Entities that conduct effective “due diligence on their acquisition targets are able to more accurately assess a target’s value and negotiate for the costs of the bribery to be borne by the target.” More importantly, the due diligence may suggest that the merger or acquisition should not take place.

3.11.1 Pre-Acquisition Due Diligence

*It should never be assumed that third-party relationships acquired from other entities have been subject to adequate due diligence.*

Avoiding vicarious liability should be a primary focus of due diligence associated with a prospective merger or acquisition. An entity “that does not perform adequate [anti-bribery] due diligence prior to a merger may face both legal and business risks.”

> “[I]nadequate due diligence can allow a course of bribery to continue—with all the attendant harms to a business’s profitability and reputation, as well as potential civil and criminal liability.”

3.11.2 Post-Acquisition Integration

*The acquired entity should be fully integrated into the internal controls and compliance program of the acquiring entity.*

Due diligence “is only a portion of the compliance process for mergers and acquisitions.” The “acquiring [entity should] promptly incorporate[] the acquired [entity] into all of its internal controls, including its compliance program. [Entities] should consider training new employees, reevaluating third parties under [the entity’s] standards, and, where appropriate, conducting audits on new business units.”

4. DUE DILIGENCE

To reduce the risk of vicarious or successor liability, an entity contemplating investment in a foreign venture or a business relationship with a third party, including a foreign partner, representative, or agent, should conduct thorough due diligence. In situations where legal or practical realities make the termination of a relationship difficult, the inquiry should be even more probing. In each situation, the extent of the inquiry should be governed by the circumstances.
4.1 **Due Diligence Must Always Be Conducted in Good Faith**

*Due diligence must always be conducted in good faith and must never be perfunctory.*

Regardless of context, due diligence must always be conducted in good faith. It must never be simply going through a series of routine steps. A dispassionate consideration of all relevant factors is required. Blind obedience to policies and procedures may not always suffice. A need always exists to step back and reflect as to whether all relevant factors have been properly considered.

An explanation to the effect that “this is the way business is done there” or “this is what everyone else does” is never sufficient. It may well be that the practical aspects of doing business in certain parts of the world may dictate the use of unconventional practices. But the use of unconventional practices and the reasons for using them should be carefully examined and documented. The reasons given must be more than conclusory, and they should be fully annotated for future reference.

4.1.1 **Due Diligence Extends to Addressing Concerns Raised**

*Due diligence should address whether concerns raised are valid and whether there may be ways to minimize potential risks.*

The due diligence process is not limited exclusively to identifying problems or areas of concern. It also entails determining whether the basis for concern is unfounded. Negative information may not have a basis in fact. Moreover, even if there is a basis for concern, the due diligence may be able to provide guidance as to whether effective means may be available for avoiding or minimizing the associated risks.

4.1.2 **Affirmative Due Diligence May Be Able to Address Certain Concerns**

*Affirmative due diligence offers another way of demonstrating that some concerns may be unfounded.*

In most situations, identifying negative information is the focal point of the due diligence process. However, in some situations, apparent concerns
may be addressed by affirmatively proving that the underlying basis for concern is unfounded. For example, unexplained wealth frequently raises concerns as to whether its source may be illicit activity. By determining that the wealth is due to an inheritance or to legitimate business activities, the underlying basis for concern may be dispelled.

4.2 Documentation

All aspects of the due diligence process should be carefully documented.

The due diligence process should be carefully documented. The documentation should summarize the sources consulted and results of the review process. Questions raised should be addressed with an explicit statement of how those questions were resolved or what may remain unresolved. Evidence of a good reputation and an absence of derogatory information should be recorded along with the identity of the sources of such information. Similarly, derogatory information, its source, and whether verified or disproved should also be documented.

Any documentation of due diligence should be maintained well past the withdrawal from an investment or the termination of a business relationship. The documentation should even be maintained well past any theoretical statute of limitations. Well-documented due diligence may provide an invaluable defense if allegations are made years later.

