or operations from within the same organisation (e.g. business units in different countries).”¹⁵ On first reading, this type of benchmarking may not seem worthwhile to pursue. If a compliance program is found deficient in one business unit within a company, examining how that program works in other business units of that company might seem pointless. Intra-corporate benchmarking, however, could be useful to the Department. If, in examining a particular company’s compliance program, the Department finds significant variations between units or product lines, those variations could be instructive in identifying flaws the company should fix or enhancements the company should adopt, and in determining whether ongoing monitoring is necessary. The Department may also find that, within the same company, one type of compliance program has “best in class” features that could be transplanted into other compliance programs—say, anti-money laundering or Bank Secrecy Act program features that could work in the anti-corruption context.

Performance Benchmarking. This “looks at performance characteristics in relation to key products and services in the same sector.”¹⁶ Although the Department does not set production performance standards—for example, how many units per hour should be produced—it could use performance benchmarking to identify features of compliance programs that yield quantitatively measurable results, such as above-average detection of instances of potential misconduct or numbers of corruption-related Suspicious Activity Reports (SARs).

Strategic Benchmarking. This “involves examining long-term strategies, for example regarding core competencies, new product and service development or improving

excellence/benchmarking-types (last visited March 2, 2016).

¹⁵ *Id.*

¹⁶ British Quality Foundation, *supra* note 14.

capabilities for dealing with change.”¹⁷ Standard components of corporate compliance programs, such as risk assessment processes and internal controls, may come to mind first here. But the Department’s methodology could also include strategic approaches recommendable to companies developing or improving compliance programs. This concept is already reflected, to a limited degree, in the Department’s Principles for Prosecution of Business Organizations, which states that prosecutors should determine “whether the corporation’s employees are adequately informed about the compliance program and are convinced of the corporation’s commitment to it.”¹⁸

II. Decide How The Department Will Benchmark with Companies

If you are to benchmark with various companies in different industries in order to set “realistic” and “tough-but-fair” expectations,¹⁹ the Department might want to consider actual in-person meetings with companies to elicit information. In-person meetings are likely to yield far more information than just open-source research into compliance programs. And detailed information about compliance programs is unlikely to be available in open-source materials. That may be because companies see competitive advantages in keeping their competitors guessing about what makes their compliance programs successful, or simply are cautious about disclosing potentially sensitive information.

If the Department wants in-person meetings with companies that move beyond superficial pleasantries, it should inform companies of the ground rules it sets for such meetings. Companies need solid assurances that if they are to be candid and specific about their programs, the Department will not publicly share that specific data.²⁰ If you need to tell companies that their statements are not “off the record”—that is, that there is no immunity for any statements that they make during these benchmarking sessions—you need to be clear about that, too. Such clear ground rules may deter some companies from participating, but encourage many other companies to benchmark.

One approach that may appeal to some companies is to offer benchmarking discussions in group meetings. Of course, if asked to meet with the Department when their competitors are present, companies in the same industry may become concerned about disclosure of confidential or sensitive information and therefore provide only generic

¹⁷ *Id.*

¹⁸ U.S. Dep’t of Justice, *supra* note 11.

¹⁹ Schectman, *supra* note 4.

²⁰ Such assurances, of course, may be more challenging to provide if companies provide written information to the Department in good faith and then find that other entities seek to obtain copies of that information under the Freedom of Information Act.

statements. On the other hand, some companies may find comfort in knowing that they are receiving the same information from the Department as their competitors. The Department should therefore consider holding exploratory discussions with representatives of industry associations, and see whether individual companies would prefer individual or group benchmarking sessions.

If the Department decides to consider group benchmarking, you should also consider opening some of those meetings to organizations other than the Department and industry representatives. Unlike the traditional notice-and-comment process in federal agencies—where advance notice and opportunity for public comment on proposed rules are routine²¹—the Department does not make it a practice to provide the public with an opportunity for advance comment on its key enforcement policy statements and compliance guidance.²² In this case, however, an additional infusion of transparency into your process could enhance the Department’s private sector credibility.

