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PSCI Conference Anti-Bribery & Anti-Corruption

September 2020

Agenda

- Global Trends
- Supply chain and Third Party risks
- Mitigation of Third Party risks
- Compliance – Way Forward

Global Trends

Global view on corruption

CORRUPTION PERCEPTION INDEX for INDIA

India		
Year	**Rank**	**Score**
2019	80	41
2018	78	41
2017	81	40
2016	79	40
2015	76	38
2014	85	38

2/3 of countries score below 50/100

43/100 Average Country Score

80 India's ranking in the annual corruption index, released by Transparency International (TI), among a group of 180 countries.

World Bank estimates the total cost of corruption globally to be around?

1. **$ 500 Bn**
2. **$ 250 Bn**
3. **$ 1 Trillion**
4. **$ 2.6 Trillion** ☑

Source: Transparency International, Corruption Perception Index 2019

From the news...

Last 5 year view

2015 · 2016 · 2017 · 2018 · 2019 · 2020

Mar, 2016

Global Pharma Company agreed to pay **$25 mn** to settle charges for **violation of FCPA** by **bribing doctors and others to prescribe its drugs**

Sep, 2016

Global Pharma agreed to resolve **violations relating to paying bribes to foreign government officials** in Russia, Mexico & Ukraine through a deferred prosecution agreement and total payments of **$519 mn**

Jan, 2017

Global Pharma agreed to pay more than **$30 mn to resolve investigations** on repeat **violations** involving interaction and improper recording of transactions with prohibited distributor in Brazil, and use of a third-party customs broker to pay bribes to government customs officials to facilitate the import and smuggling of unregistered and mislabeled products

Sep, 2018

Global Pharma Company agreed to pay **$25mn** to resolve **violations relating to payment of bribes by its subsidiaries to foreign government officials** in Kazakhstan and Middle East

Mar, 2019

Global Pharma Company agreed to pay **agreed to pay $231 mn** in a global settlement to resolve **violations of the FCPA in multiple countries** over the course of nearly a decade.

June, 2020

Global pharmaceutical and healthcare company and its former subsidiary agreed to pay over **$340 mn** arising out of conduct in multiple jurisdictions

Jul,2020

Global pharmaceutical company agreed to pay more than **$21 mn** to resolve charges that it violated the books and records and internal accounting controls provisions of the **FCPA**

Recent developments in the Anti-Bribery and Corruption Regulatory Space

01

From 2012 till date, over 110 enforcement actions have been taken by DOJ /SEC that have resulted in penalties of approximately $14 billion

02

In 2019, companies with operations in US paid/agreed to pay settlements collectively amounting to over $1 billion to the SEC and the DOJ, for their involvement in corruption cases in other countries, such as Russia, India, China, Mexico, and Brazil

03

SEC has received about 200 whistleblower allegations in 2019 for Foreign Corrupt Practices Act-related matters

04

Prevention of Corruption (Amendment) Act 2018,
The Benami Transactions Act 2016, Amendments to the Prevention of Money Laundering Act, 2016 (PMLA), Black Money and Imposition of Tax Act 2020 are the regulations introduced by the Government in the recent years

05

In 2019 and 2020 DOJ released the revised guidance note on 'Evaluation of Corporate Compliance Programmes' . In 2020 DOJ along with SEC released the updated FCPA resource guide

Prevention of Corruption (Amendment) Act, 2018 | Key Provisions

The Prevention of Corruption (Amendment) Act, 2018 lays down the following key provisions which are summarized below:

Bribe to Public Officials

- Gratification given in kind also now included apart from money
- However, in case of coercion, relief is available if reported within 7 days

Criminal Conduct

- Misappropriation of property disproportionate to the public officials income is an offence
- Intentional enrichment of self illicitly during the period of off ice is also considered an offence

Offence by a corporate

- The act introduces the concept of corporate liability wherein a commercial organisation can be found guilty under the act of giving/making promises with the intention to obtain/retain business or obtain/retain undue advantage while conducting business
- The act extends liability to foreign organizations with India operations
- Directors, managers, secretaries or other officers of such organizations will be liable if offence is committed with their consent or connivance and may be imprisoned with a period of three to seven years and penalized