4.3 Unreliable Sources

An entity should never base its due diligence on unreliable sources of information.

Care must be exercised to ensure that the sources consulted can be depended upon to provide reliable information. It should be assumed that the identity of the sources will someday be subject to disclosure. The validity of the due diligence, and the deference that will be given to it, will ultimately depend on the credibility, the competence, and the reputation of the source of a report or an opinion. Favorable reports from unreliable sources are not acceptable. Reports should never be sought from sources that may be influenced or essentially “bought.”
4.4 Red Flags

Red flags pose a legitimate basis for concern and suggest the need for additional caution and due diligence.

What constitutes a red flag depends on the circumstances associated with a particular situation. What may be questionable in one set of circumstances may not pose a basis for concern in other circumstances. But, in general, a red flag is a set of facts that, in a given context, would prompt a reasonable person to have a basis for concern as to whether prohibited conduct took place or is likely to occur.

Red flags are not, in and of themselves, conclusive evidence of prohibited conduct. However, they may present a legitimate basis for concern and suggest the need for additional due diligence and caution. “The degree of scrutiny should increase as red flags surface.” Some of the more traditional red flags found in various contexts to be a basis for concern are described below.

4.4.1 Country

The countries where an entity conducts business, either directly or through third parties, should be considered in terms of bribery and corruption risks.

The likelihood of corruption is often greater in parts of the world where the rule of law is not consistently observed. A specific country and, in some instances, a specific locale within a country may serve as a basis for heightened concern. Where an entity or agent is located is not necessarily the critical factor. The analysis should focus on where an entity is actually engaged, including where the agent is actually engaged on behalf of an entity.

For third parties, the analysis should focus on where the third party acts on an entity’s behalf. An agent may be based in a part of the world where the risk of corruption is low. But if the agent acts on an entity’s behalf in parts of the world where there is greater risk of corruption, the nature of the due diligence and the consideration of other protective measures must be increased.

4.4.2 Industry

The nature of a particular industry may increase bribery and corruption risks.
The nature of an industry may serve as a basis for concern. In general, when large governmental expenditures are involved, the prospect of corruption is greater. Similarly, when access to vital markets or rare resources is subject to governmental approvals, the prospect of corruption is likely to be greater. Certain industries like oil, construction, aircraft, telecommunications, and defense have a history of being plagued with various forms of corruption. Many other industries or subsets of industries may also have a history of corruption.

4.4.3 History and Reputation

An individual’s or entity’s history and reputation should be given serious consideration.

An individual’s or entity’s history or reputation may serve as an early indicator of potential problems before making an investment or entering into a business relationship. At the very least, a questionable history or reputation should lead to additional due diligence. It is highly unusual for someone who engages in questionable conduct to limit that conduct to an isolated incident. The questionable activity is likely to be repeated.

Information suggestive of a questionable reputation should be taken into account. News accounts of an individual or entity being in some way associated with bribes, payoffs, or kickbacks should receive prompt attention. Rumor or the experiences of others may also serve as a basis for concern. Although unverified reports should never be treated as conclusive, they should also not be disregarded. They should prompt further inquiry and additional due diligence.

4.4.4 Misrepresentations and Inconsistencies

Misrepresentations and a pattern of inconsistencies should be a basis for concern.

A pattern of misrepresentations or inconsistencies should give rise to serious concerns. A related concern is when references decline to respond to questions or become evasive. Such responses may be indicators of future problems. Without a clear understanding as to the basis of the misrepresentations or inconsistencies, and a well-supported basis as
to why they will not continue, proceeding with a business relationship should be undertaken only with the utmost caution and only with special mechanisms in place to minimize the likelihood of prohibited conduct.

4.4.5 Refusal of Certification or Confirmation

A basis for concern should arise when an employee or agent refuses to certify his, her, or its conformance with compliance obligations.

