

# Mitigating Your Most Significant Bribery & Corruption Risk Exposure: Dealings with Third Parties

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# Agenda

1. Bribery & Corruption Risk Overview
2. Assessing Third Party Risk
3. Enforcement Case Studies Involving Third Parties
4. Responding to Concerns Related to Third Parties

# Bribery & Corruption Risk Overview

# Why This Session Matters

The international anti-bribery and corruption enforcement climate in Canada and elsewhere is changing:

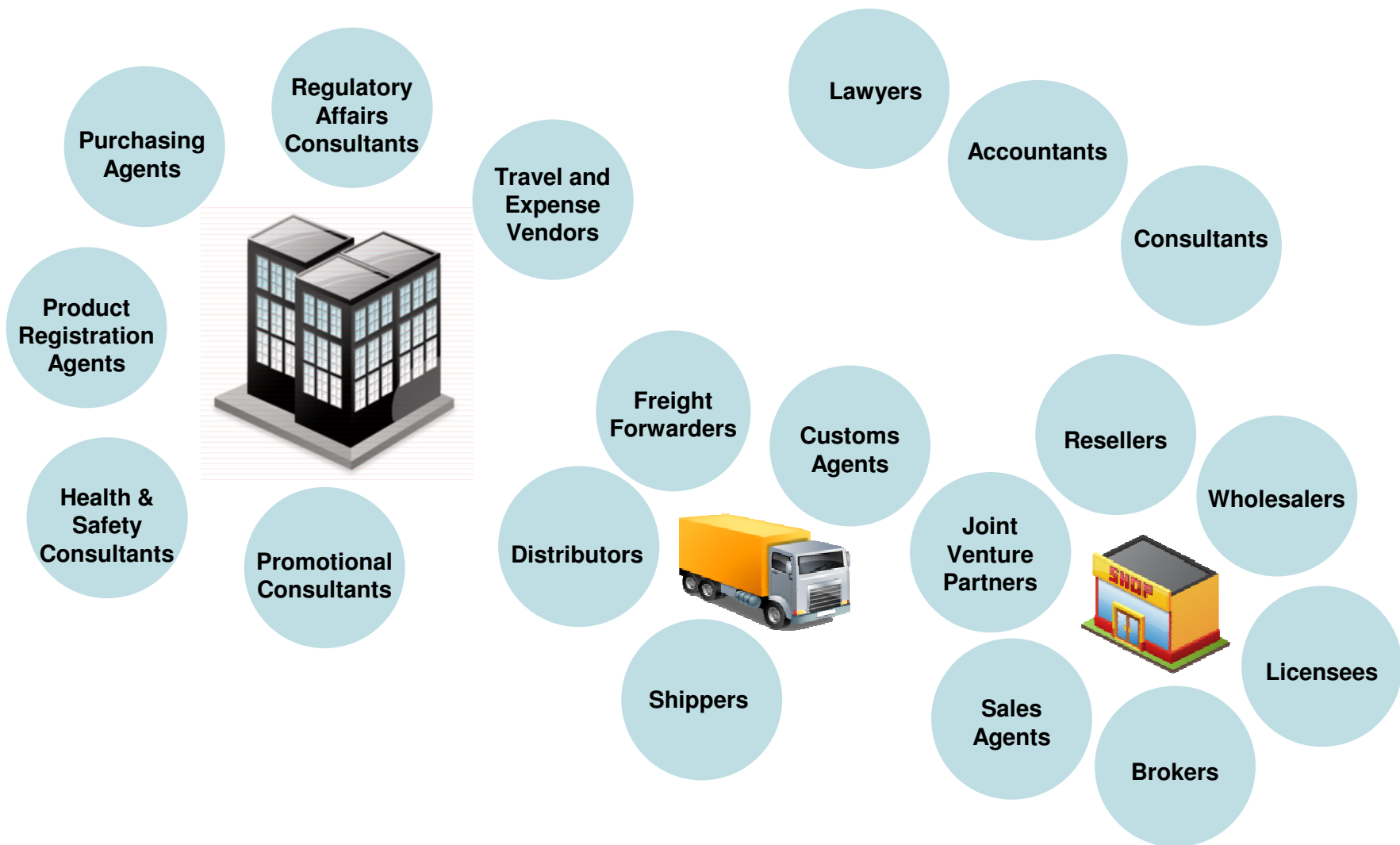
- Changes to the *Corruption of Foreign Public Officials Act (CFPOA)* in June 2013
- 12 ongoing RCMP investigations looking at violations of the CFPOA
- In 2014, Canada improved its enforcement ranking in Transparency International's progress report from "low" to "moderate" enforcement (US is "active" enforcement)
- The US Department of Justice (DOJ) and the Securities Exchange Commission (SEC) have been actively pursuing foreign companies and individuals that violate the FCPA
- Ontario Securities Commission incentivizing whistleblowing – may uncover collateral ABC issues

