

**United  
Technologies**

**DUE DILIGENCE:  
DRIVING ACTION & OWNERSHIP**

June 2013

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GLOBAL DIRECTOR OF  
COMPLIANCE INVESTIGATIONS

# DEFINING RISK

## Worst Jobs in the World Matrix



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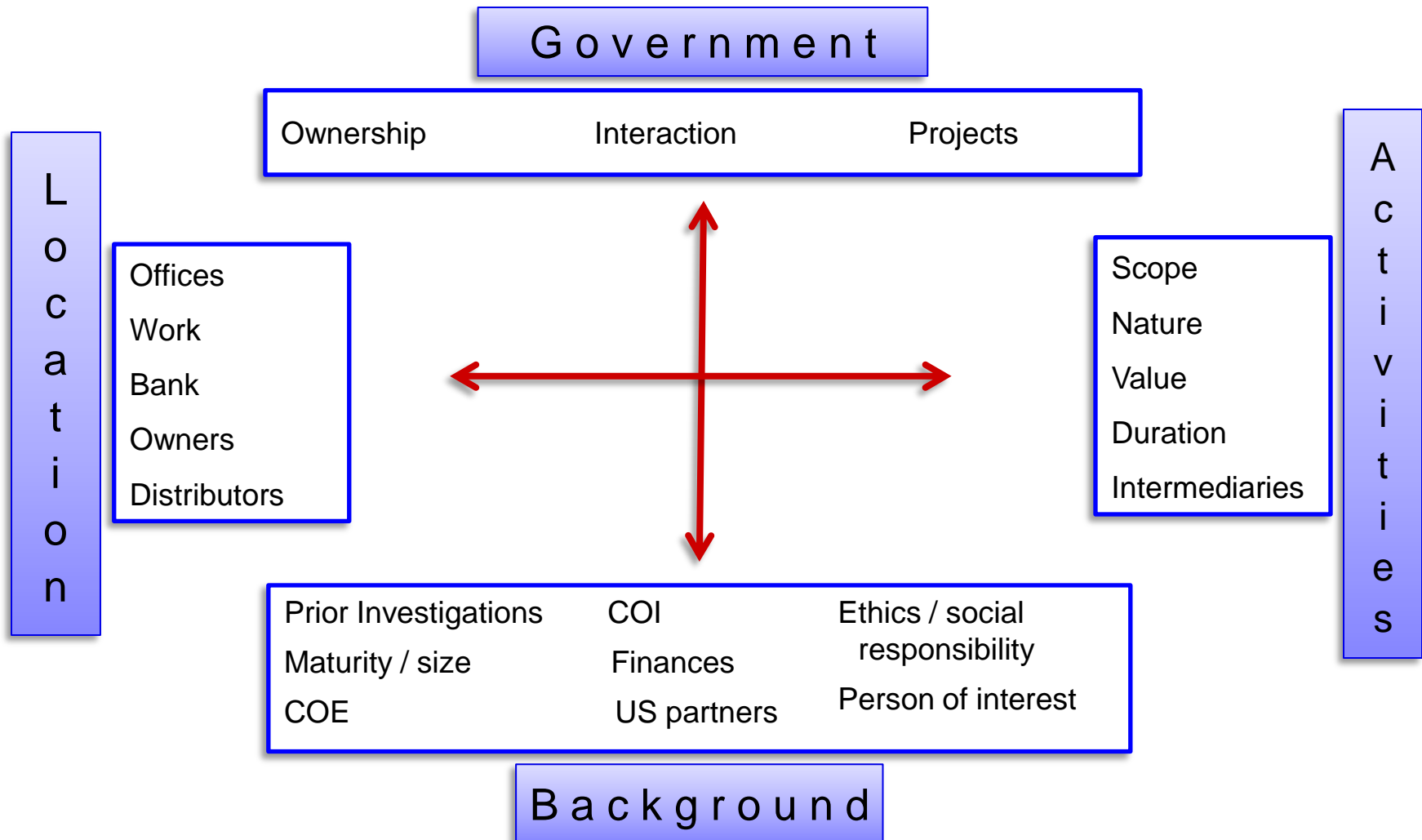
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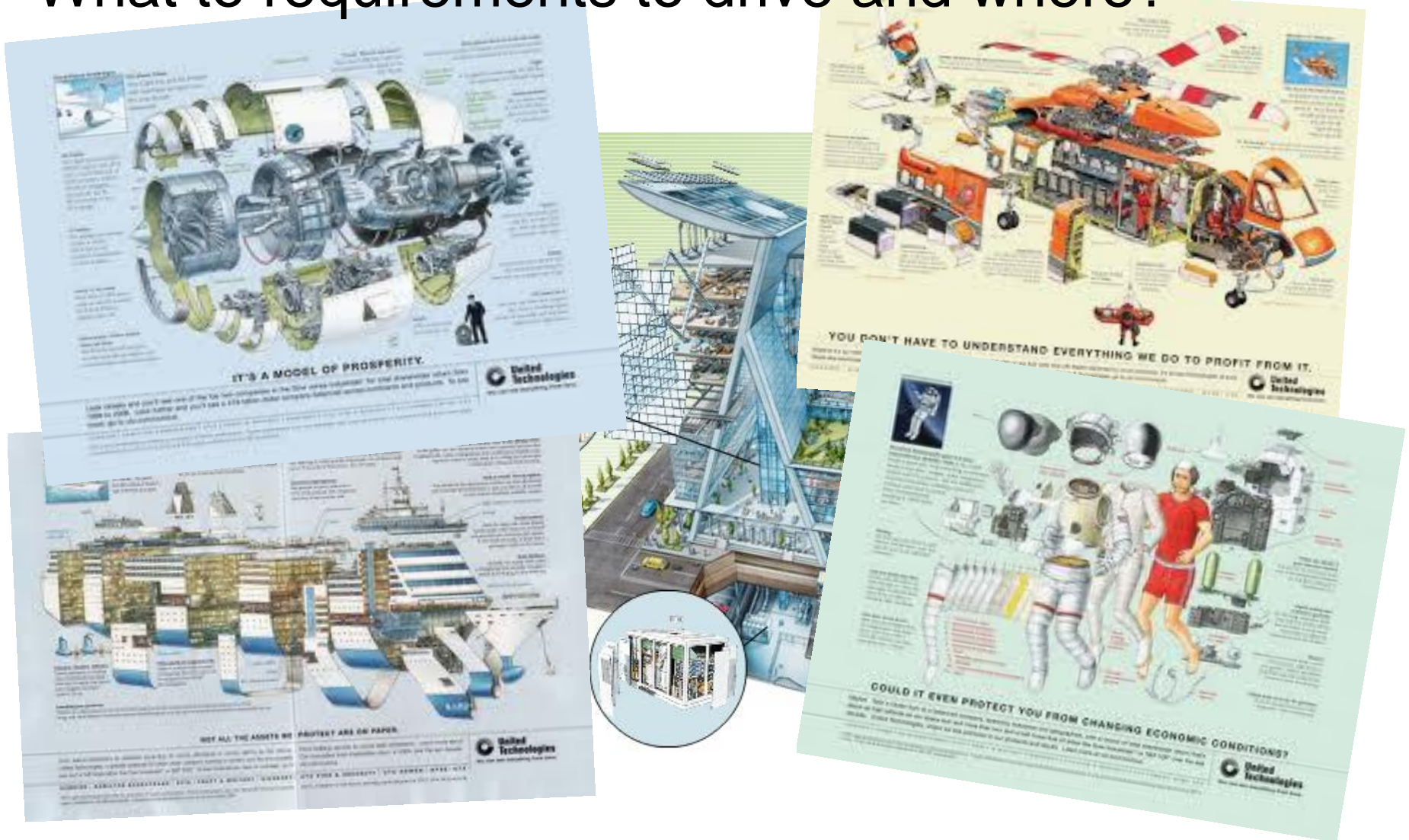
# IDENTIFYING GENERAL RISKS

