

Five Fundamentals for Taking Compliance Management Seriously

BY DANIEL LUCIEN BÜHR

Shaping the compliance discussion. In April 2010, *economiesuisse*, the Swiss Business Federation, published a policy paper on effective compliance management as a framework for its members, and to contribute to the important discussion on corporate compliance. The paper is intended first and foremost for the boards of directors and the executive management in Swiss companies. The basic principles and essential building blocks, however, may also serve as a source of inspiration for companies in other jurisdictions when establishing their own best-practice compliance plans.

Integrity as a business policy

The Swiss economy is highly globalized, and its value chains are becoming increasingly complex. This development is taking place against a background of increasing regulation and legal enforcement. In this corporate environment, integrity when conducting business is a fundamental requirement of diligent management. If companies want to be successful in the long term, they must nurture a keen culture of integrity and law-abidance. Integrity and compliance are therefore the basis, but also an opportunity for successful business.

Inspired by international compliance practice,¹ *economiesuisse*² and business specialists³ have drawn up the foundations of effective compliance management.

Swiss companies are convinced that by applying binding values and appropriate compliance management they can safeguard their integrity, and avoid or contain breaches of the law. Integrity and effective compliance are therefore unalienable elements of good, diligent business management. Compliance also contributes to the social responsibility borne by the economic players.

The mandate to any board of directors includes the basic legal responsibility of supervising those people entrusted with managing the company, in particular with regard to abidance by the law. Compliance must be implemented, supervised and adapted to changes by the board of directors with the greatest of care and attention. The aim is to ensure that any breaches of the law are avoided or discovered early enough so that the company can protect itself from claims for financial damages, potential administrative or criminal penalties, and a loss of reputation.

The board of directors determines the company's policy and values, and lays the foundation for compliance within the organization. Management ensures compliance in day-to-day business, and provides adequate staff and material resources for it to be done. In addition, management should regularly report to the board about the effectiveness of the company's compliance efforts.

The term compliance

The term compliance basically means ensuring law-abidance. Private and public stakeholders expect that any company will conduct its business in a way that complies with applicable standards. Seen from this perspective, compliance can also be defined as the state of integrity expected by the stakeholders on the basis of the civic responsibility of the companies. Historically, compliance and the practice itself are both of US origin, dating back to the

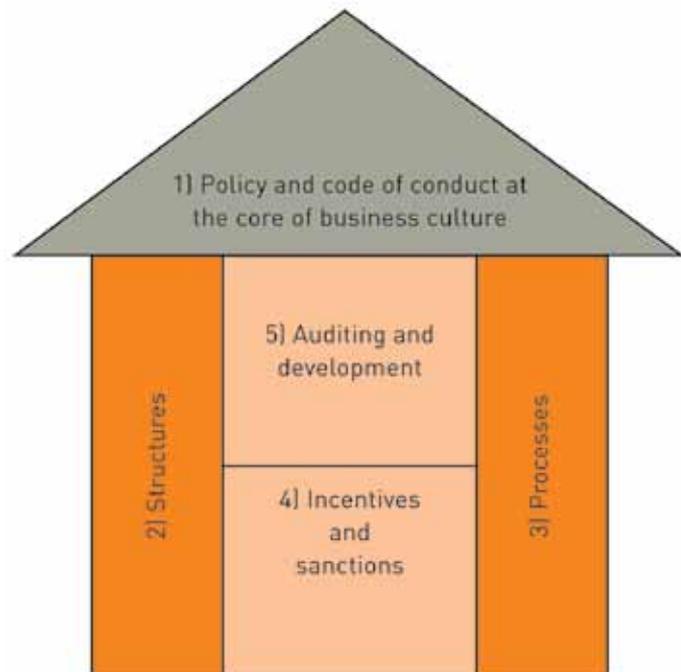


DANIEL LUCIEN BÜHR is regional counsel for Europe, Russia, Near East and Africa at Schindler Group (Elevators and Escalators), in Switzerland. He manages all

major operational legal matters of 34 country subsidiaries. Bühr earned his JD at the University of Berne and was admitted to the Swiss Bar. He holds MBA degrees from the London Business School and Columbia University. Before joining Schindler in 2006, Bühr worked as corporate secretary for a Dutch global conglomerate, and founded and sold a venture company. He is a member of various legal committees with Swiss business associations and chaired a working group on compliance management. He can be contacted at daniel.lucien.buehr@ch.schindler.com.