# Why This Session Matters

Actions that some may view as routine or necessary in foreign jurisdictions can create serious legal consequences to both the individuals involved and your organization:

- Loss of employment/ reputation
- Large financial penalties
- Jail time for individuals
- Debarment from government contracts

# Who Are Your Third Parties?





# Key Statutory Provisions: Third Parties

## ***Corruption of Foreign Public Officials Act, section 3:***

- “directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official”

## ***Criminal Code, paragraph 22.2(c):***

- A company is party to the offence if a senior officer “knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence”



# Key Statutory Provisions: Third Parties (contd.)

## ***Criminal Code section 2:***

- “senior officer ” means a representative who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer
- “representative ”, in respect of an organization, means a director, partner, employee, member, agent or contractor of the organization





# Key Statutory Provisions: Third Parties (contd.)

## ***US Foreign Corrupt Practices Act***

- prohibition includes the “authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to” a foreign official
- prohibits corrupt payment to any foreign official or to “any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official...”



# Key Statutory Provisions: Third Parties (contd.)

## ***“Books and Records” offence:***

- Prohibits conduct designed to cover up bribery
  - Off-book accounts that should be recorded under accounting standards
  - Failure to record transactions or inadequately identify them
  - Recording false expenditures and liabilities
  - Uses false documents or destroy books and records earlier than permitted by law
- Extra-territorial in nature. Conduct outside Canada is deemed to have occurred in Canada
- Maximum of 14 years’ imprisonment and unlimited fines

# Risk Overview - Key Points

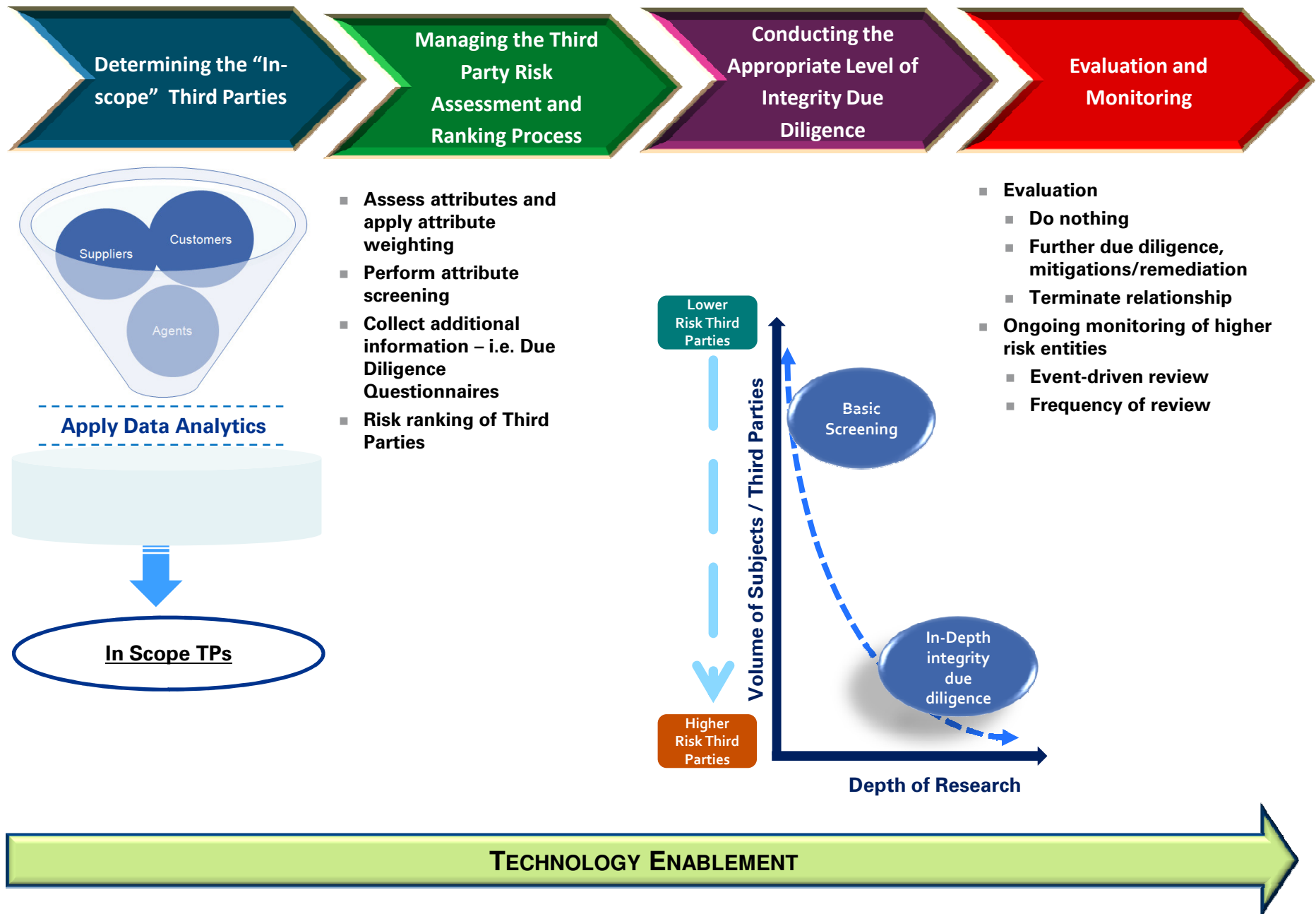
- Recognize that what your vendor, agent or business partner does can have a significant impact on your company
- CFPOA applies to direct and indirect offers or payments
  - captures your knowledge of or willful blindness to your agent's corrupt activities
- Must exercise due diligence to ensure that agents and other partners are aware and comply with anti-corruption obligations