## Beginnings of policy requirements ...



# IDENTIFYING SPECIFIC RISKS

## What to requirements to drive and where?



# OPERATIONALIZING COMPLIANCE

## Centralized decentralization

Management ownership and accountability

Objective measures of success

Focus on key program requirements to drive critical initiatives

Enterprise-wide requirements  
– *one company, one compliance framework*

Q2 2013	ETHICS TRAINING & COMMUNICATIONS							
	Onboarding <30 Days		All Emp'ee Training % Comp. (Goal: 100% end Q3)	Ethics Training Non-BPEC Users (Goal: 100% plan deployment)	Communication Plan (Goal: 100% on-plan)	BPEC % Comp.		
	% Trained <30 days of onboarding (Goal: 100%)	BPEC Onboarding Delay (Goal: 0)				% Comp. (Target: 25% per Quarter)	% Users (Target 100%)	
CCS								

Q2 2013	ETHICS CASE MANAGEMENT						ENTERPRISE RISK MANAGEMENT		
	Anti-Retaliation			Case Management		Staffing			
	Alleged / Verified / Open 365 day cycle (Goal: awareness)	Ave. days to closure (Goal: reduction of turn-time)	Handbook Flowdown (Goal: 100% yr. end)	Open <90 Days Ombuds only (Goal: 100%)	Case updates <30 days Ombuds only (Goal: 100%)	BPO Enterprise (Goal: 100%)	# RM plans (Goal: increased planning/tracking)	% on Plan (Goal: 100% on-plan)	# Tier 1 / #Non-Tier 1 (Goal: increased penetration)
CCS									

Q2 2013	IMPROPER PAYMENTS & ANTITRUST							GOV. CONTRACTS (AERO ONLY)				
	Cross-Functional Reviews				Tracking Gifts/ Travel/ Ent.		NSRs	Targeted Surveys	Investigation	Training	Corrective Actions	Staffing
	M&A Target/ completed (Goal: all complete)	NSR Total #/ target/ complete (Goal: all complete)	Other CFA Target/ complete (Goal: all complete)	Comm. BUS: A-T CFA Target/ complete (Goal: all complete)	Gov. TBD	Non-G. TBD	Aero BUS: NSR Training (Goal: 100% yr. end)	Quality (Goal: total complete)	Gov. K Case Inv. <90 days (Goal: 100%)	Gov. K Training (Goal: 100% on-plan)	Committed/ outstanding/ overdue (Goal: 0 overdue)	Gov. Contracts (Goal: TBD)
CCS												
OTIS												
P&W												
SIK												
UTAS												
UTC CORP.												

# DRIVING DUE DILIGENCE

What keeps you  
up at night?

Leading / lagging  
indicators

Measurable,  
reportable, and  
... adaptable

Plus lots of  
sunshine

IMPROPER PAYMENTS & ANTITRUST				
Cross-Functional Reviews				
M&A # / completed (Goal: target completed)		NSR Total / plan / complete (Goal: target completed)	CFA # / complete (Goal: target completed)	Comm. BUs: A-T CFA # / complete (Goal: target completed)
Aero	Comm			
<b>Goal:</b> Perform onsite cross-functional compliance reviews (anti-trust, anti-corruption) post all acquisitions.  <b>Target Metric:</b> ... <b>Example:</b> ...	<b>Goal:</b> Perform onsite cross-functional compliance reviews (anti-trust, anti-corruption) post acquisitions at high-risk sites.  <b>Target Metric:</b> ... <b>Example:</b> ...	<b>Goal:</b> Identify all NSRs, perform risk assessment, develop plan for risk-based review, execution against plan.  <b>Target Metric:</b> ... <b>Example:</b> ...	<b>Goal:</b> Perform onsite cross-functional compliance reviews at select, high-risk legacy sites.  <b>Target Metric:</b> ... <b>Example:</b> ...	<b>Goal:</b> Perform onsite cross-functional Anti-Trust reviews at select, high-risk legacy sites. This may be done as part of general C-F reviews.  <b>Target Metric:</b> ... <b>Example:</b> ...
IMPROPER PAYMENTS & ANTITRUST (cont.)			GOV. CONTRACTS (Aero Only)	
Tracking Gifts/ Travel/ Ent.		NSRs	Targeted Surveys	Investigation
Gov. (Goal: 100%)	Non-G. (Goal: 100%)	Aero BUs: NSR Training (Goal: 100% yr. end)	Quality (Goal: total complete)	Gov. K Case Inv. <90 days (Goal: 100%)
<b>Goal:</b> Develop enterprise-wide process for managing approvals and capturing data regarding all gifts, travel and entertainment provided to Government Officials.  <b>Target Metric:</b> ... <b>Example:</b> ...	<b>Goal:</b> Develop enterprise-wide process for managing approvals and capturing data regarding all gifts, travel and entertainment provided to Non-Government Officials.  <b>Target Metric:</b> ... <b>Example:</b> ...	<b>Goal:</b> Annual training of all Aero NSRs via BPEC, in-person or other equivalent means.  <b>Target Metric:</b> ... <b>Example:</b> ...	<b>Goal:</b> Deploy targeted surveys to identify risk at select locations.  <b>Target Metric:</b> ... <b>Example:</b> ...	<b>Goal:</b> Investigation of government contract allegations substantially completed to allow credible evidence determination and action by Disclosure Comm. in less than 90 days.  <b>Target Metric:</b> ... <b>Example:</b> ...

