

## **Watergate, Hewlett-Packard and the FCPA**

It has been many years since Watergate and the many lasting legacies which occurred from that break-in of the Democratic National Committee. Indeed one of those legacies is the Foreign Corrupt Practices Act (FCPA) itself. This article will focus on one of the more mundane legacies, that of the "*Watergate deposition*", which was, for those of us who were riveted by the hearings of the Erwin Committee in the summer of 1973, one of the most memorable episodes when Committee Co-Chair Howard Baker asked the question "*What did the President know and when did he know it?*". This question would appear to be quite relevant today in relation to the current FCPA investigation of Hewlett-Packard (HP) and German and Russian investigations all involving alleged bribes paid by HP for the sale of computer hardware that were to be used by the office of the prosecutor general of the Russian Federation.

As reported in The Russia Monitor on May 4, 2010, the substantive aspects of the HP case are not remarkable. High-level executives at the HP subsidiary made payments, through agents, to the Russian Prosecutor General's office in order to obtain the contract to supply computers to that office. There was a complicated financing scheme used to route payments to offshore accounts beneficially owned or controlled by unnamed Russian officials; funneling the suspected bribes through a network of shell companies and accounts in places including Britain, Austria, Switzerland, the British Virgin Islands, Belize, New Zealand, Latvia, Lithuania, and the US states of Delaware and Wyoming. The bribes were paid through three German agents, who submitted fake invoices for non-existent sales and then paid the money on as bribes to unnamed Russian governmental officials.

However, there are several unusual aspects to this HP investigation. The first is that this scheme was initially discovered during the audit of HP's office in Saxony, Germany, where German authorities first discovered evidence of bribery. The second unusual aspect, as reported in the Wall Street Journal, April 15, 2010, is that the investigation was being led by German and Russian governmental agencies. The third was that neither the US Department of Justice (DOJ) nor Securities and Exchange Commission (SEC) were involved in these investigations until after the WSJ reported the German and Russian investigation were on-going as, the next day, on April 16, the WSJ reported that both US agencies had joined the investigation.

### ***What did HP know and when did they know it?***

HP has claimed that the events in question occurred in 2003. Prosecutors have alleged the incidents in question were more recent, in the years 2004-2006. But, whenever they occurred, at least one witness is reported to have said that the sham payments were internally approved by HP. In the WSJ, April 15 article, 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-business men (the agents through which the bribes were funneled),

Mr. Brunner said. Mr. Brunner 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". While we don't know who these senior officials were, it would appear that they were senior officials of HP and that would mean actual knowledge.

The New York Times, on April 16, 2010, reported that three former HP employees were arrested by German prosecutors back in December 2009, the same month when police in Germany and Switzerland presented search warrants detailing allegations against 10 suspects. Although it was unclear from the WSJ April 16 article as to the time frame, whether in December 2009 or later, HP had retained counsel to work with prosecutors in their investigation. Apparently, since the SEC only announced it had joined the investigation on or about April 15, HP had not self-disclosed the investigation or its allegations to either the US DOJ or SEC.

There are two other curious notes regarding what HP did know and when did they know it. The first is the following statement found in both of HP's 2008 and 2009 Annual Reports, *"In many foreign countries, particularly in those with developing economies, it is common to engage in business practices that are prohibited by laws and regulations applicable to us, such as the Foreign Corrupt Practices Act. Although we implement policies and procedures designed to facilitate compliance with these laws, our employees, contractors and agents, as well as those companies to which we outsource certain of our business operations, may take actions in violation of our policies. Any such violation, even if prohibited by our policies, could have a material adverse effect on our business."*

This statement is open to many interpretations. Is it an admission of knowledge of some general practices which violated the FCPA? If HP has employees, contractors and agents who violated the FCPA why are they still employed by HP or why is HP still using them? Could it be that the SEC required an admission of an on-going FCPA investigation? It just seems rather curious.

The second curiosity was the compliance training course requirement that HP ordered its channel partners to take in October 2009. As reported by the FCPA Professor, HP apparently determined it necessary, and appropriate, for its global network of approximately 155,000 channel partners to complete HP's regulatory compliance training program or risk losing their partner status. The FCPA Professor noted that a HP spokesperson confirmed "HP is, in fact, working to have all of its global channel partners undergo training regarding government legal and regulatory compliance [including the FCPA] as part of establishing or renewing their Business Development Agreement". Just as interesting is how HP made this request, when, without any notice HP faxed out the demand to its channel partners and instructed them to pay for this training, to a previously unknown third party, via credit card. All-in-all it seems very odd. But is it possible that this effort by HP was because they knew that an investigation was ongoing regarding its FCPA compliance efforts?

There is a requirement to report any material matters in the appropriate SEC filing statements and this leads to the question of “*What did HP know and when did they know it?* Perhaps HP could claim that the enigmatic statement cited above that some employees, contractors and agents *would* violate the FCPA is evidence that not only did HP *know* of such conduct but that this statement is all HP was required to report to its shareholders. Alternatively HP could claim that its first knowledge of this matter was in December, 2009, and there has been no SEC reporting requirement since that time. However, the SEC may take a different view and any shareholders, who might be unhappy just about now, may be considering some type of derivative action against the company. On the other hand, perhaps the costs of an FCPA investigation, fines, penalties, corporate monitor and Deferred Prosecution Agreement are not “material” under HP’s definition of material for SEC reporting purposes.

Just when HP thought it could not get any worse, Businessweek reported, in a May 6, 2010 online edition, that the Indian government has claimed that HP evaded payments of approximately US\$323 million in duties to the Indian Directorate of Revenue for the import of computer products and spares from offices overseas into India by undervaluing these goods to custom officials. Regarding these allegations, which HP disputes, The Russia Monitor stated “keep in mind that “customs violations” in one country are “bribery violations” in another country (i.e., FCPA in the United States).”

Senator Baker’s Watergate inquiry is still relevant today in this HP matter. What did HP know about the allegations of bribery and when did they know it?

For a viewing of Senator Howard Baker’s questioning of Bob Halderman in the Senate Watergate hearings, [click here](#).

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