Certifications may be a useful tool in the implementation and enforcement of an effective compliance program. A basis for concern should arise in situations where an employee or agent refuses to certify that he, she, or it will not engage in prohibited practices. By themselves, certifications cannot and will not relieve an entity from liability. The refusal to execute a certification does not by itself constitute a violation. Yet it is suggestive of a basis for concern.

4.4.5.1 Certifications Provide a Record of Due Diligence

Certifications may provide evidence of the nature and extent of active enforcement of a compliance program.

Certifications provide a record, particularly to enforcement officials, that employees, agents, and others acting on behalf of an entity were specifically asked about questionable conduct. Certifications provide a record of who was asked, when they were asked, and what they were asked. The questions may be tailored to address specific areas of concern.

4.4.5.2 Certifications May Serve as a Reminder

Certifications may serve as a reminder of the need to be sensitive to certain compliance concerns.

Certifications, especially when sought regularly, help enhance an employee’s or agent’s sensitivity to the importance of an entity’s prohibitions on improper inducements. Too often, compliance concerns may recede in terms of import or focus to employees and to those acting on behalf of an entity. The timing of certifications may have the added benefit of reminding employees and agents of the need to remain vigilant with particularized compliance concerns.
4.4.5.3 **Certifications May Serve as an Educational Tool**

*Educating employees and agents as to potential areas of concern may be among the benefits and purposes of certifications.*

By varying the questions asked in the context of practical and local examples of what may constitute improper inducements, employees and agents are more likely to learn what should prompt their attention and concern. Certifications may also increase the likelihood of disclosures to compliance officials. Asking in different ways, citing different examples, or focusing on differing but related issues may prompt an employee or agent to reflect and to think in broader terms as to what may require disclosure.

4.4.5.4 **Certifications May Reveal Possible Violations**

*Carefully crafted certifications may have the benefit of fleshing out areas of concern.*

Many employees and agents may automatically sign certifications without giving much thought to the process. Yet, especially over time, some may have misgivings. A failure to sign a certification should prompt compliance officials to follow up. Carefully crafted certifications may prompt employees to identify possible areas of concern. A provision calling for the affirmative disclosure of questionable conduct may also enhance the likelihood of disclosures.

4.4.5.5 **Certifications May Provide a Clear Basis for Disciplinary Action**

*False or misleading answers to certifications may provide a documented basis for taking disciplinary action.*

Certifications may provide support for disciplinary action and possible termination should it be learned that the employee or agent provided a false certification. Certifications provide a means of notice to an employee or agent. If answers are found to be demonstrably false or misleading, certifications may provide a documented basis for taking disciplinary action.
4.4.6 Ties to Government, a Political Party, or a Political Candidate

*Whether someone may have direct or indirect ties to a particular government official should give rise to special inquiry.*

Whether those involved with a prospective investment or a prospective partner or third party have ties to a particular government official should give rise to special inquiry. The inquiry should focus on the nature of the relationship and on what bearing the relationship may have on prohibited conduct.

A similar inquiry should take place if there is a relationship with an official of a political party or a candidate or prospective candidate for public office. In all of these situations, any indirect relationship, through family members or through other intermediaries, should be examined carefully to determine possible implications.

4.4.7 Parastatals

*Relationships with parastatals—government-owned or government-controlled entities—should require careful scrutiny.*

It must always be kept in mind that an individual or entity may have a relationship with a parastatal—a government-owned or government-controlled entity. In many instances, the relationship may not be self-evident. Since no definitive test exists, special care needs to be exercised. Especially when sales promotions or other incentive programs are involved, it is important to determine an individual’s or entity’s status and what the relationship may be to a parastatal. 341

4.4.8 Anonymity

*Any statements to the effect that the identity of an agent, representative, consultant, or party to a transaction must remain anonymous should be a basis for concern.*

Any statements to the effect that the identity of an agent, representative, consultant, or, in some situations, a party to a transaction will or must remain anonymous should be a basis for concern. Exceptional circumstances may on occasion serve as a legitimate basis for anonymity. If
so, the basis for anonymity should be credible, well supported, and well documented.

