

FCPA Compliance: An Investigator's Perspective

By

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Agenda

- FCPA Overview
 - Background
 - Provisions
 - What's prohibited? / What's permissible?
 - Fines / Other Consequences
- UK Bribery Act
- Common Fraud Schemes and Red Flags
- Compliance Program – Key Components
- Questions

FCPA Background

- Investigations by the Securities and Exchange Commission (SEC) in the mid-1970s revealed that over 400 U.S. companies admitted making questionable or illegal payments in excess of \$300 million to Non-U.S. government officials, politicians, and political parties.
- U.S Congress enacted the Foreign Corrupt Practices Act (FCPA) in 1977 to bring a halt to the bribery of Non-U.S. officials and create a level playing field.

FCPA Provisions

Anti-Bribery Provision

- The FCPA criminalizes the bribery of Non-U.S. officials anywhere in the world where the purpose of the bribe is to influence an official decision in order to obtain a business benefit.

Accounting (Books and Records) Provision

- The FCPA also requires companies whose securities are traded on a U.S. exchange to meet certain standards regarding their accounting practices, books and records, and internal controls.

What is Prohibited?

- The Anti-Bribery provisions of the FCPA prohibit giving or promising to give **anything of value** to a **Non-U.S. official** with the intent to **corruptly** influence the official in some official act to obtain or retain business.

“Anything of Value”

Examples include:

Cash or cash equivalent

Gifts

Tickets to sporting events, concerts, plays, etc.

Charitable donations

Travel expenses

Loans

Company stock options

“Non-U.S. Official”

A Non-U.S. Official is any officer or employee of a non-US government or any department, agency or person acting in an official capacity on behalf of the government, including:

- Political official or candidate of a political party
- Officials or employees of public international organizations, such as the World Bank, IMF or United Nations
- Officers and employees of state-owned enterprises

“Corruptly”

- An intent to wrongfully influence the recipient in a way inconsistent with their duties.
- Does not require that the act be fully consummated or succeed in producing the desired outcome.

What is Permissible?

Facilitating Payments

- Also known as “grease payments” are typically small payments made to Non-U.S. officials to expedite or secure a non-discretionary routine government action.
 - Expediting but not approving items such as visas, permits, and licenses
- Not allowable under UK Bribery Act...many companies now prohibit facilitation payments unless there is a health and safety risk.

What is Permissible?

Reasonable bona fide expenditures related to the promotion, demonstration, or explanation of products or services.

- Travel, meals and lodging to tour company facilities to meet contractual or regulatory requirements.

What is the Record-Keeping Provision?

The Record-Keeping and Accounting provisions require companies:

1. To keep books, records and accounts in reasonable detail to accurately reflect transactions; and
2. To devise and maintain an adequate system of internal accounting controls

Accounting Implications:

- A facilitation payment may be in “compliance” with the FCPA Anti-Bribery Provision, however if documented inappropriately, it could be considered a violation of the Record Keeping and Accounting Provision
- Failure to describe what actually occurred could be a violation
 - Example: Payment for lawful commission on project is recorded as “equipment repair.”
- Intentional inaccurate recording of any payment is a violation

Lucent Technologies

- Lucent spent over \$10 million on travel and entertainment expenses from 2000 to 2003 for approximately 1,000 employees of state-owned or state-controlled telecommunications enterprises in China which were prospective or existing Lucent customers.
- Although many of the approximately 315 trips were allegedly to provide training or to allow inspection of Lucent's factories, the Chinese officials spent little or no time in the United States visiting Lucent's facilities.
- They visited tourist destinations, such as Hawaii, Las Vegas, New York City, Niagara Falls, the Grand Canyon, Disney World, and Universal Studios.
- Lucent improperly recorded the expenses in its books and records. Over 160 trips were charged to Lucent's "factory inspection account," even though the officials did not visit a Lucent factory at any time during their trips.
- In December 2007, Lucent agreed to pay a \$1 million criminal fine and \$1.5 million in civil penalties.