# Assessing Third Party Risk

# Third Party Management

- Adequate procedures designed to prevent bribery may be a factor when negotiating settlement with regulator, but may not be a defence
- Some recent guidance on third-party management:
  - A **risk assessment** to identify needs and requirements for use of all third parties
  - Proper **due diligence** to identify and select third party providers
  - **Written contracts** that outline duties, obligations and responsibilities
  - **Ongoing monitoring** of third-party activities and performance
  - **Clear roles and responsibilities** for overseeing and managing the relationship and risk

# Elements of an Effective Third Party Risk Management Program



# Determining the “In-scope” 3rd Parties

## Methodology

### Scope the Universe of 3<sup>rd</sup> Parties

- Figuring out where data resides and how many third parties you have

### Set qualifying analytics

- Using basic third party data for initial filter (e.g., vendor location, dollars purchased, type of vendor)
- Run filter to identify 3<sup>rd</sup> parties that are in scope for further screening

### Perform initial filter based on profile

- Run filter to identify 3<sup>rd</sup> parties that are in scope for further screening

# Managing the Third Party Risk Assessment and Ranking Process

## Methodology

### Preliminary attribute screening

- Use existing information in vendor and customer files to begin risk ranking process

### 3<sup>rd</sup> party due diligence questionnaires

- Questionnaires may be used to collect additional information
  - Internal Sponsor
  - 3rd Party Questionnaire
- These can be distributed electronically or manually



# Managing the Third Party Risk Assessment and Ranking Process

## Methodology

### Collect 3<sup>rd</sup> party questionnaires

- Collect information from 3<sup>rd</sup> parties or company personnel responsible for maintaining the relationship

### Assess and weigh all attributes

- Submit additional data and evaluate results

# Key Questions to Ask

- What is the service they will provide?
- Is it legitimate and necessary?
- What are their qualifications, experience, expertise for providing the legitimate services required in the circumstances?
- What is their reputation? in the industry and country? with banks, customers, suppliers and others?
- How did you come to know about them?

# Key Questions to Ask (continued)

- What are their anti-corruption compliance policies?
- Review evidence and materials
- Are their fees reasonable for legitimate services of this kind and given the location?
- Is it consistent with others in the jurisdiction?
- What are their personal and professional relationships with government officials?