legal violations in the American defense industry in the 1980s. Since the early 1990s, there has been recognition in the US economy that companies should be aware of their strategic legal risks and should systematically prevent infringements of the defined core legal areas. Since the late 1990s, compliance has also become a key element of diligent corporate management and successful risk management for European businesses. In recent years, increasing emphasis has been placed on integrity in business.⁴ Companies — just like any citizen — are required not only to behave in

accordance with the law, but also with complete integrity. Guaranteeing abidance by the law in the broader sense, i.e., as it is described in Article 716a of the Swiss Code of Obligations as the non-transferable and inalienable duty of a public limited company's board of directors, is the starting point of this article. However, beyond law-abidance, a culture of complete integrity should also be maintained. Staff needs to adhere to the corporate ethos of the company and constantly strive for new goals. As shown below, this goal can be achieved with a systematic and efficient compliance management system.



The Compliance House
Five fundamentals of effective compliance
Source: author's design.

Five fundamentals of effective compliance

Law-abidance systems or compliance programs are among the core elements of careful business management. The content of the compliance program will be different depending on the strategic risk profile (“risk map”) of the particular company. Smaller companies that operate only in one jurisdiction can take clear, straightforward measures to ensure law-abidance, whereas multinationals need to run a comprehensive professional compliance program. Although there is no single binding model for effective compliance management, there are common fundamental elements for effective compliance as shown, for example, in the “compliance house.”

1) *Policy and code of conduct are the roof of effective compliance.*

The corporate management⁵ commits to complete integrity — in particular to abidance by the law — as a key part of its corporate culture and the foundation of its business operations. It issues a code of conduct (i.e., code of ethics, code of business conduct, etc.).

2) *The structure of the compliance organization is the first pillar of the compliance house.*

The corporate management ensures that the code of conduct, in particular the requirement to abide by the law, is effectively implemented by the compliance structure. It makes adequate financial, staff and material resources available.

The structural guarantee of the effectiveness of compliance includes the creation of independent bodies to which concerns and infringements can be reported in confidence.

3) *The compliance processes are the second pillar of the compliance house.*

The compliance processes and the compliance organization together form the company’s compliance program. Planned, systematic processes include, for example, the regular analysis of the legal risks, publishing and implementing internal regulations, training exposed staff, and handling concerns and infringements.

4) *Appropriate incentives and sanctions complete the compliance house.*

Integrity and acting within the law should be the prerequisites for any remuneration. If necessary, particular achievements relating to integrity and compliance, and therefore to the corporate culture, can be rewarded. But under no circumstances should the effectiveness of the compliance program be sacrificed to conflicting com-

mercial incentives. Culpable breaches of the law should be sanctioned so that punishment and deterrence emphasize the fact that compliance is binding and non-negotiable. The requirement for integrity and compliance, together with sanctions in the event of culpable breaches of the law, are transparent parts of the staffing and remuneration policy of the company.

5) *Testing the effectiveness and the constant improvement of compliance measurements are the cornerstones of the compliance house.*

The corporate management ensures that the compliance management is regularly tested for effectiveness. Weaknesses in the program or individual measures are then put to rights. The compliance system must be adapted to take account of any changes in the company (i.e., new products, new markets, etc.).

Comments on the five fundamentals of effective compliance

1. *Policy and code of conduct in corporate culture*

Compliance starts with the commitment of the corporate management to abide by the law as a fundamental condition of all business operations. This commitment to law and order must be genuine, unequivocal, firm and constant; it is the foundation of a compliance-oriented corporate culture. The commitment to law-abidance must be made public within and outside the company, and the corporate management must act as role models in this (“walk the talk”).