Other Provisions

- Both bribe giving and receiving has been included in the Act.
- Enhanced penalties - Minimum time increased from 6 months to 3 years and Maximum time increased from 5 to 7 years
- Corruption trials to be concluded within a period of two years and can be extended by six months upto maximum four years
- Prior approval required from the relevant government authority before prosecuting a public official; Exception permitted includes cases of immediate arrest on charges of accepting or attempting to accept an undue advantage
- Repeated offence under this act will be punishable with imprisonment for five to ten years with a fine

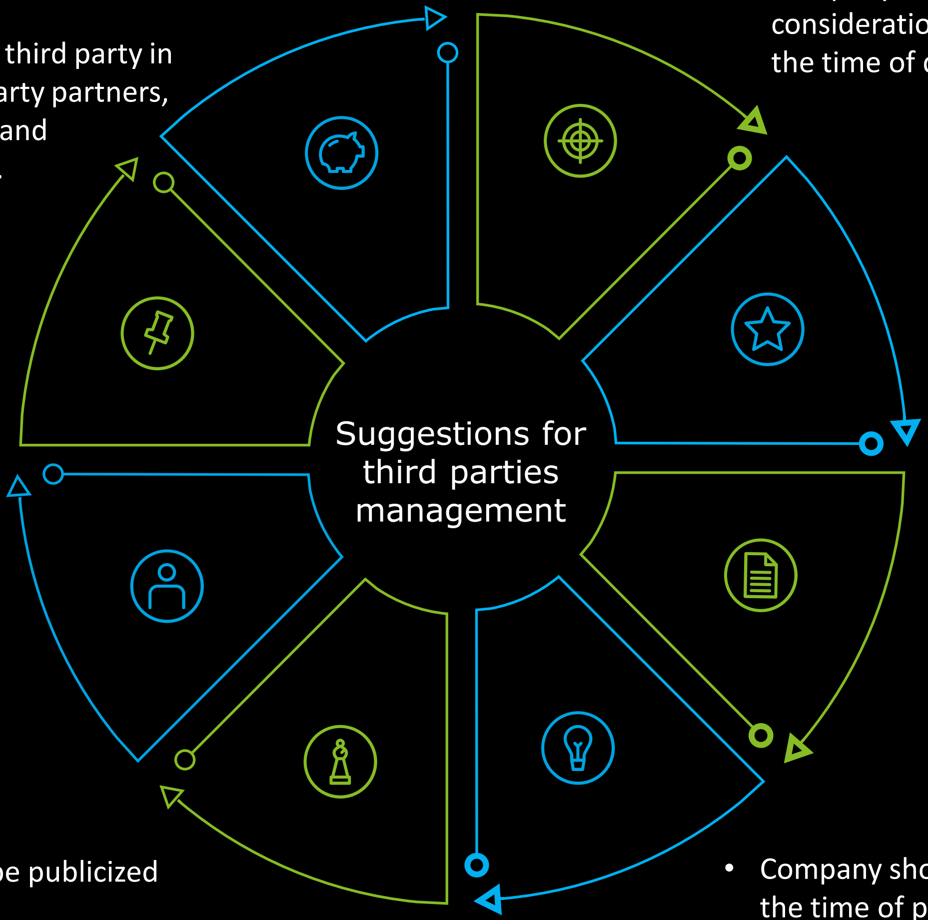
Key suggestions in the DOJ guidance with respect to third parties

Department of Justice ("DOJ") guideline in 2019 and 2020 mentions suggestions with respect to management of third parties as summarized below:

- Company should apply risk-based due diligence to its third party relationships.
- Be aware of business rationale for needing the third party in the transaction, and the risks posed by third-party partners, including the third-party partners' reputations and relationships, if any, with Government officials.

- Company should perform risk assessment taking into consideration the use of third parties by the organization at the time of designing compliance programme.

- Appropriate mechanisms to ensure that the contract terms specifically describe the services to be performed, that the payment terms are appropriate, that the described contractual work is performed, and that compensation is commensurate with the services rendered



- Company should have audit rights to analyze the books and accounts of third parties

- Communicate the policies and procedures to the third party pertaining to procurement, compliance, whistleblowing mechanism etc.

