

Organizational Integrity

Shorts



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Ethics & Compliance Program Funding

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Welcome back to the seventh edition of *OIG Shorts*, a publication of the Sheppard Mullin [Organizational Integrity Group](#). Today's discussion focuses on the thorny issue of Ethics & Compliance (E&C) program funding.

Arguing for meaningful E&C funding is no easy task in many organizations. We've all heard the retort "why do I need to spend this money, we haven't had any problems?" Sadly, many business leaders still view E&C as a cost center rather than a cost reducer.

This outmoded thinking can create quite the hurdle for Chief Ethics and Compliance Officers ("CECOs") since it is admittedly hard to measure the ROI of an initiative that, when it works, has nothing to show for it (i.e., no money coming in the door). While a Sales Department can point to revenue numbers to argue for increases in its budget, the E&C department has no similar metric. Right? Wrong.

Just because it's hard to measure the financial benefit of an E&C program, does not mean financial benefits don't exist. We submit there are many compelling — and financially sound — arguments for meaningfully funding E&C programs. We put them into two categories.

Category One: Risk avoidance:

- The U.S. DOJ has made clear that, in evaluating corporate compliance programs in the context of making criminal charging decisions, it will look explicitly at the "funding and resources" the company has dedicated to its E&C program. Poorly funded and under-staffed E&C programs increase the risk of destructive criminal prosecutions.
- The lack of a meaningful E&C program can be the differentiator between a contract breach and a federal False Claims Act case. Let's put this one into concrete terms using some admittedly over-simplified assumptions. Let's say a company overcharged a federal customer by \$100 on 100 different invoices. A breach of contract case against the company might result in damages of \$10,000 (\$100 x 100 invoices). A False Claims Act case against the company, on the other hand, might result in damages of about \$2.5M (treble damages plus penalties). A meaningful E&C program makes FCA cases less likely.



- Kenneth Polite, DOJ’s chief criminal prosecutor, has made clear that a robust E&C program *that is properly funded* is a factor that may mitigate against imposition of a federal monitor. As federal monitors are quite expensive – and back in vogue in the current DOJ – taking steps to reduce the risk of ending up with one would seem to be a worthwhile investment.
- Finally, the lack of a meaningful and meaningfully-funded E&C program is a factor that will be used by a Suspension/Debarment Official in assessing whether to exclude an organization from federal contracting following a non-compliance.

Category Two: Revenue generation and cost reduction:

- Study after study show that employees want to work for ethical companies, and are prone to leave unethical companies. One study, conducted several years ago by [LRN](#), found that 94% of employees surveyed rated company ethics as “critical” or “important” in their job selection. A well-funded E&C program reduces employee attrition and promotes employee recruitment and retention.
- An effective E&C program can be a business enabler. Take PepsiCo for example. As reported by [Forbes](#) in 2018, a project championed by PepsiCo’s E&C program “centralized and elevated due diligence of third party vendors with new technology.” The new program added great efficiencies to the sales process, while, at the same time, significantly reducing compliance risk. The project also allowed PepsiCo to demonstrate a clear risk-avoidance benefit as well as a clear sales-focused ROI.
- There are data strongly suggesting that ethics-driven companies actually outperform their peers on various stock indices. Ethisphere Magazine calls this the “[Ethics Premium](#).”

While these facts (in either category) should help bolster a CECO’s argument for proper E&C funding, there is more an energetic CECO can do to make his/her case. For example, we recommend tracking and analyzing lawsuits, settlements, internal and external negative audit findings, negative investigation findings, and the like to show potential reductions in areas that were the focus of E&C initiatives.

Interestingly, this sort of analysis was undertaken in a different but parallel context, and received significant public attention. In the context of law enforcement Consent Decrees, thought leaders across the U.S. wanted to figure out the financial benefit of the Decrees (putting aside the societal benefits of protecting constitutional rights, etc.). So they studied the number of civil rights law suits over the course of the Decrees in several major cities. As reported by the [Washington Post](#) in 2017, civil rights law suits were found to drop significantly over the course of the Decrees. One could conduct a similar, privileged litigation analysis within an organization. We suspect the results would be similar.

At the end of the day, having a meaningful, properly resourced, properly funded E&C program is not only a business imperative, it presents a significant financial ROI. We are hopeful some of the points offered here help bolster your case in your next internal budget discussion.

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