The corporate management issues a code of conduct. The code of conduct belongs to the highest-level regulations (“constitution level”) in the company, and lays down the ethical and moral framework in which the business operations are conducted.⁶

It is a set of guidelines and a moral reference point for the company. The code of conduct entitles, motivates and obligates the corporate management and all staff.

Example of an elementary code of conduct

As employees of Example Ltd., we behave in an ethical manner toward customers, suppliers, competitors, the authorities and our colleagues.

We abide by the following principles:

- 1. We abide by the laws and standards in force.*
- 2. We respect human dignity and the rights of every individual.*
- 3. We do not offer bribes to anyone; nor do we accept bribes.*
- 4. We avoid conflicts of interest or declare them at an appropriate time.*

Staff must be able to put questions directly or indirectly to the legal and compliance function, and receive competent answers within a reasonable period of time.

5. *We maintain the confidentiality of internal data.*
6. *We respect and safeguard the intellectual property of Example Ltd.*
7. *We actively support the implementation of this code of conduct.*

Example of the importance of a code of conduct in everyday business

Circumstances: The head of human resources (HR) at Example Ltd., wants to restrict staff use of the internet for private purposes in the workplace. To understand the extent to which staff uses the internet for personal use, he wants to have the staff's behavior monitored secretly.

Although he is dubious about the legality of this procedure, he asks the IT department — without any further explanation — to secretly monitor and analyze the staff's online behavior.

Assessment: The head of HR knows he must obey the law. The legislation includes the labor law that prohibits any secret monitoring of employees unless they are specifically suspected of abuse, and also the data protection law that only permits the collection and processing of personal data if the persons concerned are aware that this is being done. The head of HR is familiar with the broad outlines of this legislation. However, he rates the company's objectives to be more important and omits any clarification of the legal aspects. By doing so, the head of HR accepts to break the law. He commits a breach of the code of conduct, and through his actions, the head of HR puts Example Ltd. at risk in terms of its liability and reputation.

2. *The structure of the compliance organization*

The structure and processes of compliance are the main pillars of the compliance house. They make it possible to implement the principles laid down in the code of conduct. The structure and organization of the compliance program must be designed from the outset in such a way that illegal behavior in general is prevented or detected.

The board of directors bears the ultimate organizational responsibility. It organizes the company in such a way that any breaches of the law can be avoided or detected with appropriate effort and in good time. The board of directors decides the outlines of the staff, and structural organization of the legal and compliance function. Among other things, it decides whether the functions are joined or separate, whether they are handled centrally or not, to whom these functions report (board of directors, audit committee, CEO, etc.), and what resources and tools will be allocated to these functions so they can do their work effectively and reliably. The board of directors bears the ultimate responsibility for compliance. This responsibility cannot be delegated to any other body.

However, the board of directors can delegate compliance tasks to the corporate management, who in turn can delegate the support and supervision of employees to legal and/or compliance officers. Despite this cascade of responsibility, each employee is personally responsible for compliance within her sphere of influence.

To increase the likelihood that reprehensible practices are detected, internal and/or independent reporting bodies should be set up. These bodies must be independent in the sense that the staff runs no risk of reprisals if they report misconduct. Whistleblowing must also be protected by guaranteed anonymity and confidentiality. It is conceivable, for example, to have an internal ombudsman for reports from employees and an external reporting body for confidential or anonymous complaints.

Example of basic structure of a compliance program

A compliance program that is effective and integral in its design features the following basic elements:

- Content and mode of operation of the compliance program are known to the top management; it supervises how the program is carried out and its effectiveness.
- The corporate management ensures that the necessary resources, powers and direct reporting lines required to carry out the compliance program are guaranteed.
- The company informs and regularly trains its staff appropriate to their level in the organization about the principles and rules for complying with the code of conduct. It answers any questions asked by the staff in a timely and competent manner.
- The company checks compliance and effective implementation of the code of conduct in an appropriate way. It ensures that the staff and third parties can contact a reporting body, maintaining anonymity if requested.