Concerns should be raised if a statement is made to the effect that steps will be taken without anyone having to know the details of what is being done on an entity’s behalf. Willful blindness should never be tolerated. The more transparent a relationship or transaction, the less likely that the underlying conduct is questionable. Suspicions are therefore less likely to arise.

4.4.9 The Nature and Source of Recommendations

The nature and source of a recommendation may be an important consideration as the source may have a vested interest or some form of conflict of interest.

If a public official, political candidate, or party official suggests that a certain agent be retained or used in conjunction with a transaction, an inquiry should be made to understand the basis for the suggestion. Recommendations of this nature may, at least on the surface, be suggestive of a coordinated effort to facilitate an improper payment. It should never be assumed that the recommendation was coincidental or merely an act of kindness.

4.4.10 Peculiar Statements or Requests

Statements or requests that may seem abnormal should require additional scrutiny as to their underlying rationale.

What is actually said or implied with respect to prospective investments or business relationships requires sensitivity. The unexpected need for additional funds or special arrangements should give rise to concern. The answer may be obvious. But the precise basis for the need for the additional funds or special arrangements should be well understood and well documented.

Any request outside the norm for the industry or for a particular part of the world should give rise to additional due diligence as to the basis for the request. Among the types of requests that should cause concern are those for unusual or extraordinary payments, including, among others, unorthodox or substantial up-front payments; requests for unusually large lines
of credit; requests to disregard invoices or to pay unsubstantiated invoices; and payments for services for which there is no evidence that the services were ever provided.\textsuperscript{343}

\subsection*{4.4.11 Size and Timing of Payments or Commissions}

\textit{Special attention must be given to payments and commissions that may be disproportionate.}

Where the size of a payment or commission appears to be disproportionate to the experience, expertise, or resources of the individual or entity providing the service, questions should be raised as to what is really being proposed. A determination needs to be made as to how much time will be involved; what sort of resources will be needed; whether there are any protections to ensure that the payment or commission is not a pass-through to another individual or entity; and what has been paid in the past for comparable expertise and assistance.

\subsubsection*{4.4.11.1 Verified Experience or Expertise Must Justify the Amount Paid}

\textit{The amount of compensation should be supported by experience and expertise as well as industry standards.}

Among the factors to consider is whether the individual or entity has a record of proven experience in the pertinent field or industry. A related consideration is whether there is qualified staff or other resources that lend credence to the validity of the compensation sought. Factors that may bear on the analysis include whether documented expenses are substantial, whether substantial risk is involved, and whether the individual or entity is committing capital or substantial resources to the endeavor.

\subsubsection*{4.4.11.2 Payments Should Not Be Linked to Governmental Action}

\textit{Prospective payments should be examined to ensure that there is no linkage to governmental approval or questionable conduct.}

A related consideration is whether a payment or commission is linked in some way to approval by a governmental official or some form of
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governmental action leading to the generation of business. Due diligence should extend to possible linkage to actions taken by entities ostensibly operating in the private sector. Those entities may be parastatals. Even if the entities are not parastatals, legitimate concerns may remain over whether private or commercial bribery is involved.

4.4.12 Method of Payment

*Unusual or convoluted means of making payments should raise concerns.*

Indirect and less traceable means of making payments should raise concerns. This includes requests that payments be made in cash, that checks be made to “cash” or “bearer,” that payments be made in a third country, or that payments be made in otherwise unconventional ways. Requests for false or vague invoices or a reluctance to document transactions should always raise concerns.

