Unless you are a mind reader, you will never be able to predict whether any particular third party you work with will commit bribery. Instead, a systematic, holistic, and rigorous approach to due diligence must be in place to ensure that your company is asking the right questions about who to work with based on the right information delivered at the right time.

A comprehensive approach to due diligence management is essential for any company conducting business globally. A strong due diligence programme’s purpose is two-fold: 1) to guide your company, helping you make smart choices when it comes to international business partners, and 2) to protect your company, building procedures and a legally-defensible documentary record that can protect you from an enforcement action (under either the FCPA or U.K. Bribery Act) in the event that a third party engages in bribery on your behalf.

To fulfill these purposes, organisations must align the unique risks and strengths of their company to their due diligence programme. As a result due diligence programmes can take many forms—however, there are some components that all programmes should have. Below are the ten components all due diligence programmes need:

**Support and Buy-In of Senior Executives and the Board**

Before, during and after a due diligence programme is implemented, it is critical to have the full support of senior executives and the board. Your programme needs to be structured to work with your managers and executives to help them build the business by partnering with responsible, professional companies. A due diligence programme that is seen only as an annoyance, e.g. “a bunch of forms that don’t matter anyway,” is ineffective and a waste of time for everyone involved.

The number one cause of this problem is a compliance department with blinders on, focusing only on checking the boxes. Instead, build your due diligence programme to support the business instead of hinder it. Make sure that your processes have a defined purpose and are easy to use.

As a compliance officer, your job is to make the case for why a due diligence programme is necessary and how it can be a valuable company asset. An effective ethics and compliance programme:

- **Helps prevent:** enforcement actions, collateral civil litigation and the associated loss of confidence by shareholders, stakeholders and the public at large.
- **Will improve:** employee morale and productivity, financial performance, decision making quality and employee stability.

If company leaders do not see the value in a due diligence programme, it will not be allocated adequate resources. Take time to gain buy-in from top executives and the board up front.
Internal Due Diligence Policies and Procedures

This is the most basic requirement. Written policies and procedures are the starting point for most compliance programmes. The following are common policies that benefit most companies in supporting and maintaining an effective due diligence programme:

- **Due Diligence Procedure:** This policy should lay out each step in the due diligence process and require certification that each step was completed. It should be comprehensive but not too detailed since some issues will be decided on a case-by-case basis.

- **Due Diligence Forms for Internal Use:** A company has to require a businessperson to “sponsor” a proposed third party. These forms should ask for basic information about the selection process for the third party, the anticipated scope of the relationship, and the business justification for hiring a third party. These forms should be viewed as flexible—altered and added to when needed to reflect unique circumstances or risks.

At a minimum, internal due diligence forms should ask for:

- **Business Justification:** Who is proposing the third party relationship? What is the nature of the proposed relationship? What is the business justification for the proposed relationship?

- **Statement of Work:** What kind of services will the potential third party business partner provide (e.g. business marketing and development, regulatory support)?

- **Proposed Relationship:** What will be the relationship of the potential third party business partner with the company (e.g. agent, distributor, customs representative)?

- **Proposed Compensation Structure:** How will the potential third party business partner be compensated (e.g. retainer, success fee, commission, salary)? How does this compensation structure compare to other third parties providing similar services in the same country? In other countries? What are the payment terms?

Due Diligence Forms for Third Parties (Questionnaire)

The questionnaire that you provide to potential third party business partners is one of the most important tools in your due diligence toolbox. You should view this as a direct line of communication to the potential third party. In addition to asking for basic background information, use this form as an opportunity to ask pointed questions about specific concerns. These forms should be flexible—altered and added to when needed to reflect unique circumstances or risks.

At a minimum, the questionnaire should ask for the following information:

- **Ownership:** Who owns the potential third party business partner? Who owns any companies related to the potential third party business partner?

- **Relationships with Foreign Officials:** Is there any direct foreign official ownership (e.g. partner or owner is a foreign official)? Is there any indirect foreign official ownership (e.g. close family member is a foreign official)? Is there any direct or indirect foreign official ownership in related companies?

- **Type of Services Provided:** What types of services does your company provide overall? What services will be provided in the proposed relationship?

- **Business Background:** What prior experience does the potential third party business party have? How many years has the company been in business?

- **Business References:** Request professional references from prior and current business partners. Request financial references from a bank or other financial institution attesting to the proposed third party business partner’s solid financial standing.