III. Set Priorities for Your Benchmarking

In its process, the Department has to set limits on how many industries, and how many companies within those industries, it can benchmark. With tens of thousands of companies listed on major exchanges throughout the world,²³ it realistically cannot obtain a representative sample across all leading industries. Nor should it try to do so. As a starting point, you might consider drawing on external sources, such as the OECD Foreign Bribery Report²⁴ and related records of corporate prosecutions, to select an initial list of industries. The Department could then decide where to concentrate, based in part on its experience with industries that face the greatest bribery and corruption risks—for example, those industries encountering regulatory barriers to entry created by foreign agencies with vast and unconstrained discretion.

Whichever industries you select, if the Department expects you to provide more

²¹ See, e.g., OFFICE OF THE FED. REGISTER, A GUIDE TO THE RULEMAKING PROCESS, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited March 28, 2016).

²² See, e.g., U.S. DEP’T OF JUSTICE, U.S. ATT’Y’S MANUAL § 1-1.100 (1997 ed., rev. May 2009), <https://www.justice.gov/usam/united-states-attorneys-manual>.

²³ See *Monthly Reports – Latest Statistics (January 2016 data)*, World Federation of Exchanges, <http://www.world-exchanges.org/home/index.php/statistics/monthly-reports> (last visited March 28, 2016).

²⁴ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD FOREIGN BRIBERY REPORT (2014), <http://www.oecd-ilibrary.org/docserver/download/2814011e.pdf?expires=1458940182&id=id&accname=guest&checksum=0B60F084099B54ABA23EAE8512B65786>.

specific guidance on what level of compliance program is appropriate for a business's risk level, you also need to set realistic expectations on how specific your guidance can be, absent a vast increase in your staffing. As the Department's and the SEC's *FCPA Resource Guide* properly notes, "each compliance program should be tailored to an organization's specific needs, risks, and challenges":²⁵

Individual companies may have different compliance needs depending on their size and the particular risks associated with their businesses, among other factors. When it comes to compliance, there is no one-size-fits-all program. . . . [S]mall- and medium-size enterprises likely will have different compliance programs from large multi-national corporations, a fact DOJ and SEC take into account when evaluating companies' compliance programs.²⁶

For that reason, your best approach may be to urge the Department to take key concepts of corporate compliance that it has previously issued—such as the *FCPA Resource Guide*'s often-cited "Hallmarks of Effective Compliance Programs"²⁷—and explore those to see what additional guidance may be most useful to businesses. Here are some of those concepts:

A. Commitment from Senior Management and a Clearly Articulated Policy Against Corruption²⁸

The *FCPA Resource Guide* and public remarks by Department officials stress the importance of corporate commitment to a "culture of compliance."²⁹ These statements typically fall into one of three categories.

1. *Statements About Organizational Process.* These are generic admonitions stating that senior management must make a commitment to a "culture of compliance"

²⁵ CRIMINAL DIV., U.S. DEP'T OF JUSTICE & ENF'T DIV., SEC. AND EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 57 (2012) [hereinafter *FCPA RESOURCE GUIDE*], <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>.

²⁶ *Id.*

²⁷ *Id.* at 57–62.

²⁸ *Id.* at 57.

²⁹ *See, e.g., id.*; Marshall L. Miller, Principal Deputy Att'y Gen., Remarks at the Advanced Compliance and Ethics Workshop (October 7, 2014), <http://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller-0>; Stuart F. Delery, Assistant Att'y Gen., Keynote Address at CBI Pharmaceutical Compliance Congress (January 29, 2014), <http://www.justice.gov/iso/opa/civil/speeches/2014/civ-speech-140129.html>; Brent Snyder, Deputy Assistant Att'y Gen., Remarks at the International Chamber of Commerce/ United States Council of International Business Joint Antitrust Compliance Workshop: Compliance is a Culture, Not Just a Policy (September 9, 2014), <http://www.justice.gov/atr/file/517796/download>.

and see that their commitment is reinforced and implemented at all levels of their business with process steps such as the following: “clearly articulate company standards, communicate them in unambiguous terms, adhere to them scrupulously, and disseminate them throughout the organization.”³⁰

