

Anti-Corruption, the FCPA and the (Apparent) Failure to Escalate

At the recent Corporate Counsel Institute – Europe put on by the Georgetown University Law CLE program in London, participant Matthew King, Group Head of Internal Audit at HSBC was interviewed by Project Counsel Founder Gregory P. Bufithis on his opinion regarding one of the more important elements for implementing a successful compliance program. Mr. King stated that in his opinion, one of the key features of any successful compliance program was “*escalate*”.

By this he meant that in almost every circumstance regarding a compliance issue he had been involved with, at some point a situation arose where an employee did not report a situation or event up to an appropriate level for additional review. This failure to escalate led to the issue not reaching the right people in the company for review/action/resolution and the issue later became more difficult and more expensive to deal with in the company. Mr. King emphasized that a company needs to have a culture in place to not only allow elevation but to actively encourage elevation. Additionally both a structure and process for that structure must exist. Lastly, while a whistleblower process or hotlines are necessary these should not be viewed as the only systems which allow an employee to escalate a concern.

An example of this failure of escalate was recently seen in the HP matter involving its German subsidiary and allegation of bribery to receive a contract for the sale of hardware into Russia. The Wall Street Journal has reported that at least one witness has said that the transactions in question were internally approved by HP through its then existing, contract approval process. Mr. Dieter Brunner, a bookkeeper who is a witness in the probe, said in an interview that he was surprised when, as a temporary employee of HP, he first saw an invoice from an agent in 2004. "It didn't make sense," because there was no apparent reason for HP to pay such big sums to accounts controlled by small-businesses, Mr. Brunner said. He then proceeded to say he processed the transactions anyway because he was the most junior employee handling the file, “I assumed the deal was OK, because senior officials also signed off on the paperwork”.

Think what position HP might be in today if this temporary employee had escalated his concern. Initially, HP would not have been under investigation by governmental authorities in Germany and Russian. In the United States, both the DOJ and SEC have announced they will also investigate the transaction, which it can only be supposed are for potential FCPA violations. While HP has not made any public announcements regarding the costs of the investigation date, it can only be speculated that the costs will be in the millions if HP is required to deal with investigators from these three jurisdictions as well as perhaps investigating other international operations to ascertain if other commissions paid involved similar allegations of bribery and corruption as those in this German-subsiidiary’s transaction.

So is your company encouraging its employees to escalate their concerns regarding a transaction or do your employees simply approve a transaction because everyone else has done so?

For the YouTube video of the Gregory P. Bufithis interview of Matthew King, see [here](#).