To minimise the burden on compliance teams, the process of distributing and collecting responses to the questionnaire can be automated using an online due diligence application.
Risk Ranking Based on Red Flags

An effective due diligence programme allocates resources by ranking risks. Higher risk candidates should be treated differently than lower risk candidates. You should risk rank third parties annually and assign monitoring tools based on relative risk ranking (e.g. audits, unannounced visits or meetings, annual training, more frequent certifications).

A good due diligence investigative service will provide risk ranking information in a due diligence report. The best services have developed their own risk ranking formulas based on sophisticated algorithms that take into account the type, frequency and relationships between identified red flags. Sophisticated risk-ranking systems are “locked-down” so they cannot be manipulated by users to reach desired result. Objectivity is key to the DOJ and SEC when evaluating whether a compliance programme is effective.

Key risk-ranking factors include:

- **Geographic**: Countries are ranked by Transparency International, a ranking can be found here: http://www.transparency.org/research/cpi/overview
- **Industry**: Some industries are historically more dependent upon bribery such as the medical device industry and the oil industry.
- **Adverse Media Reports**: If any negative media reports were discovered you must investigate further. Was there any basis to any corruption allegations? How did the potential third party business partner explain the adverse information? This may require an enhanced due diligence service investigation.
- **Government Relationships**: Involvement of foreign official, foreign government referral.
- **Services or Compensation Irregularities**: Are the proposed services typically provided by third parties in that region in that industry? Is the proposed compensation structure typical of third parties in the region in the industry?
- **Prior History**: Has this potential third party business partner ever been involved in a corruption scandal in the past? Have other major companies worked with them? Have other major companies performed due diligence on them and ultimately rejected them?
- **Proposed Financial Structure**: Is the potential third party business partner proposing an unusual financial structure such as being paid in cash or pre-paying for services? Did they request money be transferred to a third party account or a different country? Is the fee requested substantially higher than market rates with no substantive justification?
- **Ethics & Compliance Programmes**: Does the potential third party business partner have an anti-corruption policy in place? Are they willing to undergo training on your anti-corruption programme? Are they willing to certify compliance with anti-corruption policies?

You must follow up and resolve any red flags through:

- **Interviews or Follow-Up Questions**: An additional questionnaire may be necessary
- **Enhanced Due Diligence** (see below)
- **Contractual Provisions Addressing Red Flags to Mitigate Risk** (see below)
- **Modification of Proposed Arrangement to Mitigate Risk** (e.g. limiting the venture’s scope, adjusting compensation terms)
Due Diligence Investigative Services

This is perhaps one of the most essential components of a compliance programme. Your company should form a relationship with a due diligence provider—there are a number of excellent options available today. These services are vital—they are your “boots on the ground,” providing adverse media searches, local records checks, pictures of local facility and local investigative and reputational evidence. These services empower you to double check your internal knowledge of a potential third party and the information a third party provides in their questionnaire.

Even more importantly, due diligence reports from investigative services provide a source for customising your third party due diligence questionnaire. For example, if a due diligence investigative service report finds an article making corruption allegations against a board member of a potential third party business partner, you can include specific questions about the allegations and that individual’s involvement in a potential joint venture.

Open Source Intelligence Screening: A company has to use an open source intelligence screening service to check the third party and its owners against databases that collect adverse information, prior corruption allegations, civil and criminal prosecutions and other important relationship information. There are many alternatives but the system has to be efficient, minimise false positives, and be easily accessible for company staff.

Risk Ranking Formula: The best due diligence investigative services include a risk analysis in their due diligence reports. Some of the most sophisticated due diligence investigative services have developed their own risk ranking formulas that assist you in identifying potential third party business partners who may need more in-depth due diligence based on discovered red flags.

In selecting a due diligence investigative service, you should look for:

- **Adequate Due Diligence Report Scope:** Does the service perform a risk assessment to rank identified issues? Are due diligence reports provided timely and with appropriate information (e.g. watch or sanctions list screening, adverse media report screening, Politically Exposed Persons (PEP) screening, financial background checks)? Are multiple levels of due diligence reports offered for when red flags necessitate a more in-depth review?

- **Online Access:** Can you easily administer through an online portal? Is there a quick glance dashboard to alert you of any newly discovered red flags? Can you designate others to assist you in carrying out due diligence tasks? Does the system allow for global collaboration with other business units? Can third parties upload documents to your portal?

- **Automation of Routine Tasks:** Does the system automate ongoing review? Are notifications automatically sent upon initiation or completion of a task? Can you “batch screen” existing third parties?

- **Third Party Relationship Management:** Some systems will facilitate your interaction with potential third party business partners. Is there a third party “onboarding” process to integrate direct feedback from third party?