Criminal Fines

Anti-Bribery

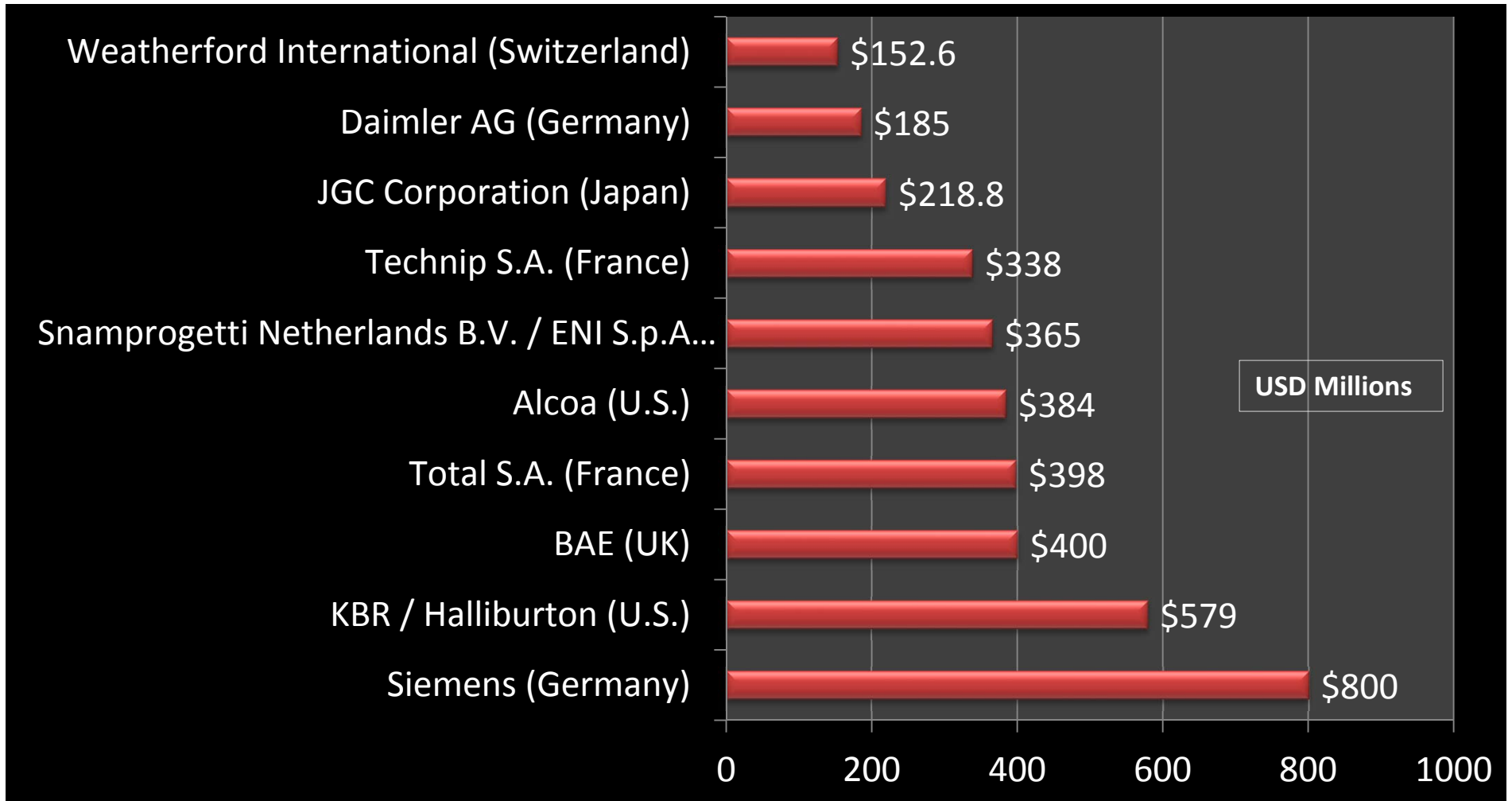
- Entities: Fine up to \$2 million per violation
- Individuals: Fine up to \$250,000 and/or imprisonment up to 5 years per violation

Accounting Provisions

- Entities: Fine up to \$25 million
- Individuals: Fine up to \$5 million and/or imprisonment up to 20 years

Fines imposed on an individual cannot be paid directly or indirectly by the company on whose behalf the person acted.