DyKEMA:

When you expect unparalleled client service,
outstanding results, exceptional value

For more information call Dykema Chairman
Rex Schlaybaugh at 877.599.6800 or go to
www.dykema.com

Chicago • Dallas • Detroit • Los Angeles • Washington, D.C.
Ann Arbor • Bloomfield Hills • Grand Rapids • Lansing • Lisle

- The company does not establish any commercial objectives that run counter to compliance with the code of conduct. It punishes any infringement of the code of conduct. The compliance program is regularly and systematically tested for effectiveness.

3. *The compliance processes*

The compliance processes are the operative component of an effective compliance program. They are systematic procedures for surveying, evaluating and testing relevant information on compliance with legislation and standards.

In addition, reliable advice for the staff is a central resource for effective compliance. The processes include, in particular, establishing and applying a general risk analysis; publishing internal rules and directives; developing and applying concrete risk-minimizing measures; training and support for staff; answering questions about compliance (“speak-up” principle for staff, and “ask me” principle for the legal and compliance function), processing reports and conducting checks. In addition to the processes that are specifically compliance oriented, compliance elements should also systematically be embedded in the business operations.

The regular training of the company’s staff creates awareness and understanding of the importance of the code of conduct and the internal rules of behavior. As compliance with legislation requires a basic knowledge of the law and awareness of the rules of behavior, the company has an obligation to train its staff thoroughly. The training must be systematic and recurrent. It must consider the specific corporate risks, and the current state of employees’ knowledge and their responsibilities.

In addition to training, advising staff is another key compliance process. Staff must be able to put questions directly or indirectly to the legal and compliance function, and receive competent answers within a reasonable period of time.

Example of training in a Swiss multinational

The company holds code-of-conduct training sessions at least once a year for all new employees in each group company. During these sessions, the company’s values and code of conduct are presented and explained by trained staff (lawyers and compliance officers). In addition, the rules of conduct with regard to bribes and competition law are explained in detail. The company has pinpointed these two sectors as major legal risks.

All staff members must regularly attend a code-of-conduct training session. The training is either in the form of a computer course or as a face-to-face session. Each training session is followed by a confidential electronic compliance survey. In this survey, the staff are able to comment on compliance with the code of conduct and alternating specific compliance questions.

The knowledge of the code of conduct is always refreshed whenever there are important management meetings, such as meetings of country or regional managing directors.

If they have questions, staff can contact the legal advisor, the compliance officer of their group company or the group’s legal department. In areas where there are particular legal risks, compliance-training sessions are held that tackle those specific legal risks.

4. *Appropriate incentives and sanctions*

Not only does staff share responsibility for the financial success of the company, but also for the law-abidance of the business operations and maintaining the company’s reputation. Incentives for both management and staff are an effective tool in putting the code of conduct into practice. Law-abidance is a requirement of any effective compliance program, and if necessary, is supported by incentives. Culpable breaches of the law and internal rules, on the other hand, are punished with a sanction. Sanctions may take the form of a reduction in financial entitlements, an official warning or even dismissal.

A company should not undermine the code of conduct by rewarding commercial success even though legal risks are being ignored. Attention should also be paid to the fact that unrealistic commercial objectives, combined with group pressure, may cause individual employees to break the law and internal directives. Therefore, the corporate management must make it clear that good performance is not only commercially above average, but also systematically takes account of, and minimizes the risks associated with, any business. In this respect, risk management focuses on abidance with the law.

5. *Testing the conceptual effectiveness of compliance*

Measures taken by the company to ensure compliance must systematically be tested for effectiveness. The main tool for this is preventative testing, which can be carried out announced or unannounced. Qualified internal or external staff investigates whether corporate management and the staff are abiding by the laws and internal directives. The level of knowledge and business practices must be assessed, and business procedures and correspondence examined in detail and evaluated.

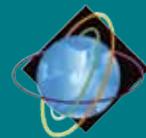
The ineffectiveness of a compliance program in an individual case does not mean that it is ineffective overall, i.e., in the way it is designed. However, if a significant breach of the code of conduct and the rules of conduct is discovered, the compliance program must be re-examined. What caused the breach must be ascertained. If any individual breach is attributable to incomplete or faulty compliance organization, a lack of or unclear rules, or insufficient

*You've got to
be kidding*

trying to manage all the multi-jurisdictional nuances of employment law with
a single, multi-national law firm.

