

## CEP Magazine – May 2018 Third-party assessments of ethics: A proactive tool to demonstrate due diligence

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An increasing number of federal and state regulatory enforcement actions against companies are requiring ethics and integrity reforms, along with fines and penalties, as part of the settlement or resolution. Such actions—which include deferred prosecution agreements (DPAs), non-prosecution agreements (NPAs), administrative agreements, consent decrees, and court-ordered settlements—all presuppose that the cited misconduct occurred due to an absence of effective controls, discipline, or corporate compliance. More importantly, many government actions specifically cite the absence of an effective ethics and compliance (E&C) program and controls, or weak corporate ethical culture, as the leading causal factors contributing to the company’s misconduct. Conversely, companies that can demonstrate a corporate commitment to ethics and compliance and present a strong defense that their misconduct is truly due to one or more “bad actors” (rather than a tainted culture) fare better in the enforcement actions. “Better” often means lower fines and penalties, as well as avoidance of the costs and inconvenience of hiring an independent monitor, if required by the government agreement or ordered by a court.

Much to their benefit and credit, many national and international corporations recognize that ethics and compliance is much more than a written set of rules and policies. Companies use E&C programs to communicate company mission statements, goals, and expectations; to encourage staff to share the same set of corporate values; and to drive their behaviour in day-to-day business activities. However, if a company is truly committed to an effective E&C program, establishing a written set of policies and controls is simply not enough to withstand scrutiny. Moreover, those companies that have established strong comprehensive E&C programs know that they are not static and can get stale without appropriate regular care and attention. E&C programs evolve as companies change, employees turn over, new laws and regulations are enacted, and compliance priorities evolve, depending on government agency enforcement objectives and the public discourse on ethics and integrity matters.

### **Third-party assessments has advantages**

With so many factors to consider, how can a board of directors or senior corporate leadership ensure that the ethical culture they want to build is working and effectively driving employee behaviour? How can legal counsel help better prepare companies to be able to demonstrate their due diligence to government regulators or law enforcement if (or more likely, when) employee misconduct puts the company in the crosshairs of enforcement actions? To gain a better understanding of the effectiveness of corporate E&C efforts and to identify any gaps in one company’s approach compared with the best practices of other companies, some legal counsels recommend that their clients engage specialized, third-party consultants to conduct an independent assessment of their ethical culture and E&C programs before a crisis occurs.

An independent third-party assessment of a corporate E&C program is a specialized evaluation of a business

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entity conducted by a team of experienced E&C professionals. Its purpose is to provide an unbiased evaluation of a company's corporate culture, assess its ethics and compliance policies and anti-corruption controls, determine whether employee training is having its intended effect, and assess whether the company is consistently and fairly enforcing its rules on ethics and integrity. An independent evaluation can help a forward-thinking company to identify potential problem areas before violations occur, improve its ability to manage the risk of compliance or ethical violations, and demonstrate its due diligence to governmental regulatory authorities and stakeholders, if the inevitable violation occurs.

The question could be asked, why would legal counsel recommend that a company bring in an outsider to evaluate its E&C program? The answer is quite simple: It is very difficult for a compliance officer or committee to effectively self-evaluate their own program. There is a lack of objectivity in such an assessment (both real and as perceived by outside stakeholders and regulators), and often, corporate compliance officers lack a deep understanding of the best practices in the field or the ability to benchmark their program against those of other companies. Most importantly, if an enforcement action were to take place, the government is unlikely to attach much credibility to a compliance program or corporate culture evaluation conducted by the company itself.

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