Top 10 Enforcement Actions (U.S. Fines Only)



Source: www.FCPABlog.com

THE FINES ARE SEVERE BUT THERE ARE
OTHER CONSEQUENCES

THE WALL STREET JOURNAL.

May 6, 2008

WEDNESDAY, JANUARY 31, 2007 - VOL. CCXLIX NO. 25

French Firm Scrutinized In Global Bribe Probe

Feb. 6, 2007, 5:43PM

Firms to pay \$26 million in Nigeria bribery case

By TOM FOWLER
Copyright 2007 Houston Chronicle

WIDENING SCANDAL

At Siemens, Witnesses Cite Pattern of Bribery

SEC penalizes Fidelity over improper gifts

\$8 million ends long-running case over offerings from outside

March 18, 2012, 10:28 AM
Dun & Bradstreet Investigating FCPA Allegations

Officials to Be Prosecuted for

Bridgestone to shut unit due to bribes

REUTERS NEWS SERVICE

November 1, 2012, 6:57 PM

Avon Warns of Further Firings Amid FCPA Probe

FINANCIAL TIMES

Afghan minister accused of taking bribe

\$30 MILLION PAYMENT ALLEGED

The New York Times

Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle

NEWS

ALLEGATIONS OF FRAUD IN THE HOUSE -

J&J Reports Improper

Drug Firm Tells Regulators Of Expenditures Overseas; A Senior Executive Resigns

SEC spokesman declined to comment. The disclosures are a bitter pill for a company that prides itself on its clean corporate image. It was not immediately clear whether the probe extended beyond the countries, which J&J described as "strategic."

Johnson & Johnson Faces Corruption Charges

Johnson & Johnson's general manager in the United States and that one of its executives is resigning over the charges.

By JULIA WERDIGIER
Published: October 1, 2009

Did minister get \$75,000 bribe?

Other Consequences

- Damage to company reputation
- Loss of faith in company by stakeholders, such as investors, shareholders, employees and customers
- Severed business relationships with other companies
- Incarceration of individuals
- Debarment from government contracting
- Government-appointed monitors
- Costly to Investigate
 - Walmart spent USD \$439 million the past two years to investigate allegations of improper payments. Projected costs for 2015 between USD \$200 million and \$240 million.
 - Siemens' internal investigation costs were approximately USD \$1 billion.

Enforcement Agenda for 2015

Wall Street Journal – Risk & Compliance Report
Fines, FCPA on Enforcement Agenda for 2015
October 9, 2014

- The senior deputy chief of the U.S. Department of Justice’s criminal division’s fraud section, was speaking at a New York panel on government priorities in the coming year.
- “It’s fair to assume that the penalty amounts are not going to be going down.”
- FPCA enforcement is one area that won’t be cooling down soon, he said, adding that there are “a bunch” of FCPA cases in the pipeline.
- **The department has “more prosecutors and more resources than we’ve ever had before” dedicated to FCPA.**
- **“You should expect that FCPA prosecutions are going to remain vibrant, aggressive and appropriate.”**

UK Bribery Act

- Considered the world's strongest anti-corruption law in the world.
- Covers British citizens (living in UK or overseas) and individuals who reside in the UK. Also applies to any UK incorporated entity or any Non-UK entity that has a business or part of a business in the UK.
- The Act creates four offenses:
 - The offering, promising or giving a bribe
 - The requesting or agreeing to receive a bribe
 - A separate offense for bribery of a Non-UK public official
 - An offense for failing to prevent bribery

FCPA vs. UK Bribery Act

FCPA

1. Prohibits bribery of Non-U.S. officials
2. Allows facilitation payments
3. The person offering or giving the bribe is only liable
4. Contains accounting provisions

UK Bribery Act

1. Prohibits bribes to any person (Non-UK official or private citizen)
2. No exception for facilitation payments
3. Recipients of bribes can be charged
4. No accounting provisions; however UK law requires companies to keep accurate accounts.