- Company to engage in risk management of third parties throughout the lifespan of the relationship and not only during the onboarding process.
- This should be performed through updated due diligence, training, audits, and/or annual compliance certifications by the third party

- Confidential reporting mechanism to be publicized to third parties as well

- Company should address the red flags identified at the time of performing risk-based due diligence to its third party relationships.

Supply Chain & Third Party

Knowledge Check | Situation 2

You have just been transferred to a new location in the middle of the year. You have been informed that it is difficult to get admission to any good school in the middle of the year. A key supplier offers to have your child admitted to a good school

A. Take his help because your child's career is very important.

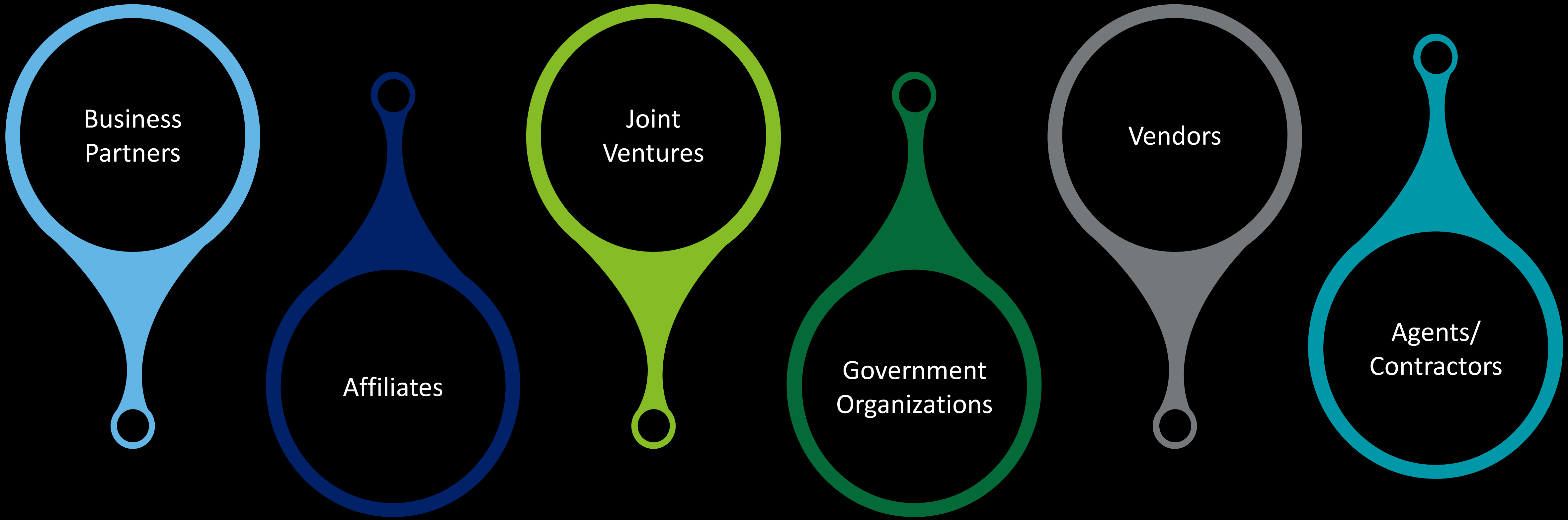
B. Make sure there are no strings tied to the offer.

C. Refuse his help and discuss it with your immediate superior.

D. Take his help but resolve not to be partial towards him.

What is a third party?

A third party can be defined as any individual or entity, which is not a direct employee, which provides a product/ service to, or on behalf of, the sourcing organization. Third parties are typically managed at both the Engagement and Relationship levels.



Third Party Universe (Illustrative)

Risks associated with third parties

Risks are compounded by the inherent nature of the business ecosystem that has multiple touchpoints with vendors, middle men and government agencies.

