

The FCPA and Tone at the Top and in the Middle

Just how important is “Tone at the Top”? Conversely, what does it say to middle management when upper management practices the age old parental line of “Don’t do as I act; Do as I say”? We wondered about this age old question as we read the Saturday’s edition of the New York Times and its piece entitled “H.P. Ousts Chief for Hiding Payments to Friend” In the story, the Times reported that (now former) Hewlett-Packard Chairman and Chief Executive Mark Hurd was “ousted by the Company’s Board of Directors for the lowliest of corporate offenses — fudging his expenses.”

The saga apparently began when a contractor who was assisting with Hewlett-Packard’s marketing contacted the Company in June and through her lawyer charged sexual harassment against Hurd. The Times reported that while the Board was investigating the sexual harassment charge, they found inaccurate expense reports that covered payments made to the woman. These payments were “said to range from \$1,000 to \$20,000.” After being confronted with the information, Hurd offered to pay back these monies but the Board refused and demanded his resignation, which he tendered. Hurd received \$12,224,693 in severance, according to a Hewlett-Packard filing with the Securities and Exchange Commission (SEC) on Friday. The Company also “extended the deadline for Hurd to purchase up to 775,000 shares of H.P. common stock, which were vested as of Friday, and 330,117 performance-based stock units that will also vest.”

We have previously discussed the importance of “Tone at the Top” and our colleague Lindsay Walker has guest blogged on the subject of “Integrating Ethics and Compliance into the Entire Organization”. We both believe that a Company’s ethics and compliance culture are set by the very top levels of management. We both believe that a Company’s ethics and compliance culture are set by the very top levels of management. The US government would also appear to believe that a Company’s ethics and compliance culture are set by the very top levels of management because the US Sentencing Guidelines read, in part, *“High-level personnel and substantial authority personnel of the organization shall be knowledgeable about the content and operation of the compliance and ethics program ... and shall promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”*

However if top management is not fully committed to such an ethical and compliance culture, such lack of commitment will be clearly understood by middle managers of a company. This is particularly true of the Foreign Corrupt Practices Act (FCPA). As noted above, the US Sentencing Guidelines mandate that the highest levels of management promote and encourage not only ethical conduct but a commitment to comply with the FCPA itself. In his article entitled, *Ethics and the Middle Manager: Creating "Tone in The Middle"* Kirk Hanson, listed eight specific actions that top executives could engage in which demonstrate a company’s and their personal commitment to ethics and compliance. The actions he listed were:

1. Top executives must themselves exhibit all the "tone at the top" behaviors, including acting ethically, talking frequently about the organization's values and ethics, and supporting the organization's and individual employee's adherence to the values.
2. Top executives must explicitly ask middle managers what dilemmas arise in implementing the ethical commitments of the organization in the work of that group.
3. Top executives must give general guidance about how values apply to those specific dilemmas.
4. Top executives must explicitly delegate resolution of those dilemmas to the middle managers.
5. Top executives must make it clear to middle managers that their ethical performance is being watched as closely as their financial performance.
6. Top executives must make ethical competence and commitment of middle managers a part of their performance evaluation.
7. The organization must provide opportunities for middle managers to work with peers on resolving the hard cases.
8. Top executives must be available to the middle managers to discuss/coach/resolve the hardest cases.

We have previously noted that Hewlett-Packard is under investigation for allegations of paying bribes to obtain commercial sales contracts in Russia. (See here and here) Given the current situation with the former Chairman and Chief Executive and the ongoing bribery investigation by not only German and Russian governmental authorities but also the SEC and Department of Justice for possible FCPA violations, it might be a propitious time for Hewlett-Packard's top management to implement some or all of Hanson suggestions regarding the communication of Hewlett-Packard's commitment to FCPA compliance and ethics to its middle management and indeed throughout its organization.

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