Companies that are subject to the FCPA and have offices in the UK or employ UK citizens have to comply with both the FCPA and UK Bribery Act.

FRAUD SCHEMES AND RED FLAGS

Bribery Methods

Examples include:

- Gifts, travel and entertainment
- Overpayment for good and services
- Payment for fictitious services
- Unusually high discounts on products
- Cash payments, Checks and Wire Transfers

Common Fraud Schemes

Gifts, Travel and Entertainment

- Clothing and jewelry for official and/or spouse
- Female escorts
- Expensive liquor
- First class or business class fare for short flights
- Sightseeing tours
- Paid vacations
- Red envelopes during Chinese New Year
- Lavish entertainment

Common Fraud Schemes

Agents

- Payment percentages are inflated to facilitate the payment of bribes, with a portion being for legitimate work by agent, and a portion for illegitimate activity.

Consultants

- Payments for fictitious work.

Distributors

- Reduction in prices to distributors, which allows a greater margin on sales.
- A portion of margin differential is then used for improper payments.

Common Fraud Schemes

Payments via Expense Reports

- Employee pays bribe and submits expense, usually with fictitious documentation for an unrelated expense, in their expense report for reimbursement.

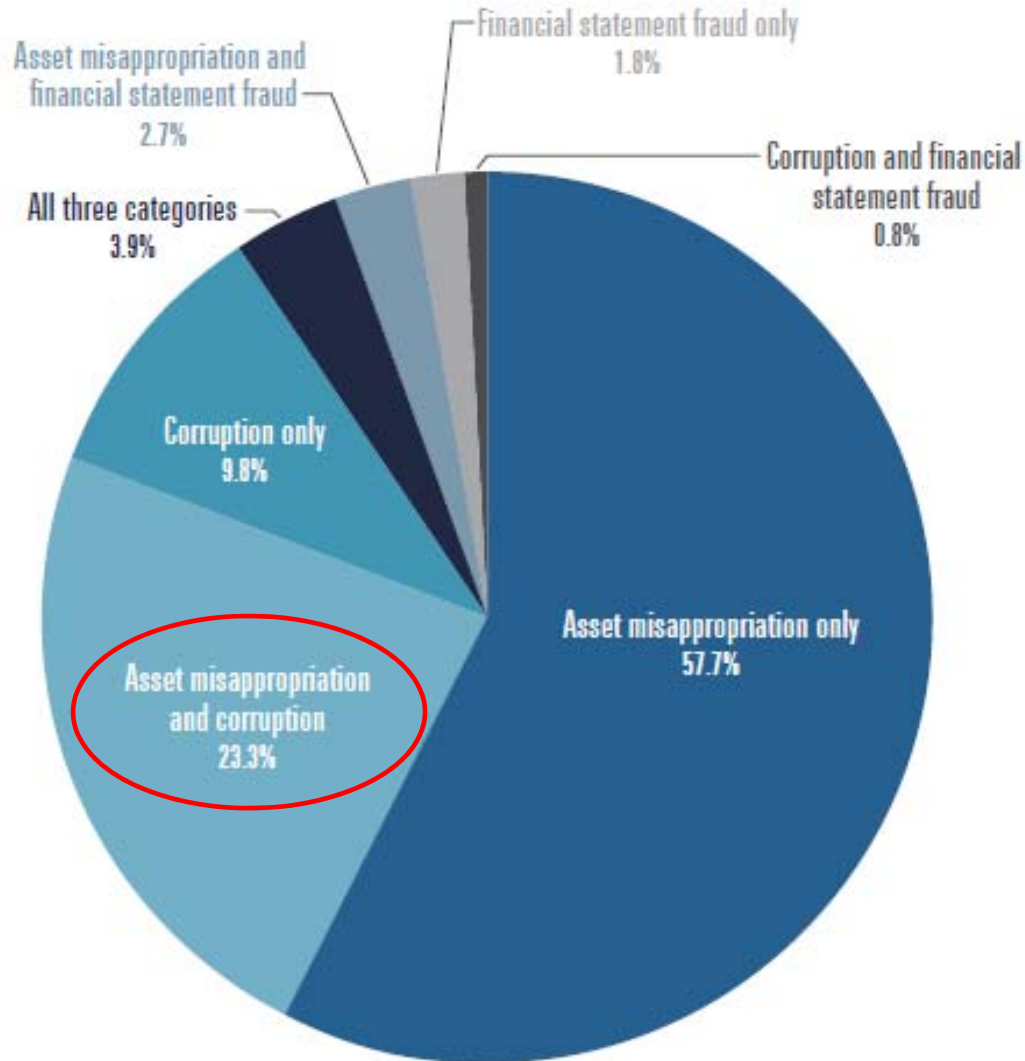
Check or Wire Transfer to Employees

- Funds are disbursed for a fictitious reason using falsified documentation, and employee acts as intermediary and makes improper payments.