In our experience, the top 3 most vulnerable processes in the sector are

- Procurement
- Sales & Distribution
- Inventory

Types of risks & touchpoints

- Intellectual property theft and anti-trust actions
- Inventory - Diversion or theft of products
- Bribery and Corruption
- Procurement and Tendering
- Custom Clearances (CHA, Brokers etc.)
- Sales promotion and marketing
- Counterfeiting (Adulteration of products and efficacy of the drug) and Pilferage
- License registrations and renewals (Consultants, advocate, etc.)
- Medical practitioners – Accepting gifts in return for promoting certain drugs
- Preclinical and clinical trial issues, such as lack of informed consent and lack of data integrity
- Land aggregation (land aggregators, political parties, land mafia)

Knowledge Check | Situation 2

You are in the process of setting up a plant and have hired the services of a local legal firm to help you with all the regulatory clearances/approvals. You are informed that certain regulatory clearances cannot happen without paying bribes. You get the requisite permissions within a very short time frame.

A. Do nothing as you have not bribed anyone.

B. Take a confirmation from the firm that they have not broken any laws while helping you with the approvals.

C. Carry out a diligence to check if the legal firm paid bribes and take corrective measures if that is found to be true.

D. Make a note of not enlisting the services of this firm in the future and report the non-compliance internally.

Mitigation of Third Party Risks

Mitigation of third party risks

A third party can be defined as any individual or entity, which is not a direct employee, which provides a product/ service to, or on behalf of, the sourcing organization. Third parties are typically managed at both the Engagement and Relationship levels.

01

Inventory of third parties
Collating an exhaustive list of third parties is the first step in understanding the type of third parties

02

Risk based identification
This step involves categorization of third parties based on the risk. Customized questionnaires can be designed to identify any FCPA red flags

03

Due diligence based on risk rating
Risk based approach triggers the right set of diligence activities and questions for the third parties leading to efficiency and effectiveness

04

Formal engagement of third party
This should include third party representations, the right of company to audit, the right of company to terminate the agreement etc.

05

Post engagement monitoring of risk
A company should have its third parties certify, on an annual basis, that they are in compliance, and will continue to comply, with the company's FCPA policies and procedures

Mitigation of third party risks

Inventory of third parties

Collating an exhaustive list of third parties is a big undertaking. Risks cannot be assessed and mitigated until they are found, but most companies have tens of thousands of third party relationships. The company should have an understanding of who their third parties are and the activities they perform.