# Integrity Due Diligence

## Methodology

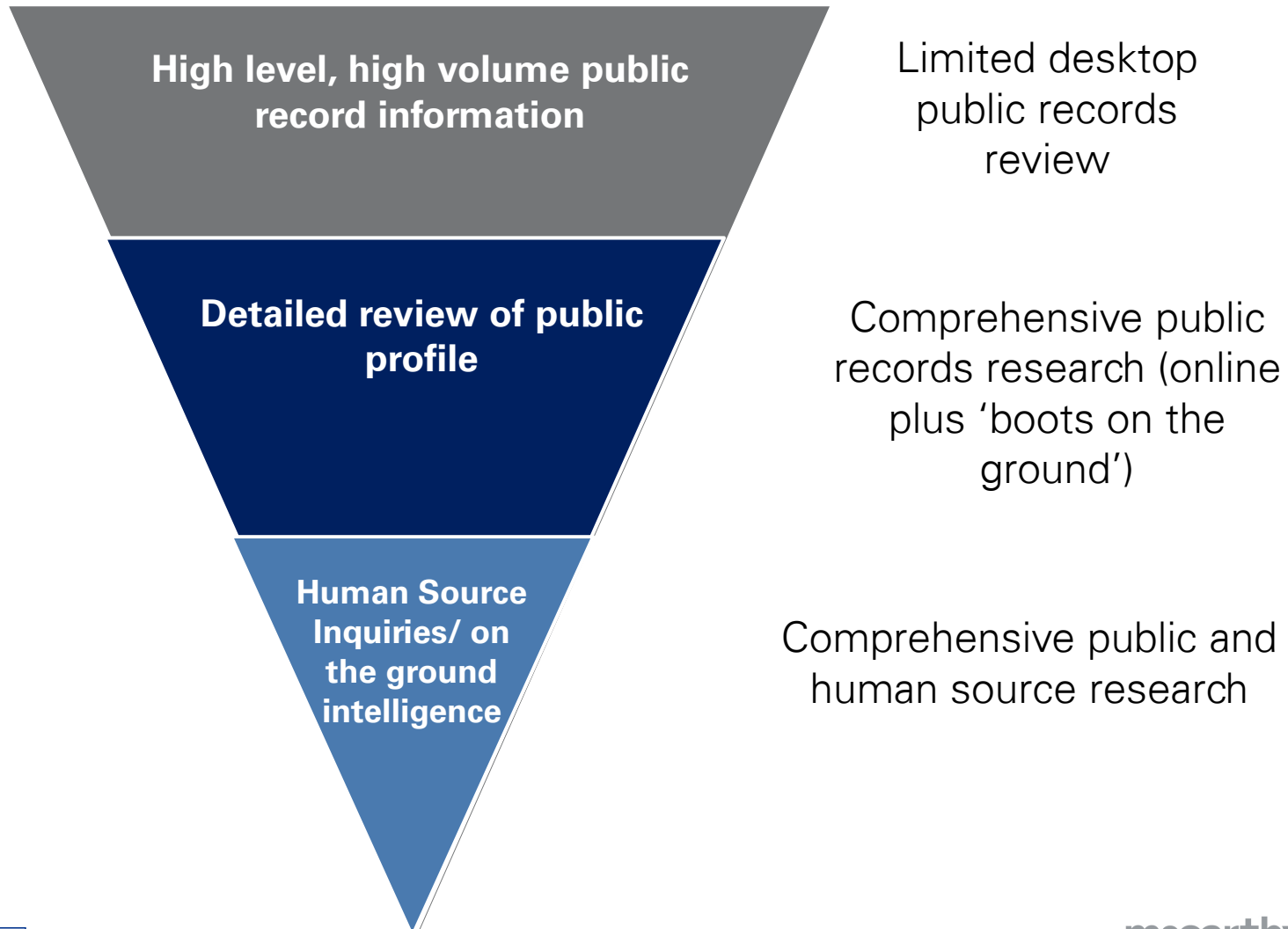
### **Assign 3<sup>rd</sup> parties to Tiers**