Disbursements from petty cash

Cash Checks or Bearer Checks

ACFE: 2014 Report to the Nations



Of the 1,483 cases, approximately 30% involved two or more of the three primary forms of occupational fraud.

Overlap of Asset Misappropriation and Corruption accounted for the second highest percentage of cases.


Third-Party Red Flags

- Excessive agency commission percentages or amounts (sometimes paid in round dollar amounts)
- Agency payments are in excess of stated commission rates
- Requests for up-front commissions
- Third-party requests payment outside the country where they reside
- Third-party resides outside the country where the services are rendered
- Lack of qualifications on the part of the third-party to perform services
- Vague deliverables in contracts
- One time payments to agents or consultants

Third-Party Red Flags

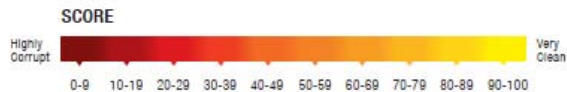
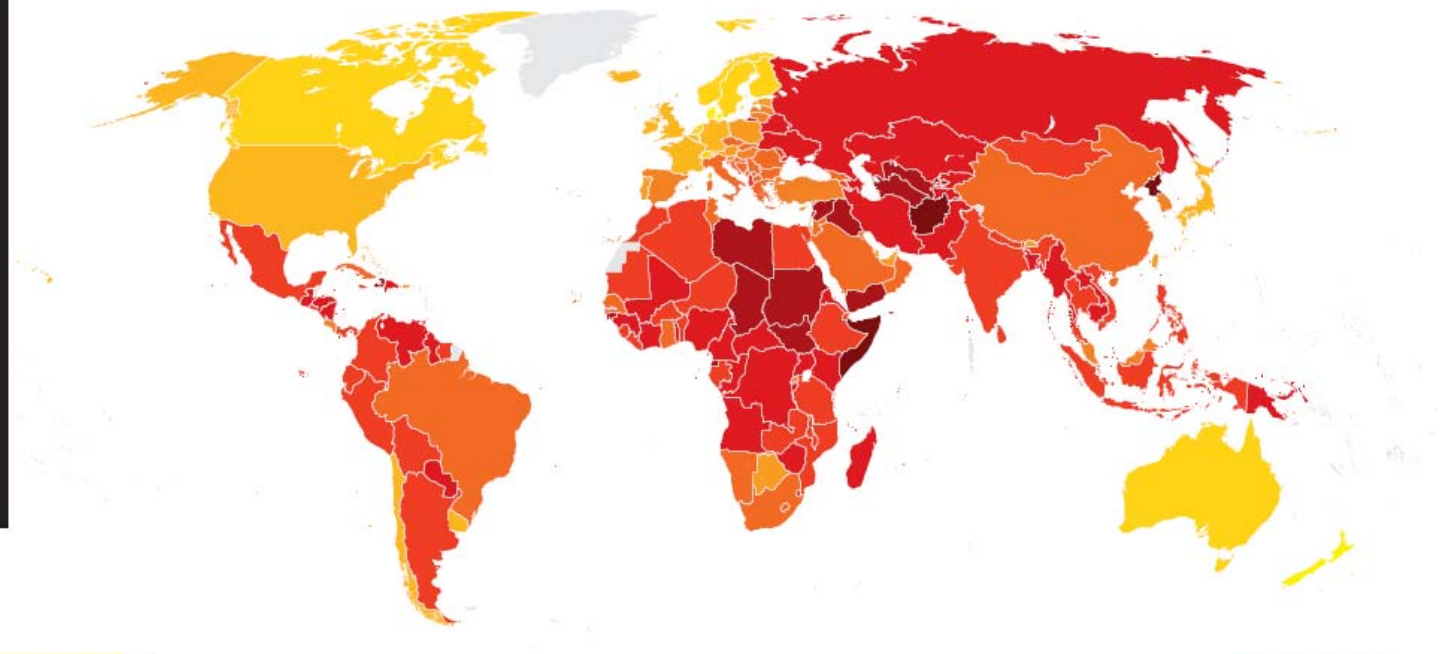
- Third-party requests cash payments
- Lack of supporting documentation for payments
- Payments to personal bank accounts
- Third-party is specifically recommended by a Non-U.S. official
- Third-party is related or has business ties to a Non-U.S. official
- Third-party refuses to abide by FCPA
- Credible rumors or media reports of corrupt behavior
- Refusal to disclose owners, partners or principals
- Transaction takes place in a country with a high corruption index