More companies are evaluating and implementing comprehensive due diligence systems. NAVEX Global, with whom I am affiliated, offers a comprehensive third party risk management system with a fully integrated due diligence workflow and auto-generated reports that incorporate both superior commercial due diligence data and the level of analyst-led review and research appropriate to the risk.

Go to NAVEX Global’s website for more information.
Enhanced Due Diligence

For important relationships that require in-depth due diligence, outside counsel should be used for investigation and resolution. These due diligence reviews are aimed at “problem situations,” address serious risks and require more resources. They should be reserved for critical potential third party partners that present an abnormally high degree of risk or where a number of red flags are found.

Most companies that perform basic due diligence investigative services also offer more in-depth, enhanced due diligence investigative services. When red flags are spotted for a potential third party business partner, decide what enhanced due diligence procedures are necessary. A more in-depth report is a starting point, more specific representations or a contract that is structured to mitigate risk (e.g. prevent a certain individual from making operational decisions for a joint venture) may also be necessary.

Comprehensive and Creative Written Contract Procedures

Too often companies do not approach the issue of drafting a contract as an important step in the due diligence process. It is an extremely effective way to reduce risk and demonstrate a company’s good faith attempt to ensure compliance with the FCPA and UK Bribery Act. Targeted contractual provisions should be drafted to respond to specific risks or concerns.

You should never use a “standard” contract; rather each contract should specifically address any red flags or unusual circumstances with a potential third party business partner.

- **Control Parties**: Are there any individuals identified with red flags that need to be screened from operation and management of business?
- **Disclosure of Relationships**: Do any relationships need to be disclosed to prevent conflicts of interest (e.g. a manager of the potential third party is also a government official, or related to one, and must make public any conflicts of interest that may arise)?
- **Limitation of Scope**: Should the scope of the venture be limited to mitigate risks that arise from certain activities such as limiting a sales rep to commercial (not governmental) sales?
- **Anti-Corruption Training Needed**: Does the potential third party business partner require additional anti-corruption training due to any identified red flags? Are there any specific areas of higher concern where targeted training is necessary?

Audit Trail

A due diligence programme should be fully documented. FCPA expert Tom Fox has emphasised this point repeatedly: If it is not documented, it did not happen.

- **Research Records**: Due diligence investigative service reports provide clear proof that research was conducted to identify red flags. You need to retain all records for five years.
- **Advice of Counsel**: Due diligence requires advice of counsel – an extra layer of protection for every company so that they can argue to government that they sought advice of counsel on a due diligence issue and relied on that advice when making its good faith decision. Advice of counsel completes the documentation process, providing a clear record of the due diligence process undertaken and resulting actions or decisions based on any identified red flags.
Ongoing Third Party Monitoring and Auditing

DOJ and SEC have seen improvements in every company’s due diligence programmes. The next issue they are certain to emphasise is how did the company monitor its third parties and how did the company use its audit rights to ensure compliance? This is the new cutting-edge issue and one that demands careful thought and design.

Many due diligence investigative services include this service for a designated amount of time with their initial due diligence report. NAVEX Global’s system includes on-going, continuous monitoring of initial screening targets for two years. If an alert appears, the system automatically generates a new report and emails compliance personnel. For your organisation this translates into peace of mind knowing your third parties are continuously screened. Furthermore, costs become more predictable since you don’t have to pay for additional screening every quarter/six-months/year - depending on your existing protocol.

Ongoing Evaluation and Improvement Procedure

No due diligence programme is perfect. Each due diligence process undertaken for a potential third party business partner will reveal strengths and weaknesses of a due diligence programme. Make sure that there is a regular, scheduled method to utilise experience to improve your programme. This can take the form of a “summary of due diligence procedure” write-up after each potential third party business partner is evaluated or a quarterly evaluation of the process as a whole. Survey executives and managers who initiate the due diligence process about how it could be improved on a yearly basis.

Use the information you glean to reallocate resources, identify unnecessary or burdensome procedures and look for technological solutions to resource issues.

Conclusion

In the end, you want to be able to answer the two questions the government will ask if an investigation is opened:

- What kind of due diligence review did the company conduct to identify red flags?
- How did the company assess and resolve any red flags relating to the third party?

Make sure that your company can answer both these questions with an effective due diligence programme.

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Michael Volkov, CEO and Owner of The Volkov Law Group, LLC, maintains an FCPA blog—Corruption, Crime & Compliance. He is a regular speaker at events around the globe, and is frequently cited in the media for his expertise on criminal issues, enforcement matters, compliance and corporate governance. In February 2013, Michael Volkov created the Volkov Law Group, a firm specialising in compliance, internal investigations and white collar defence.