# Due Diligence for the Global Enterprise

**Jay G. Martin**

Baker Hughes Incorporated

Vice President, Chief Compliance Officer,  
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# Due Diligence for the Global Enterprise

Key Principles of Baker Hughes' Global FCPA Due Diligence Program for Third Party Non-U.S. Representatives



# FCPA Due Diligence: Third Parties, Non-U.S. Representatives

## Introduction

- FCPA does not specifically mandate that U.S. companies perform due diligence with respect to their international business associations and use of third party non-U.S. representatives.
- No crime is committed nor regulation violated by a company's failure to perform FCPA due diligence.
- U.S. enforcers of FCPA often charge U.S. companies with *knowledge* with respect to the activities of their third party non-U.S. representatives.
- FCPA due diligence should be examined in the context of the meaning of *knowing* conduct under the Act.
- The vast majority of FCPA violations have involved third party representatives

# Third Party Non-U.S. Representatives FCPA Due Diligence Keys to Success

- Consistently applied process on a global basis
- Full and complete disclosure with regard to third party non-U.S. representatives
- Fully address and resolve all FCPA red flags arising out of due diligence process
- Independent review of all third party non-U.S. representatives throughout process
- Business unit buy-in/cooperation with FCPA due diligence process
- Dedication of adequate resources
- Know all of company's third party non-U.S. third party representatives and closely monitor their activities on an ongoing basis
- Good recordkeeping with respect to due diligence process
- Good controls around approval and making of payments to non-U.S. representatives

# Practical Application of FCPA Due Diligence to Non-U.S. Third Party Representatives

- Conduct a sufficient level of FCPA due diligence on all third party non-U.S. representatives to ensure that circumstances – so-called “red flags” – do not exist that should reasonably alert the company to a high probability that a violation of the FCPA will occur.
- Determining the appropriate degree of FCPA due diligence in any particular case is a judgment to be based on a review of the particular facts and circumstances of that case.
- Company’s actions or inactions in the FCPA due diligence area are always judged in hindsight by the government enforcers.
- No amount of FCPA due diligence can guarantee that an FCPA violation will not occur, but a healthy degree of caution and prudent business sense can carry a company a long way towards achieving good FCPA compliance.

# Types of Third Party Non-U.S. Representative Services Covered by Baker Hughes's Due Diligence System

- General sales
- Government sales
- Marketing
- Customs
- Taxes
- Visas
- Licenses and permits
- Legal
- Accounting

# FCPA Third Party Non-U.S. Representative Due Diligence Process Information Gathering

- Third Party Non-U.S. Representative Engagement Request from a Business Unit
  - Reasonableness of terms (commission, term, territory, etc.)
  - Business justification (current opportunities in territory, how candidate was identified, evaluation of alternatives, etc.)
  - Identification of third party non-U.S. representative's expected activities and services to be provided
  - Qualifications of potential third party non-U.S. representative (expertise, experience, resources)
  - Identification of known conflicts

# Structuring a Successful Relationship with a Third Party Non-U.S. Representative

- Structuring the Relationship
  - The agreement should be in writing
  - The agreement should fully set forth the services to be performed by the third party non-U.S. representative.
  - The agreement should specify the compensation that will be paid for the services.
  - In the *York International Corporation* case (Lit Rel. No. 20319, October 1, 2007), the absence of a written agreement and payment for “nebulous and undocumented services” evidenced knowledge on the part of the company that funds paid to a third-party non-U.S. representative would be used for a prohibited purpose.