2. *Statements About the Benefits of a Culture of Compliance.* These are comments of a predictive and aspirational nature, such as: “A strong ethical culture directly supports a strong ethical compliance program. By adhering to ethical standards, senior managers will inspire middle managers to reinforce those standards. Compliant middle managers, in turn, will encourage employees to strive to attain those standards throughout the organizational structure.”³¹

3. *Statements About the Causes of Process Failure.* These are more admonitory statements, intended to distinguish well-designed and executed compliance programs from programs where corporate behavior fails to measure up. For example, according to the *FCPA Resource Guide*, failure of effective implementation “may be the result of aggressive sales staff preventing compliance personnel from doing their jobs effectively and of senior management, more concerned with securing a valuable business opportunity than enforcing a culture of compliance, siding with the sales team.”³²

However, each of these categories lacks a *definition* of “culture of compliance.” In this regard, the Criminal Division is not alone. Other Department components and agencies have talked around the concept, without coming any closer to the heart of the idea.³³ Perhaps these representatives have in mind a functional definition of “culture of compliance;” that is, if an organization adopts and implements a detailed compliance program, and vigorously and consistently enforces that program, that constitutes a “culture of compliance.” The Department, however, should aspire to more than that, if it means those words to be more than a casual buzz phrase.

Your challenge, then, is to decide how the Department could meaningfully define “culture of compliance.” One starting point is a classic definition of “culture”: “that complex whole which includes knowledge, belief, art, morals, law, custom, and any other ca-

³⁰ FCPA RESOURCE GUIDE, *supra* note 25, at 57.

³¹ *Id.*

³² *Id.*

³³ See Snyder, *supra* note 29; U.S. DEP’T OF THE TREASURY, FINANCIAL CRIMES ENF’T NETWORK, NO. FIN-2014-A007, ADVISORY TO U.S. FINANCIAL INSTITUTIONS ON PROMOTING A CULTURE OF COMPLIANCE (August 11, 2014), http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-A007.pdf.

pabilities and habits acquired by man as a member of society.”³⁴ Each of the elements of this definition stacks up nicely in relation to the basic requirements of corporate compliance. Knowledge of relevant laws and corporate policies are essential for effective compliance programs. But so is the belief that such laws and policies must be followed not only because of the penalties for noncompliance, but also because the company’s values and principles align with that law and policy, and are grounded in basic moral principles (such as, “We don’t need to lie to customers or the public, or bribe people, to do business.”). And company values, if thoroughly communicated and reinforced by senior executives and middle managers in intra-company communications, can become custom over time, and become so much a part of everyday behavior inside the company that law-abiding actions become habitual. As one financial services company puts it, culture is

understanding our vision and values so well that you instinctively know what you need to do when you come to work each day.

Culture is the attitude we bring to work every day—the pattern of thinking and acting with the customer in mind. It’s the habit of doing the right things, and doing things right. It’s a thousand behaviors inherited from team members who came before us, behaviors that we model today and then pass on as our legacy for team members who come after us. It’s behaviors and attitudes that are core to who we are³⁵

If this approach rings true with you, consider also that the Department will need to proceed carefully in defining “culture of compliance.” Enforcement officials and compliance experts often refer to “building a culture of compliance.”³⁶ With respect, no organization can “build” an internal and sustainable culture like assembling a set of Lego[®] blocks. Like a garden, an organizational culture requires cultivation—preparation of the ground, seeding, fertilization, regular supplying of nutrition, and constant scrutiny to weed out unwanted hosts and to control invasive species.³⁷ The best approach for the Department, then, would be to see what it can learn from benchmarking from various companies—seeing how they define their key organizational values and translate those into

³⁴ 1 EDWARD B. TYLOR, *PRIMITIVE CULTURE: RESEARCHES INTO THE DEVELOPMENT OF MYTHOLOGY, PHILOSOPHY, RELIGION, ART, AND CUSTOM* (6th ed. 1871).

³⁵ *Our Culture*, WELLS FARGO, https://www.wellsfargo.com/invest_relations/vision_values/5 (last visited March 25, 2016).