The Employment Law Alliance.®

Complying with the laws in all the places you have employees? It's no joke. The best people for the job are the ones who are actually there. Our local experts know local laws better than anyone else. And certainly more than a multi-national firm without lawyers located where your employees are. We offer seamless service in all 50 states and over 120 countries. That's the Employment Law Alliance. Here for you, wherever here is. No kidding.



EMPLOYMENT
LAW ALLIANCE®
Helping Employers Worldwide®

EmploymentLawAlliance.com

ACC Extras on... Compliance Management

ACC Docket

- *Business Ethics: Is a Dedicated Compliance and Ethics Office Right for You? (July 2010)*. Compliance and ethics offices have become more popular, but does your client need one? This column offers thoughts to consider before making such an investment. www.acc.com/docket/c&eoffice_jul10

QuickCounsel

- *Successful Records Management Programs (Aug. 2010)*. A compliant records management program is necessary for organizations to proactively and progressively manage all data, media and information. Organizations need to demonstrate "good faith" intentions to follow these best practices consistently and accurately. www.acc.com/quickcoun/rmp_aug10 

Leading Practices Profile

- *Leading Practices in Providing In-house Legal Support for Corporate Governance Initiatives and Compliance and Ethics Programs (Sept. 2010)*. This Leading Practices Profile examines corporate governance, compliance and ethics practices of eight companies. Organizations featured in this profile describe how their legal and compliance functions support their boards of directors and board committees. In addition, organizations provide insight into how they assess the effectiveness of their boards, implement their codes of conduct, provide training on ethics and regulations, and construct systems to assess risk and compliance. www.acc.com/lpp/support_corpgov_sep10

InfoPAKSM

- *Compliance Officer and General Counsel: Benefits and Pitfalls of Combining Roles (Sept. 2010)*. This InfoPAK discusses the role of a compliance program

in a corporation's organizational structure, the various options the corporation has when deciding who will lead the program, and the impact of each on the program's operations. www.acc.com/infopaks/co&gc_sep10

Quick Reference

- *Checklist on Basic Compliance Risks (June 2009)*. This checklist covers basic risk in environment, workplace health and safety issues. www.acc.com/quickref/cklst_comprisk_jun10

Sample Form & Policy

- *Ethics and Compliance Manager (Feb. 2005)*. Sample job posting for an "ethics and compliance manager" that manages the ethics and compliance program for the company, ensuring that the company exercises due diligence to prevent and detect criminal conduct. www.acc.com/sfp/e&c_mgmt_feb05

Article

- *Best Practices in Records Management: Practical Guidelines for Achieving Compliance (June 2009)*. The article reviews best practices in records management. Includes discussion of background on records retention, five essential components of best practices, and how to review a company's records retention programs. www.acc.com/bp_rec_mgmt_jun09

ACC has more material on this subject on our website. Visit www.acc.com, where you can browse our resources by practice area or search by keyword.



The new GLD button lets you click to copy, print or email a checklist from certain ACC online resources.

training or support for employees, then the compliance program needs to be improved.

A company's own standard to act with integrity and abide by the law does not mean that every imaginable breach of the law by staff must be prevented by any means possible. Instead, companies should rely on their promotion of ethical conduct, on their staff taking responsibility and on their adequate compliance efforts.

Corporate compliance identifies the strategically relevant risks of not abiding by the law, and concentrating on preventing serious breaches before they occur by applying the principles of risk management. For all companies, these

risks include offering and taking bribes, breaches of competition law, health and environmental protection regulations, personal rights and product safety rules.

Focusing on serious breaches of the law does not mean that a company might accept culpable breaches of the law by its corporate management and staff in other areas. All companies bear a duty to exercise diligence in the management of their business, and therefore, a general obligation to obey the law.

Compliance expectations apply to all companies regardless of their type and size. The details and application of specific compliance measures, on the other hand, are

defined individually. Smaller companies will have straightforward compliance measures. Setting a good example and the character strength of the owner, along with a few written rules on the values of the company, might suffice.