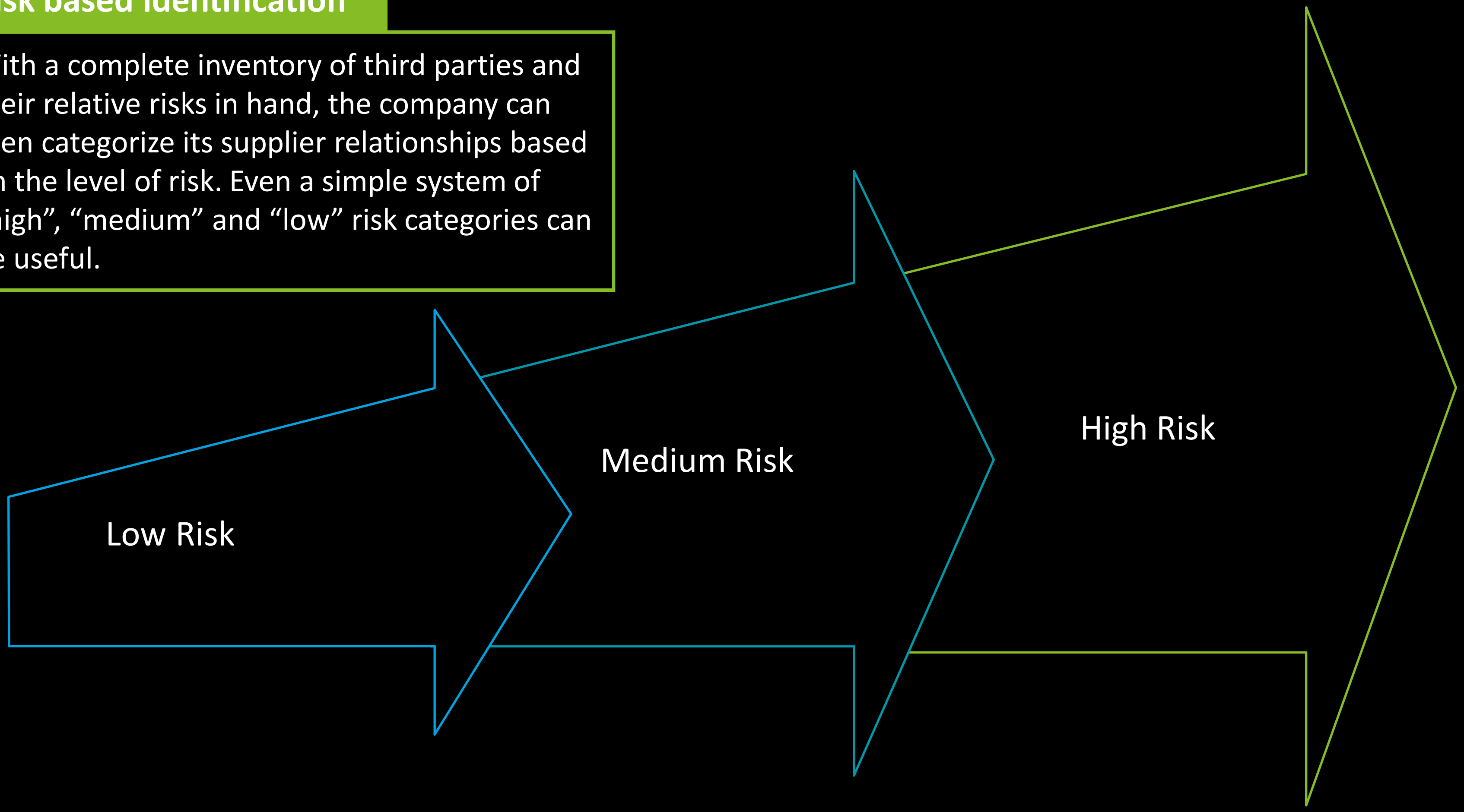
The term third party includes all the entities that have entered into a business relationship with the company.

Third Party Universe (Illustrative)

Mitigation of third party risks

Risk based identification

With a complete inventory of third parties and their relative risks in hand, the company can then categorize its supplier relationships based on the level of risk. Even a simple system of “high”, “medium” and “low” risk categories can be useful.



- TP is related to foreign officials
- TP is has a very high interaction with the customers
- TP is incorporated in an offshore jurisdiction
- TP requests payment to offshore accounts

High risk parameters (Illustrative)