# Structuring the Third Party Non-U.S. Representative Relationship (cont'd.)

- In structuring the third party non-U.S. representative relationship, the agreement between the company and the representative should include representations and warranties that:
  - The third party non-U.S. representative is not a foreign official or an agency/instrumentality of a foreign government. (If the answer is affirmative, additional representations and warranties will be necessary – *e.g.*, that the third party is not in a position to award or influence the award of business, or that the third party will be recused from the decision whether to award business, and that the relationship of the company and the third party will be disclosed to the non-U.S. government.)
  - The third party non-U.S. representative is authorized to act in the capacity contemplated by the agreement (*i.e.*, the relationship is lawful and the third party has the necessary licenses and permits).



# Structuring the Third Party Non-U.S. Relationship (cont'd.)

- The third party non-U.S. representative agreement should contain representations and warranties concerning compliance with the FCPA:
  - That the third party non-U.S. representative is familiar with the FCPA and the anti-bribery provisions, as well as anti-bribery provisions of local law.
  - That no payments have been made in the past that would violate the FCPA or the anti-bribery provisions of local law.
  - That no prohibited payments will be made in performing the service under the agreement.
- There should be audit rights contained in the agreement.
- There should be a representation and warranty of representative's compliance with all applicable laws and regulations of the country in which the services are to be performed.
- There should be a restriction on representative's use of sub-agents.
- Provision should be made for notification of the company by third party non-U.S. representative should circumstances change making the representations and warranties inaccurate.

# Structuring the Third Party Non-U.S. Relationship (cont'd.)

- All payments should be made by wire transfer into the bank account of third party non-U.S. representative in country where services are provided.
- The agreement should be clear that reason to believe that the representations and warranties have been violated will be sufficient grounds for declaring the agreement void.
- The term should be limited.
- There should be periodic reporting requirements for third party non-U.S. representatives.
- There should be an international arbitration clause for dispute resolution.

# Ongoing Oversight of Third Party Non-U.S. Representative

- Obtain written reports of third party non-U.S. representative's business activities, meetings, marketing efforts, or specific projects
- Review changes in personnel, especially at senior levels of agent.
- Reconcile invoice, payment requests, expense reports
- Conduct periodic audits or on-site access as provided by written agreement
- Provide mandated FCPA training for third party non-U.S. representative
- Recertify all third party non-U.S. representatives every two years
- Internal oversight meetings and on-site audits

# Due Diligence at the Global Enterprise

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General Dynamics

Director of International Compliance

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# Due Diligence at the Global Enterprise

Why is due diligence important?

- Business conducted in countries and regions perceived to be high risk for corruption.
- Use of third-party intermediaries to conduct business (e.g., sales representatives, consultants) or joint ventures to enter new markets.

# Due Diligence at the Global Enterprise

What is the purpose of due diligence?

- To demonstrate no actual knowledge of illegal activities.
- To demonstrate that reasonable steps were taken to mitigate the risk of illegal activities happening in the future.

# Due Diligence at the Global Enterprise

Should the level of due diligence be the same for all cases?

- Due diligence should be risk-based.
- Some circumstances are more risky than others.



# Due Diligence at the Global Enterprise

What is risk-based due diligence?

- The level of due diligence varies depending on the existence of one or more of higher-risk circumstances.
- Some companies use a “one size fits all” heightened due diligence approach because they treat all risk as high risk.

# Due Diligence at the Global Enterprise

continued

- The companies that use a “one size fits all” due diligence approach tend to have more resources to handle the administrative burden and they have very little appetite for risk.
- In some cases, it is a reflection of a past or current enforcement action.

# Due Diligence at the Global Enterprise

continued

- Other companies use a multi-tiered due diligence approach because they have some higher risk circumstances but most circumstances are perceived to be low to medium risk.
- These companies also have greater financial and resource limitations.

# Due Diligence at the Global Enterprise

## Risk Factors to Consider for a Heightened Due Diligence

- High risk country/region based on perceived corruption.
- Involvement of third-party intermediaries (especially those who receive compensation based on success)

# Due Diligence at the Global Enterprise

Risk Factors to Consider for a Heightened Due Diligence continued

- Involvement of government owned or controlled entities.
- Size and significance of transaction.
- Local partner requirements

# Due Diligence at the Global Enterprise

## Multi-Tiered Due Diligence Approach

### See Tiered Due Diligence Handout

- Illustrative of multi-tiered anti-bribery compliance due diligence approach for use of third-party intermediaries.
- This type of approach can be customized for other compliance areas.