

So...When Does Compliance and Ethics No Longer Matter?

In a post yesterday on TheAtlantic.com, Daniel Indiviglio posed the question “*Does Hurd’s New Oracle Gig Prove Business Ethics Don’t Matter?*” Indiviglio noted that while Mark Hurd’s missteps at H-P may have been “incredibly dumb”; the decisions he made which led to his ouster did not relate to his business acumen. Indiviglio quoted Bloomberg to explain the value that Oracle must have seen in hiring Hurd:

At H-P, Hurd more than tripled profit by cutting costs and expanding beyond the company's core business of computers and printers. He oversaw an acquisition spree of more than \$20 billion, letting the company branch out into services, networking equipment and smart phones. Oracle, which also has bulked up through takeovers, would draw on Hurd's background blending software and hardware as it expands into server sales.

Indiviglio noted that it would appear that Oracle “thinks Hurd’s talent for business-making trumps his poor [ethical] decision-making elsewhere.” While recognizing that in certain professional service businesses, such as auditing, integrity is everything; conversely in other types of businesses where profit motives may not be connected to good ethics, an emphasis on integrity may not jeopardize business as much and as “long as poor decisions don’t compromise profit, they [business ethics] will eventually be forgotten.”

We have previously discussed the importance of “Tone at the Top” and our colleague Lindsay Walker has guest blogged on the subject in “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. The reason is that this is the very ‘tone’ which company employees pick up on and use as the basis of their *de facto* guidance about what one can and cannot do; instead of following a written Code of Ethics. In most industries there is [almost] always an apocryphal ethics story along the lines of ‘In some unknown country an un-named Regional Manager is alleged to have said the following: “*If I violated the Code of Ethics, I may or may not get caught. If I violate the Code of Ethics and get caught, I may or may not be disciplined. But if I miss my numbers for two consecutive quarters I will be terminated.*”’

In the Foreign Corrupt Practices Act (FCPA) compliance world, we wonder what the Department of Justice (DOJ) or Securities and Exchange Commission (SEC) would think about a company which had such an attitude regarding compliance. Both the DOJ and SEC also appear to believe that a Company’s ethics and compliance culture are set by the very top levels of management as the US Sentencing Guidelines read, in part, “*High-level personnel and substantial authority personnel of the organization shall ... promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.*” The DOJ has also cited to the Organization for Economic Co-operation and Development (OECD) Good Practice Guidance on Internal Controls, Ethics, and Compliance as a guide to best practices in the FCPA compliance arena. The OECD lists

12 specific guidelines for companies to utilize as a basis to construct an effective compliance program. The list includes at least two points that seem to bear weight on this issue. They are:

1. A culture of compliance with the appropriate “tone at the top”.

* * *

3. It must be the duty of every employee to observe a company’s compliance program.

So take some time to think about the message you believe Oracle is sending to its employees by hiring Mark Hurd?

This publication contains general information only and is based on the experiences and research of the author. The author is not, by means of this publication, rendering business, legal advice, or other professional advice or services. This publication is not a substitute for such legal advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified legal advisor. The author, his affiliates, and related entities shall not be responsible for any loss sustained by any person or entity that relies on this publication. The Author gives his permission to link, post, distribute, or reference this article for any lawful purpose, provided attribution is made to the author. The author can be reached at tfox@tfoxlaw.com.

© Thomas R. Fox, 2010