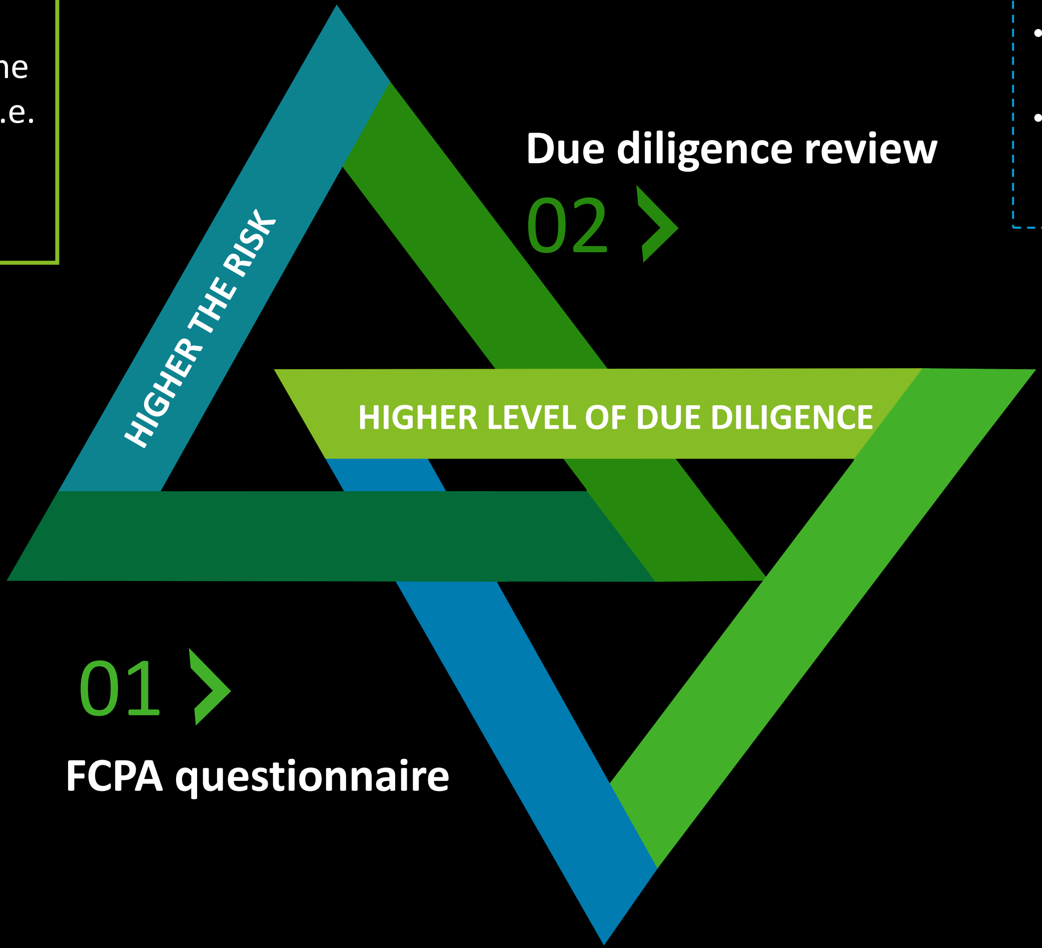
Mitigation of third party risks

Due diligence based on risk rating

Risk based approach triggers the right set of diligence activities and questions for the third parties leading to efficiency and effectiveness. The diligence exercise can be divided into two parts i.e. completion of a FCPA questionnaire by the third party and a review exercise

The FCPA questionnaire should be designed to identify FCPA "red flags". At a minimum, the third party should provide:

- Contact information of its owners and board of directors, including % ownership by each, and other businesses in which each might have interest
- Information on related companies
- Information on relationship with current or former government officials



02 Due diligence review

01 FCPA questionnaire

At a minimum, the due diligence review should cover:

- Types of license, registration & renewals required by third party
- The identification & resolution of any FCPA red flags
- An acknowledgement from the third party agreeing to abide by the FCPA & other relevant laws

Mitigation of third party risks

Formal engagement of third party

All high risk relationships with third parties should be memorialized in a written agreement. Below are illustrative provisions, which can be included in the agreement:

1. Third party representations and warranties that it is not owned or controlled by a foreign government, that no foreign official holds an ownership interest in it, and that it will abide by company's FCPA compliance policies and procedures
2. The right of the company to audit, at its discretion or at least based on reasonable suspicion of a violation, the third party's books and records and other business records
3. The right of company to terminate the agreement if it has a good-faith belief that the third party has made improper payments, and to have all funds previously paid under the arrangement returned
4. The right of company to disclose the third party's conducts to regulators
5. The right of the company to require annual certifications of prior and future compliance with the FCPA to be signed by all significant members of third party (Directors, people with regular contact with government etc.)

Mitigation of third party risks

Post engagement monitoring of risk

Vigilance over a third party's activities does not end when the third party is engaged. Rather, it continues during the period the third party is engaged by the company

Exercising of audit right over a third party to verify compliance with FCPA and other applicable regulations

Obtain a declaration on an annual basis, that the third party is in compliance with FCPA and other applicable regulations

Any red flags raised by the third party's activities should be fully investigated and the relationship be re-evaluated basis the results

If the company becomes aware of possible violations through a third party, the company should immediately curtail the use of that third party

On-going monitoring (Illustrative)

Knowledge Check | Situation 3

A vendor sends you a 5 gram gold coin as a Diwali gift. The gold coin carries the vendor's logo and name. He informs you that he has sent similar coins to all his Business Associates.