- Based on assessment and ranking process, develop tiers or risk ratings

### **Perform due diligence commensurate with the risk profile of the 3<sup>rd</sup> party**

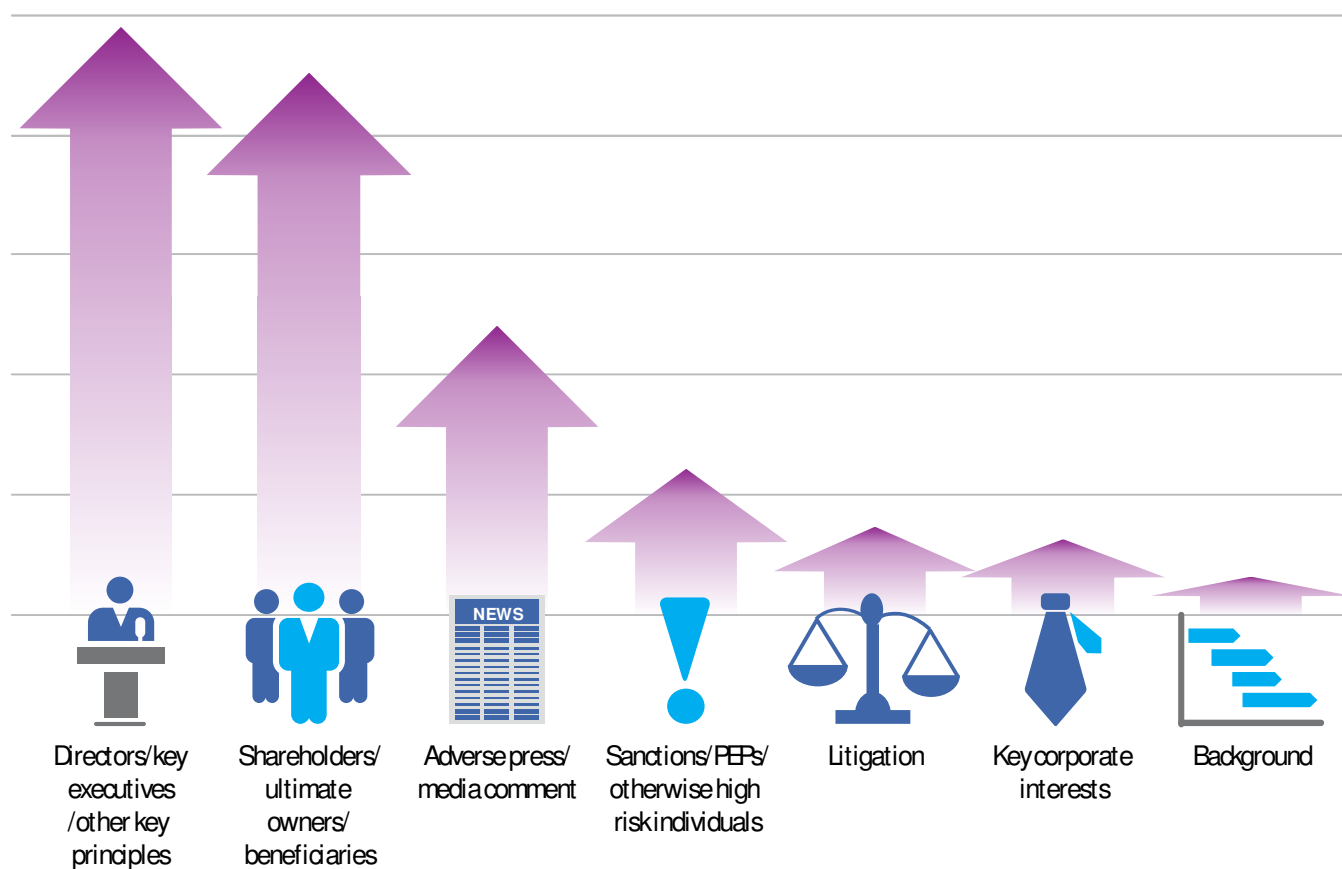
- Once the 3<sup>rd</sup> parties are in tiers, perform the appropriate level of due diligence commensurate with the risk profile of the 3rd party

# Integrity Due Diligence



# KPMG Analysis of Our Enhanced Due Diligence Reports

## FACTORS LEADING TO HEIGHTENED RISK RATING



# Potential “Red Flags”

- Unusually high commissions
- Success-based fees
- Upfront payment
- Lack of transparency in its expenses and accounting records
- Lack of qualifications or resources
- Recommendation from an official of the government customer

# Evaluation and Monitoring

## Methodology

### Evaluation

- Assess 3<sup>rd</sup> parties for further review, termination or alternative arrangements
- More due diligence on suspicious or high risk entities – e.g., site visit

### Remediation / Upfront Risk Mitigations

- Utilize risk scoring to focus efforts on high risk entities or geographies
- Remediation or mitigations to be put in place with 3<sup>rd</sup> party (e.g., training requirement)
- Consideration of monitoring program going forward



# Evaluation and Monitoring

## Methodology

### Monitoring

- Routine monitoring of higher risk entities which leverages data from multiple information sources
- The use of appropriate technology makes the process much more efficient, repeatable and controllable
- Site visits, transaction testing, management declarations, etc.