This can be combined with training sessions with a consultant, external legal support for the business operations and an internal control system. Medium-sized companies generally have a higher risk than smaller companies in the event of a serious breach of the law. Consequently, the compliance program must be thought through in greater detail. It must be totally sound. The internal organization, the processes and the control mechanisms should still be straightforward and fit for purpose.

Large companies require a professional compliance system (best-practices benchmark). The legal issues are considerably more complex, and there are far more people involved than in smaller companies. Since a serious breach of the law can jeopardize the reputation or even the existence of the company, the commitment to law-abidance must be a prominent part of the corporate culture, and the upholding of moral values a constant focus of the corporate management.

An effective compliance program is proof of the policy and the expectations of the code of conduct. The corporate management ensures that the compliance organization is provided with appropriate resources, and equipped with the necessary internal powers and a direct reporting line to it. The design and conceptual effectiveness of the compliance program should be checked regularly by the experts. If there are any shortcomings, the corporate management has the duty of diligence to adapt the compliance program promptly.

Compliance as a challenge

Now more than ever, setting up and running a compliance management system is necessary for companies faced with increased legal and societal demands in a complex economic environment. Effective compliance reduces the danger of legal sanctions, financial losses and damaged reputations. Corporate management's clear and visible commitment to integrity and law-abidance is of key importance. The corporate management must enforce the policy and code of conduct, and establish an adequate and functioning compliance organization.

Early-warning systems, internal directives, training, and targeted incentives and sanctions are important elements for effectively containing and avoiding business risks.

Compliance does not only involve abiding by the law, but also ensuring the integrity, and socially and ethically responsible conduct of all the company's employees.

Effective compliance strengthens a corporate culture, and the business decisions are not taken merely according

to economic criteria, but always also include the complete social and ethical responsibility of the company as an equal decision-making criterion. Professional compliance management is a central component of diligent management and a demonstration that the company is not only striving for long-term profitability, but that it also maintains a culture of integrity and takes its social responsibility seriously.

Setting up and running an effective compliance system is a major challenge for a company. Depending on the company's size and business, the compliance measures it requires are more or less extensive. So the compliance program must be tailor-made to fit the company. However, the expectations of state and society are the same for any company. Corporate management is therefore obliged to constantly and diligently check whether business and internal organization is in-line with the law and rules of ethical conduct, and to correct any shortcomings appropriately and in good time. ❏

Have a comment on this article? Visit ACC's blog at www.inhouseaccess.com/articles/acc-docket.

NOTES

- 1 For example, there is reference to UN Global Compact (www.unglobalcompact.ch), the Implementation Guide for the ICC Codes (ICC Document No. 240/619, December 2009), the Ethics and Compliance Book of the Ethics & Compliance Officer Association (Waltham, USA, April 2008), and the guidelines for a good compliance program as described in the US Federal Sentencing Guidelines Manual of the United States Sentencing Commission (www.ussc.gov).
- 2 www.economiesuisse.ch.
- 3 The articles were written by the working group of the economiesuisse Committee for Legal Issues, comprised of Dr. Daniel Lucien Bühler (Schindler Management AG), Dr. Philip Kübler (Swisscom AG), Dr. Patrick Sommer (CMS von Erlach Henrici) and Christian Stiefel (SwissHoldings). The experts panel was comprised of Dr. David Frick (Nestlé), Dr. Urs Jaisli (Roche), Dr. Knut Mager (Novartis), Prof. Dr Othmar Strasser (Zürcher Kantonalbank), Alfred Gerber (Sulzer), Georg Matiaska (Valora) and Jürg Wyser (PWC).
- 4 Ben W. Heinemann Jr., "High Performance with High Integrity," *Harvard Business Press*, 2008.
- 5 In public limited companies, the board of directors. When responsibility for running the company is entrusted to third parties (i.e., corporate management) the principles also apply to these third parties.
- 6 In practice, many codes of conduct broadly call for ethical behavior, i.e., personal integrity and honest, respectful business operations. This takes into account the fact that in many countries legally permitted yet morally reprehensible practices exist (particularly in the corruption sector).