³⁶ *See, e.g., Snyder, supra note 29, at 5; CHARLES H. LEGRAND, BUILDING A CULTURE OF COMPLIANCE* (2005), <http://www.qualitymag.com/ext/resources/QUAL/Home/Files/PDFs/Building%20a%20Culture%20of%20Compliance.PDF>.

³⁷ *See generally* U.S. DEP’T OF AGRIC., NAT’L INVASIVE SPECIES INFO. CENTER, <http://www.invasivespeciesinfo.gov/index.shtml> (last modified March 16, 2016).

elements of their compliance programs—and then identify examples of how companies, regardless of size, can articulate and implement their own “cultures of compliance.”

B. Code of Conduct and Compliance Policies and Procedures³⁸

The next hallmark in the *FCPA Resource Guide* that warrants discussion stresses the importance of a corporate code of conduct and compliance policies and procedures.³⁹ The *FCPA Resource Guide* states: “As DOJ has repeatedly noted in its charging documents, the most effective codes are clear, concise, and accessible to all employees and to those conducting business on the company’s behalf.”⁴⁰ Clarity, of course, is always important, but concision may not be achievable in every case. Depending, among other things, on a company’s size, geographic dispersion, and complexity of its operations, a company may need to be relatively more prescriptive and terse in stating its requirements for law-abiding conduct. Further guidance on how to strike a suitable balance between clarity and concision—again, drawn in part from your benchmarking sessions—would therefore be useful.

The *FCPA Resource Guide*’s paragraph on compliance policies and procedures is more instructive because it concisely identifies key components of such policies and key risks that such policies should address. Because the *FCPA Resource Guide* notes that “[t]hese types of policies and procedures will depend on the size and nature of the business and the risks associated with the business,”⁴¹ your benchmarking efforts should seek to identify factors that would justify differences in the length and detail of such policies and procedures.

C. Oversight, Autonomy, and Resources⁴²

The next *FCPA Resource Guide* hallmark states the need for one or more senior executives, with appropriate autonomy and resources, to oversee a corporate compliance program.⁴³ Because what constitutes “appropriate autonomy and resources” may vary widely for smaller and larger companies, the language in this section is too general and laden with contingency—for example, a single paragraph in this section indicates three times that it will “depend” on circumstances.⁴⁴ Benchmarking on this hallmark would be

³⁸ FCPA RESOURCE GUIDE, *supra* note 25, at 57.

³⁹ *Id.* at 57–58

⁴⁰ *Id.* at 57.

⁴¹ *Id.* at 58.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

more useful if it concentrates on identifying examples of suitable practices to ensure sufficient oversight, autonomy, and resources in companies of different sizes. For example, while a number of large companies have now separated their risk and compliance functions from their legal departments, smaller companies may need to decide whether and how they can leverage their legal departments to be effective overseers of risk and compliance.

In conducting its benchmarking on this hallmark, the Department should assume that many companies may be willing to discuss who is overseeing and implementing compliance programs, but skittish about sharing data on how many dollars they put into their compliance resources. If you can look into the latter topic, you may be able to identify percentage data that could be useful for companies of various sizes. For example, “We found that for companies with annual revenues of less than \$50 million, those companies that appeared to have effective compliance programs typically devoted between A and B percent of their annual budgets, while for companies with annual revenues of \$500 million or more, those companies that appeared to have effective compliance programs typically devoted between C and D percent of their annual budgets.” Guidance that suggests a range of acceptable resource commitments, with appropriate caveats, could be particularly meaningful.

D. Risk Assessment⁴⁵

The next hallmark, on assessment of risk, may be both the most valuable and the most frustrating guidance in the entire *FCPA Resource Guide*. This section contains a number of helpful comments that emphasize the need for a risk-based approach to risk assessment: underscoring the importance of avoiding “too much focus on low-risk markets and transactions to the detriment of high-risk areas”; warning that “performing identical due diligence on all third-party agents, irrespective of risk factors, is often counterproductive, diverting attention and resources away from those third parties that pose the most significant risks”; and noting that “[w]hen assessing a company’s compliance program, DOJ and SEC take into account whether and to what degree a company analyzes and addresses the particular risks it faces.”⁴⁶

What makes this section frustrating is the fact that it offers no guidance on how to construct and conduct the risk assessment process, which it emphasizes “is fundamental

⁴⁵ *Id.* at 58–59.