A. Bring the gift to the attention of the Company.

B. Return it to the vendor with a thank you note.

C. Accept the coin believing it to be a standard gift sent by the vendor to all his business associates.

D. Give one of your Company's corporate gifts in return.

Case Study

Background: Our client (pharmaceutical company) was worried about few of its third parties and wanted to conduct an ABAC risk assessment on these third parties to understand any potential irregularities and red flags with respect to their procurement of services.

Proposed Approach for third party risk assessment

Step 1 | Background and Process Review

- **Review polices and procedures** of vendor/s pertaining to the government interactions, payment approvals, Anti-bribery and compliance etc.
- **Process walkthrough** with key stakeholders including process owners
- **Data Collection** from the Client and the third party
- **Identify known issues** by review of past internal audit reports, statutory audit reports etc, if available

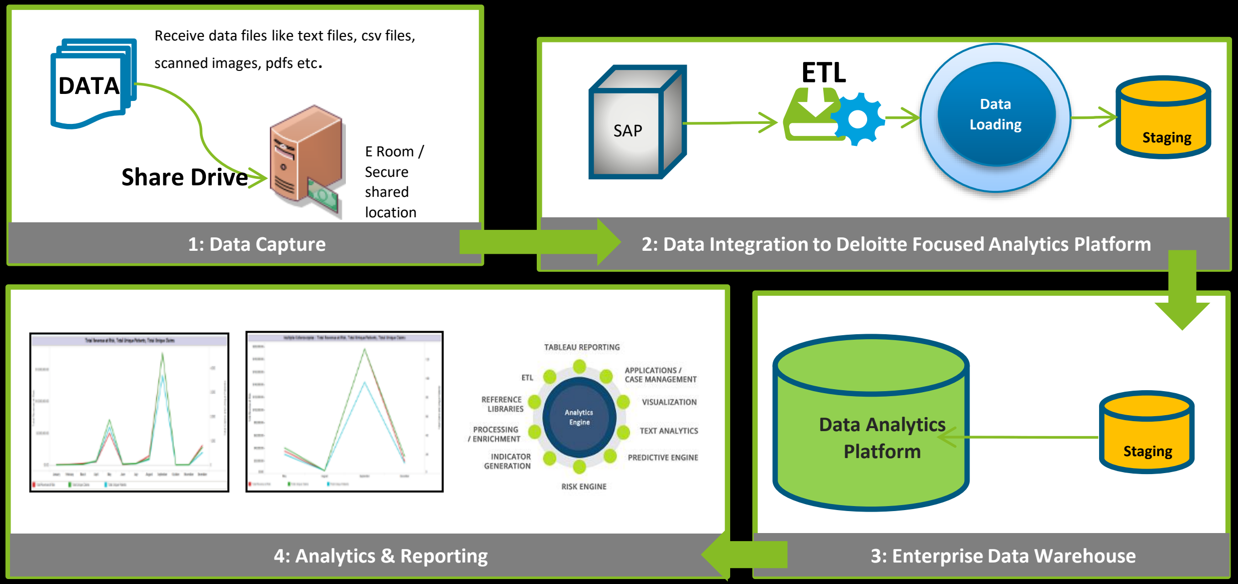
Step 2 | Data Analysis and Transaction Review

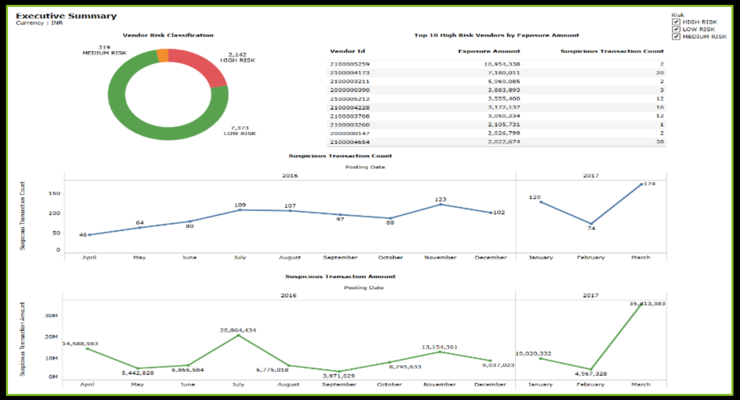
- **Focused data analytics-** Processed the obtained accounting/ transactional data and performed data analytics tests
- **Sample selection –** Basis the outcome of data analysis and understanding obtained from the management discussions and policy reviews, selected sample transactions
- **Transaction testing-** Reviewed documents such as agreements, comparative price quotations, invoices, proof of service/GRN, proof of payment etc.