2013 CORRUPTION PERCEPTION INDEX MAP

 **TRANSPARENCY INTERNATIONAL**
the global coalition against corruption

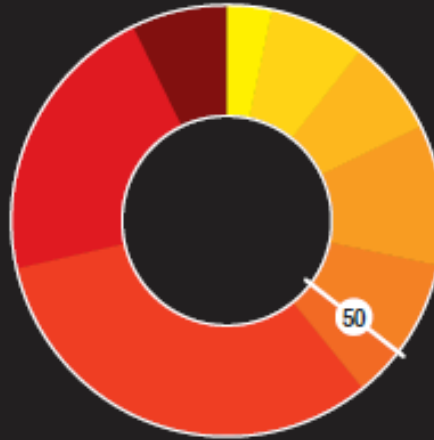
CORRUPTION PERCEPTIONS INDEX 2013

The perceived levels of public sector corruption in 177 countries/territories around the world.



#stopthecorrupt
www.transparency.org/cpi

CORRUPTION PERCEPTIONS INDEX 2013: ASIA PACIFIC



The perceived levels of public sector corruption.

64% score below 50

Top: New Zealand

Bottom: Afghanistan, Korea (North)



RANK	COUNTRY/TERRITORY	SCORE
1	New Zealand	91
5	Singapore	86
9	Australia	81
15	Hong Kong	75
18	Japan	74
31	Bhutan	63
36	Taiwan	61
38	Brunei	60
46	Korea (South)	55

53	Malaysia	50
80	China	40
83	Mongolia	38
91	Sri Lanka	37
94	India	36
94	Philippines	36
102	Thailand	35
114	Indonesia	32
116	Nepal	31
116	Vietnam	31

RANK	COUNTRY/TERRITORY	SCORE
119	Timor-Leste	30
127	Pakistan	28
136	Bangladesh	27
140	Laos	26
144	Papua New Guinea	25
157	Myanmar	21
160	Cambodia	20
175	Afghanistan	8
175	Korea (North)	8

The 2013 Corruption Perceptions Index measures the perceived levels of public sector corruption in 177 countries/territories around the world. To see the full results go to:

www.transparency.org/cpi
#stopthecorrupt

Compliance Program

Key Components

- Tone at the Top
- Effectively Implemented Code of Conduct
- Clearly defined Anti-Bribery, Gifts and T&E Policies
- Employee Education and Training
- Reporting Mechanism (Hotline, Website, Email)
- Investigation Team
- Third-Party Due Diligence and Training
- Anti-Bribery Clauses in Third Party Contracts
- Anti-Bribery Reviews / Internal Audit Testing

Questions???

