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HP settlement revisits US standards for compliance programs: UK to follow?

- » Recent settlement agreements for Foreign Corrupt Practices Acts (FCPA) violations have all required common improvements to the offending companies' compliance programs.
- » Eighteen compliance program improvements are being required by the SEC and DOJ.
- » These compliance requirements should now be considered as standards and best practices.
- » The UK recently adopted changes to the UK Bribery Act that will allow the use of similar settlement agreements that may contain similar standards in the near future.
- » A company's compliance program should be consistently improved over time to comply with these standards.

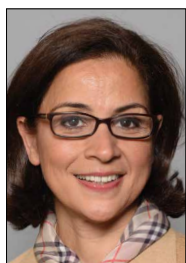
In April 2014, Hewlett-Packard (HP) entered into a settlement agreement with the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) with respect to long-standing bribery allegations made under the Foreign Corrupt



Birk

Practices Act (FCPA) against HP's subsidiaries in Russia, Poland, and Mexico. HP agreed to pay approximately \$108 million in disgorgement and penalties.

According to the SEC's press release,¹ the bribes were recorded on HP's books as legitimate commissions and expenses paid to consultants and agents. In most instances, HP had used these third parties as conduits for the bribes and had done little or no due diligence before using them. HP either had ineffective policies in that regard, or the policies that did exist were circumvented.



Moghadam

The HP settlement made important news and received favorable comment as well as criticism for being "too little" and "too late," but it again confirmed the continuing reliance of these regulatory agencies on deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) containing prescriptive provisions or standards for improving the offending company's compliance programs. These 18 standards for effective compliance programs appear to have superseded, or at least annotated, those contained in the 1991 Federal Sentencing Guidelines (FSG). These same standards have now been used in multiple instances.

This article will review and comment on these standards as a broadened approach and best practices for designing and implementing effective compliance programs. We will also note the recent change to the UK Bribery Act that may invite the use of similar standards in

connection with resolving offenses under that Act as well.

The philosophy for the 18 compliance standards

DPA and NPA used in bribery cases are focused on the parts of the compliance program that will prevent such illegal activities in the future. Nevertheless, the standards used for effective anti-bribery compliance programs in the DPAs and NPAs are broad enough to serve as useful elements for every company's compliance efforts. We have categorized these standards under the following headings:

- ▶ Documentation: The code of conduct, policies, and procedures
- ▶ Leadership and resources
- ▶ Effective use of processes and procedures
- ▶ Due diligence for mergers & acquisitions and business partners
- ▶ Internal controls

In our discussion of each category, we will comment on the expansion of compliance standards that seems to broaden the original elements contained in the FSG.

▶ Documentation: The code of conduct, policies, and procedures

Although echoing some of the fundamental elements from the FSG, the new standards also provide additional guidance for contents of the code, policies, and procedures. This includes the need for risk-based assessments, requirements for specific anti-corruption policies, and criteria for review and testing. Listed below are summaries of the standards that relate to the drafting and contents of the code, policies, and procedures, with emphasis provided by us on some key wording.

1. **A written compliance code** including a clearly articulated corporate policy against

violations of the FCPA and other applicable foreign law counterparts.

2. **Compliance policies and procedures** that are developed through a risk assessment of the individual circumstances of the company.
3. **Specific anti-corruption policies and procedures** applicable to all directors, officers, employees, and outside parties acting on behalf of the company in a foreign jurisdiction. These policies and procedures must address (a) gifts; (b) hospitality, entertainment, and expenses; (c) customer travel; (d) political contributions; (e) charitable donations and sponsorships; (f) facilitation payments; and (g) solicitation and extortion.
4. **Review** of the anti-corruption compliance policies and procedures no less frequently than annually.
5. **Periodic testing** of the anti-corruption code, policies, and procedures to evaluate and improve their effectiveness.

▶ Leadership and resources

Though still identifying the need for strong support and commitment from the top of the organization (as in the FSG), the new standards amplify the need for empowered leadership for the compliance organization, and with sufficient resources. Resources also need to be available to advise those individuals who conduct business in foreign jurisdictions.

6. **Strong, explicit, and visible support** and commitment from the board and senior management to the compliance code and policies.
7. **One or more senior executives** who are empowered to implement and oversee the anti-corruption compliance code, policies, and procedures. These executives report directly to the board or committee of the

board and have sufficient resources and autonomy.