Step 3 | Consolidate findings

- Discussions with the management on the findings
- Summarized the findings in a written report

Forensic Data Analytics





Illustrative vendor profiling

Compliance – Way Forward

Key considerations for compliance teams in India

Consideration to each company's unique circumstances

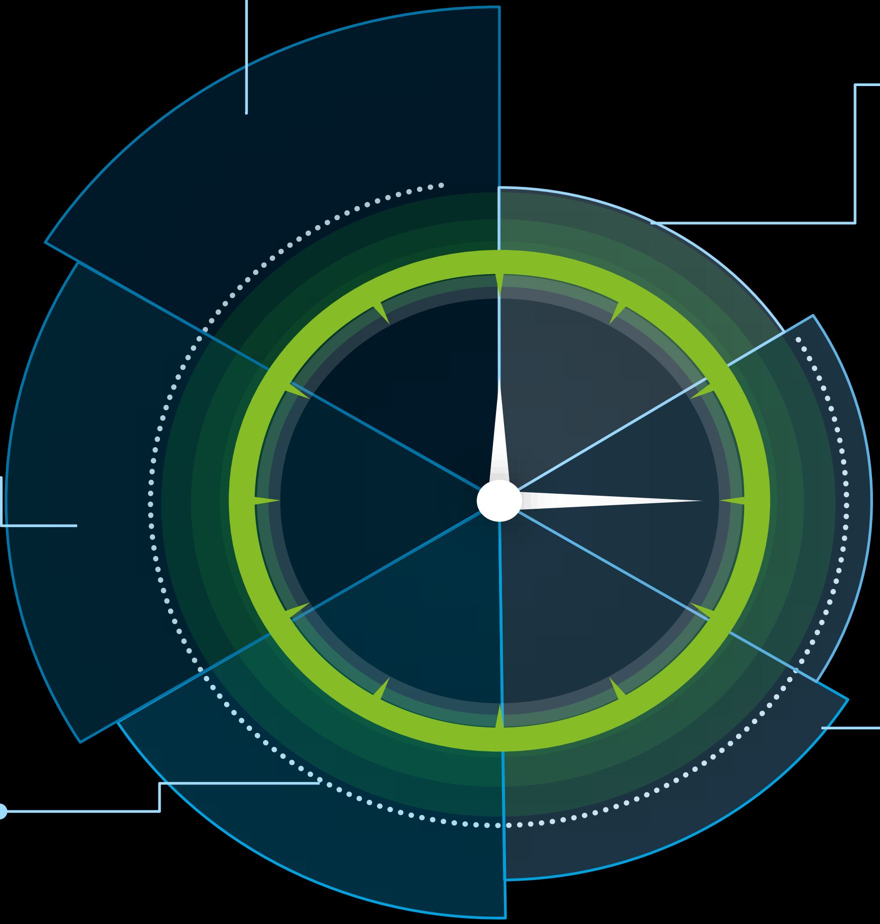
Was your compliance program built after considering the risks associated with the uniqueness of your industry, relevant market, geographical presence etc.?

Sufficiency of necessary manpower and resources?

Considering your responsibilities and expectations do you have enough resources to implement and monitor the effectiveness of the compliance program in this changing dynamic environment?

Periodic/Regular risk assessment

How often do you perform a risk assessment for the third parties after they have been on boarded to identify any potential issues?



Sufficient direct or indirect access to data for the compliance resources

- Do you have a centralized mechanism to pull out the data across the geographies or businesses to perform focus compliance analytics?
- Do you analyse the data manually or is there any platform to do it on a continuous basis?

Integration of the acquired entity into existing compliance structures

How often do you perform an exercise for a timely and orderly integration of compliance standard into the acquired entities? Or is it just restricted to the pre-acquisition due diligence?

Questions?

“The important thing is not to stop questioning”

— Albert Einstein