# Managing Third Parties Who “Pass”

- Fully document all due diligence
- Do not engage unless senior compliance or legal approve
- Establish procedure for referring “red flags” or problematic cases to outside legal counsel or forensic accountant
- Incorporate anti-bribery compliance into contracts:
  - acknowledgment and awareness of anti-bribery issues
  - disclosure of government relationships
  - disclosure of past corruption and fraud-related charges, convictions
  - disclosure of any pending or ongoing investigations
  - periodic certification and audit rights
  - notification of any changes in foregoing
  - right to terminate
  - right to indemnification for breach of anti-corruption obligations

# Enforcement Case Studies Involving Third Parties

# Panalpina (2010)

- Swiss freight forwarder paid bribes of \$27 million for customs clearance and import permits in Angola, Azerbaijan, Brazil, Kazakhstan, Nigeria, Russia and Turkmenistan.
- For Panalpina's oil field services customers, including Pride International, Royal Dutch Shell, Tidewater, Transocean, Global Santa Fe and Noble
- In order "to circumvent local rules and regulations relating to the import of goods and materials"
- The oil field services companies were also investigated and admitted to making payments through freight forwarder
- Voluntarily disclosed, negotiated deferred and non-prosecution agreements, and paid fines totaling \$237 million

# Alcatel-Lucent (2010)

- Use of agents and consultants in Costa Rica, Honduras, Malaysia, Taiwan, Kenya, Nigeria, Bangladesh, Ecuador, Nicaragua, Angola, Ivory Coast, Uganda, and Mali in connection with telecom contracts
- In Costa Rica, a subsidiary wired about \$18 million to two consultants; more than half was then passed to government officials
- In Honduras, a subsidiary hired and made payments to a "consultant" who was a perfume distributor with no experience in telecommunications; personally selected by "the brother of a senior Honduran government official"
- In Taiwan, the company and its joint venture hired two consultants with no telecommunications experience; passed some of their \$950,000 payments to Taiwanese legislators
- Voluntarily disclosed, negotiated a deferred prosecution agreement, and paid fines of \$137 million
- Also agreed to cease using third-party sales and marketing agents in conducting its worldwide business

# Maxwell Technologies (2011)

- Swiss subsidiary alleged to have paid Chinese state-owned electric utility infrastructure manufacturers kickbacks
- Charged inflated prices for equipment sales and paid the excess to their Chinese agent who passed amounts on to officials
- Invoices issued to Maxwell by agent for "extra amount" or "special arrangement" fees
- Found Maxwell had failed to maintain adequate controls over payments to the agent, conduct due diligence regarding the agent, and provide anti-corruption training to relevant employees
- Voluntarily disclosed, negotiated a deferred prosecution agreement, and paid penalty of \$14 million

# Responding to Concerns Related to Third Parties

# Initiating the Investigation

- Assess scope, complexity and materiality of risk
  - Can internal staff conduct investigation?
  - Is multidisciplinary team warranted?
    - Lawyers, Accountants, Government Relations, Public Relations, etc.
  - How important is preservation of legal privilege?
- If using external multidisciplinary team, best to retain independent experts
- Who supervises investigation?
  - In-house counsel vs. Audit committee vs. Special committee



# Investigative Challenges When Third Parties May be Involved

Bribery and Corruption investigations involving third parties are often challenging and complex due to a number factors:

## **Collection of Information:**

- Privacy issues
- Rights of access to records and people
- Willingness of third parties to cooperate
- Laws around moving data across borders

# Investigative Challenges When Third Parties May be Involved

Bribery and Corruption investigations involving third parties are often challenging and complex due to a number factors:

## **Analysis of Information:**

- Multi-national scope, language, local laws and intentionally poor record keeping are all complicating factors
- Difficult to detect - misrecorded in the books and records
- Increasingly, those engaging in bribery are becoming more sophisticated in their approach
- Data analytics can be used to look for outliers, or alternatively, certain patterns around events

# In Summary

Third parties add layers of complexity to existing bribery and corruption compliance and investigative challenges

# Thank you

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