8. **A system for providing compliance advice** for those individuals doing business in foreign jurisdictions.

► **Effective use of processes and procedures**

Among the clarifications and additions provided by these new standards are effective investigation processes, confidential reporting, and incentives for appropriate ethical behavior. These processes and procedures include:

9. **Adequate communication and anti-corruption training** to directors, officers, employees and appropriate agents, and business partners; and certifications from such individuals that they have received the appropriate training.
10. **Confidential reporting** of anti-corruption violations and an effective system for tracking reports.
11. **Investigating and documenting allegations** of anti-corruption violations with an effective and reliable process.
12. **Mechanisms to enforce** the code of conduct, including appropriate incentives and discipline.
13. **Appropriate disciplinary procedures** that are applied consistently and fairly regardless of rank or position, as well as remedial actions and other steps to prevent future violations.

► **Due diligence for mergers & acquisitions and business partners**

In connection with the HP settlement, a spokesperson for the SEC was quoted as saying: “Companies have a fundamental obligation to ensure that their internal controls are both reasonably designed and appropriately implemented across their entire business operations, and they should take a

hard look at the agents conducting business on their behalf.”

Due diligence in connection with engaging agents and for acquisitions continues to take on additional importance. The new standards specify required due diligence activities for a company to have an effective compliance program, including:

14. **Risk-based due diligence** and compliance requirements pertaining to the retention and oversight of all agents and business partners.
15. **Provisions in contracts with agents and business partners** to prevent violations of anti-corruption laws, including rights to audit the books of agents and partners, and termination rights resulting from any compliance breach.
16. **Risk-based due diligence policies and procedures** for mergers and acquisitions, including risk-based due diligence on anti-corruption matters, and reports on any conduct found through due diligence to be violations of anti-corruption laws.
17. **Application of the compliance code, policy, and procedures** to newly acquired entities as quickly as practicable; and training and compliance audits conducted as quickly as practicable.

► **Internal controls**

Robust internal financial controls continue to be a foundational element for every company’s compliance program, including:

18. **Financial and accounting procedures** that provide fair and accurate books, records, and accounts so as not to conceal bribery.

UK Bribery Act

Earlier this year the U.K. added a new tool to the arsenal available to its compliance officials when it adopted settlement procedures for compliance violations, including the

possibility of DPAs and NPAs. For the first time since the inception in 2011 of the UK Bribery Act, officials there have been given the possibility of settling (rather than litigating) allegations of bribery violations against corporate entities. Until now, settlements could not be used as a mechanism for ensuring improvements in a company's compliance program. As a result, very few cases under the Act have moved forward. Now, however, with the possibility of settlements and the availability of DPAs and NPAs, we may see an uptick in the number of cases and outcomes in the U.K. that actually result in improvements to companies' compliance programs.

Since the UK Bribery Act has very broad application to every company with business conducted in the U.K., we can anticipate seeing DPAs and NPAs with requirements very similar to those used in the U.S.

Conclusions and recommendations

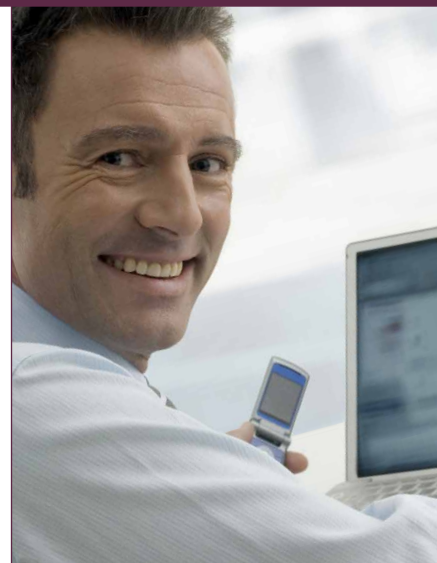
We are recommending to compliance organizations of public companies that, as a result of the HP settlement and others similarly documented, they adjust their thinking as to the required elements for an effective compliance program. The 18 standards contained in recent settlement agreements in the U.S. lead us to believe that companies should be considering continuous improvements to their compliance programs, in order to be able to demonstrate the intent to comply with these standards, which should now be considered as best practices. *

1. U.S. Securities and Exchange Commission Newsroom: SEC Charges Hewlett-Packard with FCPA Violations. April 9, 2014. Available at <http://bit.ly/sechp>

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