⁴⁶ *Id.* at 59.

to developing a strong compliance program.”⁴⁷ This is a noteworthy deficiency, as the 2015 KPMG Survey reported that “executives admit that an [Anti-Bribery and Corruption] risk assessment is one of their companies’ top challenges.”⁴⁸

On this issue, the Department could benchmark with various companies, and consult outside experts on risk assessment, to better understand how companies are creating risk assessment processes and methodologies.

That benchmarking should also address how companies should decide what types of data and analysis are appropriate in determining what constitutes a high-, moderate-, or low-risk market for their companies. Many companies appear to rely exclusively on Transparency International’s Corruption Perceptions Index (CPI),⁴⁹ perhaps the longest-running measure of corruption risk country-by-country. While the CPI methodology is sound and well-defined for its stated purpose of presenting perceptions of corruption based on expert opinion,⁵⁰ the Department should consider offering guidance on the appropriateness of using the CPI as the sole basis to identify high-risk markets, given the *FCPA Resource Guide*’s emphasis on a company’s addressing “the particular risks *it* faces.”⁵¹ Other types of bribery and corruption-related risk data may deserve serious consideration, as companies seek to refine their risk assessment processes to identify their particular risks with greater clarity.⁵²

E. Training and Continuing Advice⁵³

This hallmark discusses the importance of training and certification “for all directors, officers, relevant employees, and, where appropriate, agents and business partners.”⁵⁴ It notes the approach of “many larger companies” in implementing a “mix of

⁴⁷ *Id.* at 58. It should be noted that individual FCPA corporate resolutions routinely include detailed provisions on the elements of a required corporate compliance program—sometimes known to FCPA practitioners as “Attachment C”—that include some limited language on the basic elements of a risk assessment process.

⁴⁸ KPMG Survey, *supra* note 13, at 3.

⁴⁹ See *Corruption Perceptions Index 2015*, TRANSPARENCY INTERNATIONAL, <http://www.transparency.org/cpi2015> (last visited March 25, 2016).

⁵⁰ See, e.g., *Corruption Perceptions Index 2014: In Detail*, TRANSPARENCY INTERNATIONAL, http://www.transparency.org/cpi2014/in_detail#myAnchor2 (last visited March 25, 2016).

⁵¹ FCPA RESOURCE GUIDE, *supra* note 25, at 59 (emphasis added).

⁵² See, e.g., RICHARD ROSE & CARYN PEIFFER, *PAYING BRIBES FOR PUBLIC SERVICES* (2015); KARLYN D. STANLEY, ELVIRA N. LOREDO, NICHOLAS BURGER, JEREMY N. V. MILES, & CLINTON W. SALOGA, *BUSINESS BRIBERY RISK ASSESSMENT* (2014), http://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR839/RAND_RR839.pdf.

⁵³ FCPA RESOURCE GUIDE, *supra* note 25, at 59.

⁵⁴ *Id.*

web-based and in-person training conducted at varying intervals,” and offers broad comments on the content of such training.⁵⁵ What this does not clearly address is the extent to which companies should be adopting a risk-based approach in deciding what quantity, depth, and formats of training should be provided to various officers and employees. U.S.-based finance and human resources employees, for example, likely do not need the same depth of third-party risk training that managers and executives operating in foreign markets need. Nor do executives in low-risk business lines need the same depth and frequency of training as executives in high-risk business lines. Your benchmarking efforts should therefore explore how the Department can provide more specific guidance on this point.

F. Incentives and Disciplinary Measures⁵⁶

This hallmark heavily emphasizes companies’ effective enforcement of their compliance program. It notes that “DOJ and SEC will . . . consider whether, when enforcing a compliance program, a company has appropriate and clear disciplinary procedures, whether those procedures are applied reliably and promptly, and whether they are commensurate with the violation.”⁵⁷ Here, your benchmarking activities could focus on identifying examples of what the Department considers “appropriate and clear disciplinary procedures,” “reliabl[e]” and “promp[t]” application of such procedures, disciplinary measures that would be “commensurate with the violation,” and fair and consistent application of disciplining and incentivizing across the organization.⁵⁸ The easy case, from an enforcement perspective, would be a situation in which a company fires or otherwise sanctions lower-level employees for wrongdoing, while leaving untouched high-level executives who authorized a course of wrongdoing. Responsible senior management, however, would want no part of such a situation, and therefore would welcome some more specific examples of best practices for disciplining misconduct and incentivizing exemplary conduct.