4.4.12.1 Discounts

*Care must be exercised in determining why discounts are being sought and the mechanics associated with the discounts.*

Regardless of setting or what anti-bribery law may be implicated, care must be exercised in determining why discounts are being sought and the mechanics associated with the discounts.\(^{344}\) The ways in which discounts have been used to fund improper inducements are limitless.\(^{345}\) Aside from improper inducements to foreign public officials, the improper use of discounts may extend to kickbacks or other forms of private or commercial bribery prohibited by various legal regimes, including, among others, the U.S. Travel Act,\(^{346}\) the UK Bribery Act,\(^{347}\) and Canada’s Secret Commissions Act.\(^{348}\)

4.4.12.2 Commissions

*The context and circumstances surrounding a commission are critical to determining whether it may be improper.*

Whether the payment of a commission is in line with industry standards is just one of many factors in determining whether an inducement
may be improper. The larger context must always be kept in mind. The key to any analysis is understanding what may be really taking place.

Generally, commissions should be paid “to third parties on a [one-time] fee basis where their role is pure introduction.”[^349] “[P]ayment terms and how those payment terms compare to typical terms in that industry and country, as well as the timing of the third party’s introduction to the business,” should be subject to review.[^350] How a commission is paid may be another factor to consider. Making a commission payment conditional upon government approval may also be problematic.

Even if industry norms serve as support for the commission, a basis for concern may still exist. If an agent has ties to a government or a para-statal, relying on industry standards does not necessarily overcome concerns generated by potential ties to the government. The agent may still be acting as a conduit for an improper payment.

4.4.13 Placing Arbitrary Controls on the Due Diligence Process

*Placing arbitrary limits or controls on how the due diligence process is conducted should be a basis for concern.*

Placing arbitrary limits or controls on the due diligence process may be a basis for concern. This is particularly so where there is no good basis for limiting or controlling the due diligence process.[^351] The greater the degree to which difficult and potentially awkward questions are precluded in the due diligence process, the greater the need to justify the deviation from a thorough and direct due diligence process.

Valid reasons may exist for placing limits or controls on the due diligence process.[^352] Whatever those reasons, they must be well supported and well documented. Every effort needs to be taken to ensure that the limitations placed on the due diligence process are not used as a means of preventing relevant information from being disclosed.

4.4.14 Qualifications

*Qualifications or relevant experience should always be considered.*

Lack of qualifications or relevant experience should always be a basis for concern. Why a certain individual or entity may be used under these circumstances needs to be explored and adequately explained. This may
extend to situations where staff or facilities may be inadequate or otherwise unqualified. The concerns may become particularly compelling if the compensation does not take into consideration the lack of qualifications, relevant experience, or resources.

4.4.15 Illegal Agency

Who may legally serve as an agent must be considered with care.

Specific limitations may be imposed in some countries as to who may serve as an agent. A determination should be made as to whether the proposed individual or entity is prohibited by the written law of a country from serving as an agent, representative, or consultant. A similar determination needs to be made when an investment may be contemplated.

A proposed investment or business relationship should not proceed if prohibited by the written law of a country. Care must always be exercised to ensure that any legal opinion is provided by competent and respected legal counsel. As is the case with other aspects of the due diligence process, the adequacy of the due diligence may ultimately depend upon the competence and reputation of the legal counsel who renders the opinion.

4.5 Communicating Sensitive Information

Great care must always be exercised in communicating sensitive information.

The unintended consequences of communications must always be kept in mind. How and where information may be conveyed may pose a real danger to an entity and those acting on its behalf, including those involved with conducting due diligence or internal investigations. Simply designating the communications as privileged or confidential may not suffice. What may be protected in a legal setting is unlikely to have any meaningful impact in dealing with practical realities in some parts of the world.

The protected status of communications in legal settings may not apply in all jurisdictions. But, in addition, the communications may be more easily subject to intrusions by governments, by competitors, or by others with questionable motives. Information in the wrong hands may place in serious jeopardy the very well-being of employees, agents, and anyone acting on behalf of an entity.