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Ethics Have Calculable Value

In-House Counsel Have Key Role

By Sergio Marini

There is just one social responsibility for businesses, Milton Friedman wrote, and that is to devote its activities and resources to increasing profits. According to this theory, as long as a company stays within legal and regulatory bounds, actions that demonstrate social responsibility are a waste of shareholders' money.

Profit is certainly the goal, but the possibility that implementing socially responsible policies and promoting an ethical way of doing business could generate profit as well as good will is worth considering.

Acting ethically adds value to the business in four principal ways:

- Socially responsible actions promote the company and make consumers more likely to believe that it produces high quality products.
- Socially responsible activities, such as focusing on sustainability and improving internal control procedures, can lower costs and improve efficiencies.
- Implementing policies to assure compliance with rules and regulations mitigates the risk of penalties or sanctions.
- Socially responsible actions generate a sort of "halo effect," according to a recent study by Harrison Hong of Princeton University and Inessa Liskovich of the University of Texas (reported in *The Economist*, June 27, 2015). Companies with the most comprehensive social responsibility

programs receive less costly punishments than other companies when they do commit violations.

So it is that acting ethically does have an immediate, positive impact on the bottom line.

But there's more. In the last 40 years some important changes have taken place. Gone are the days when companies could be assumed to answer only to their shareholders. Profit is the main goal on a short-term basis for the shareholders, but the long-term success of companies in a free-enterprise system depends on confidence from stakeholders within the community the business depends on. Companies that behave ethically are able to maintain stakeholders' satisfaction and confidence.

Ethical behavior can also enhance employee loyalty and attract better personnel. This goes beyond mere principle. Unethical behaviors asked of company personnel, or discovered by one employee about another, create workforce tensions. Personnel may find themselves in the moral dilemma of having to choose between safeguarding their positions or acting according to their moral compass. Adhering to ethical and socially responsible policies helps avoid these tensions. Employees feel themselves more accountable to the company and its owners, which leads to better performance.

In a world where companies are generally seen as acting unethically for their own profit, individuals will be proud of working for – and buying from – a respected, reputable and still profitable organization. The opposite is true for a company that is found to have acted unethically. It will be blamed and shamed, by its own personnel, and by other stakeholders, as well.

Going back to Friedman's assumption – that so long as it stays within the rules of the game a company need only concern itself about profits – the question arises: Should we refer only to the rules embodied in laws and regulations, or rather go beyond them to a wider system of social rules, such as those dealing with community obligations, gender roles, pollution and behavior toward customers?

We suggest the latter. On a long term basis, doing business in conformity to a wider system of social rules will also maximize profits. The in-house counsel has a key role to play in this endeavor. Whereas top management is appointed by the shareholders and acts as their agent, in-house counsel is appointed by the company itself and has primary responsibility towards the company as a whole, including its stakeholders and society at large, not only towards share-

holders. This means that, in supporting top management's activities, in-house counsel may be in the position of preventing it from focusing on short-term gains and taking "shortcuts to profitability."

In-house counsel should not only have the kind of thorough knowledge of the company that enables strategic advice, but also the broad knowledge of applicable rules and regulations that enables compliance. In addition, like all legal professionals, the in-house counsel needs a set of "deontological" rules (the expression of the principles of ethics as applied to a profession) in order to provide a framework for giving advice with intellectual independence.

To fulfill their ethical obligations, in-house counsel should be provided with full access to corporate information, along with the assurance that the information received and any opinions given are subject to the attorney-client privilege. This encourages management to make full disclosure without the risk of what they disclose being used against them in court.

The issue of privilege is problematic in Europe. In some European countries in-house lawyers are members of the Bar, and therefore swear an oath to fulfill the same ethical obligations as lawyers in private practice. In some other countries (for example, Belgium) the profession of lawyers who are employed by companies is regulated by a set of laws. They are part of a separate institution which issues its own code of deontology. And in some countries, lawyers who work in companies are neither admitted to the Bar nor recognized by the law.

In such a varied situation, the European Company Lawyers Association (ECLA) has drafted its own Code of Ethics with the aim of setting out common basic professional and ethical principles for all in-house lawyers in Europe. The Code of Ethics is based on those of most member associations, and is a point of reference especially in those countries where the in-house lawyer's profession is not yet recognized.

Considering that most common law countries do recognize the special role of in-house counsel, thus providing for a sort of "legal privilege," the lack of recognition in other countries may cause unequal treatment and irregularities in a global market. Thus, legislative action on this matter would seem to be necessary at both the country and EU level. ■

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