G. Third-Party Due Diligence and Payments⁵⁹

This hallmark properly notes the frequency with which third parties are used as conduits, cutouts, or “bagmen” to conceal the transmission of bribes to foreign officials,

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 60.

and specifically refers to the need for “[r]isk-based due diligence” with third parties.⁶⁰ Even though this section contains an extended discussion of guiding principles for conducting risk-based due diligence,⁶¹ you should consider conducting extensive benchmarking on this topic, including identifying specific best practices that address those principles. The 2015 KPMG Survey reported that, according to its respondents, “management of third parties poses the greatest challenge in executing [Anti-Bribery and Corruption] programs,”⁶² and that “more than one[-]third of the respondents do not formally identify high-risk third parties.”⁶³

Moreover, guidance on what constitutes appropriate due diligence with regard to third parties needs to acknowledge that third parties vary widely in their size and complexity. For example, companies whose operations depend on third parties with multiple tiers, such as distribution channels, would appreciate clear guidance on law enforcement agencies’ expectations about how far due diligence should go through those levels.⁶⁴

H. Confidential Reporting and Internal Investigation⁶⁵

This hallmark briefly discusses the need for a mechanism for employees to report suspected or actual misconduct confidentially and without fear of retribution, and a suitable process for investigating such allegations and documenting the company’s response.⁶⁶ Even if this discussion seems to raise points requiring no further explanation, your benchmarking could be useful in identifying examples of effective confidential-reporting approaches and of organizational designs that ensure prompt and effective investigations of reported misconduct.

I. Periodic Testing and Review⁶⁷

This hallmark correctly states that “a good compliance program should constantly evolve.”⁶⁸ Senior executives need to recognize that systematic misconduct within a company does not spring up spontaneously, but is the outcome of an evolving process that can owe as much to gradual erosion of business ethics as to individual decisions by corporate

⁶⁰ *Id.*

⁶¹ *See id.* at 60–61.

⁶² KPMG Survey, *supra* note 13, at 3.

⁶³ *Id.*

⁶⁴ *Id.* at 7–9.

⁶⁵ FCPA RESOURCE GUIDE, *supra* note 25, at 61.

⁶⁶ *Id.*

⁶⁷ *Id.* at 61.

⁶⁸ *Id.*

executives.⁶⁹ Sound compliance programs should be continuing processes that change as business lines expand, and risks and risk appetites change.

Here, your benchmarking on this subject could include a search for examples of sound internal controls that companies of different sizes could effectively implement, including a detailed examination of data analytics as a key component of internal controls. The 2015 KPMG Survey found that even though “data analytics is an increasingly important and cost-effective tool to assess [Anti-Bribery and Corruption] controls,” “only a quarter of respondents use data analysis to identify violations and, of those that do so, less than half continuously monitor data to spot potential violations.”⁷⁰ The Department should therefore underscore its interest in data analytics and provide guidance to companies on that topic.

J. Mergers and Acquisitions, Pre-and Post-Acquisition⁷¹

The final hallmark in the *FCPA Resource Guide* has two key elements. First, it broadly identifies the risks that a company creates when it conducts inadequate pre-transaction due diligence in mergers and acquisitions. Second, it highlights the Department’s and the SEC’s interest in prompt post-acquisition integration of the merged or acquired entity into the remaining entity’s internal controls, including its corporate compliance program.⁷²

Considering how substantial the risks may be to acquirers, including the prospect of imposition of successor liability, the guidance in this section is overly thin. Your benchmarking here should seek to identify the types of constraints under which law-abiding companies must operate in a pre-transaction environment, where corporate executives overseeing the negotiations may be operating under intense time pressures, and highlight compliance practices and approaches that are likely to be effective in identifying or discouraging potential misconduct despite those constraints.

This section also does not address whether the Department considers this guidance to reflect a risk-based approach. The Department should clarify its views on that issue after benchmarking, as the logic of its insistence on a risk-based approach to compliance in other areas should apply to the M&A context as well.

⁶⁹ *See id.* at 61–62.

⁷⁰ KPMG Survey, *supra* note 13, at 3.

⁷¹ *See* FCPA RESOURCE GUIDE, *supra* note 25, at 62.

⁷² *See id.*

IV. Publish the Results of Your Benchmarking and Compliance Guidance in a Single Document

This is the final step, on which the credibility and value of the other steps in your process will largely depend. Improving the Department's knowledge base is always a useful exercise, but the Department needs to share the fruits of its labors—more precisely, the specific conclusions and expectations that it develops from the benchmarking process—with the public, by publishing it in a single document.

Last year, a senior Department official stated that “[w]henver possible, we try to communicate clear guidance to the corporate community through our criminal resolutions, our interactions with companies and their counsel during an investigation or prosecution and other channels such as [public] conferences”⁷³ With due respect, that approach does not result in clear *ex ante* guidance to companies. In individual cases, documentation of a corporate criminal resolution can be illuminating about certain actions that led to, or constituted, criminal conduct. But it tells interested readers only what went wrong—not why things went wrong, or how law-abiding companies should improve their compliance efforts to avoid the same fate.

As for interactions with companies during investigations and prosecutions, whatever guidance Department prosecutors convey to corporations in nonpublic negotiations stays behind closed doors for most of the corporate world. That guidance may be useful to an individual company under investigation—though it will likely oppose disclosing any details of its alleged wrongdoing or the remedial steps it is required to take, other than what the resolution of that investigation requires it to disclose. And it will certainly be useful to the outside counsel representing the company, who can use the knowledge gained behind closed doors to represent other companies in future Department investigations. But if the guidance does not find its way into public documents, other companies not involved in the proceeding will not benefit from it.

Finally, the Department's willingness to allow its prosecutors to speak and write publicly about corporate compliance issues is commendable. The problem here is not the quality or good intentions of the speakers, but the randomness of the creation of additional fragments of guidance, especially when different officials make different points about compliance at different times. As a result, companies and lawyers must pore over a farr-

⁷³ Leslie R. Caldwell, Assistant Att’y Gen., U.S. Dep’t of Justice, Remarks at New York University Law School’s Program on Corporate Governance and Enforcement (April 17, 2015), <http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law>.

go of data sources, like Roman haruspices poring over the entrails of sacrificial animals, to divine what the Department means to say about corporate compliance. And such divination is no easy matter. Public remarks by Departmental officials of various ranks must be scrutinized and compared with numerous press releases and supporting documents for criminal prosecutions, while exploring the Department's more general public guidance, ranging from the Fraud Section's FCPA published opinions⁷⁴ to the Antitrust Division's Business Review Letter process.⁷⁵

None of this implies that Department officials should stop announcing corporate criminal resolutions, providing closed-door feedback to companies under investigation, or writing and speaking about corporate compliance. But the Department and the SEC should also collect their cumulative experience and guidance on corporate compliance into as few places as possible, and periodically update that collection. For foreign bribery and corruption matters, the *FCPA Resource Guide* has been a substantial step in that direction, but has proved to be too brief in presenting its much-touted hallmarks of compliance. Whether incorporated into a revised *FCPA Resource Guide* or maintained as a separate public document, your benchmarking efforts should seek to make the information costs for companies as low as possible.

In conclusion, the best of luck to you in your work. Although some have been dubious about the concept of a Compliance Counsel, you can make a significant contribution by helping the Department to develop clarified, refined, and clearly communicated expectations about compliance practices.

Sincerely,

Jonathan J. Rusch

⁷⁴ See *FCPA Opinions*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/criminal-fraud/fcpa-opinions> (last updated June 17, 2015).

⁷⁵ See *Business Review Letters and Request Letters*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/atr/business-review-letters-and-request-letters> (last updated March 25, 2016).