

Corporate Integrity: Are you well equipped?

In our society, corporate integrity has been – and remains – at the center of attention of the media, the politicians and the judiciary. This text tries to put it into context and suggest various measures for managing risks. It also proposes various measures for dealing with crises as well as searches.

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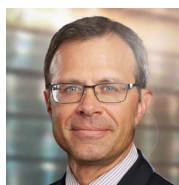
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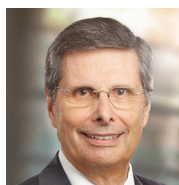
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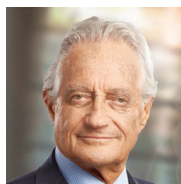
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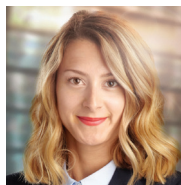


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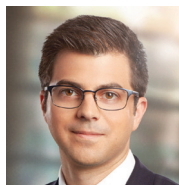


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Integrity and risk management

1. **Integrity** is a **moral value** which goes beyond merely respecting the rules.
2. **Greed**, negligence and a lack of rigor are the main **adversaries** of integrity.
3. **Integrity** is **regulated by** and entrenched in our laws.
4. **Behaviour consistent with integrity** must be encouraged through the implementation of a culture of integrity and a coherent **normative framework** (rules and policies).
5. This **coherence** is **essential** and must appear, among other things, in messages, decisions, actions and behaviour of both the board and management. Thus, **compensation** should not directly or indirectly **promote** behaviour which is inconsistent with integrity and **violations** should be **sanctioned**.
6. **Managing risks** related to behaviour inconsistent with integrity is a major component of the **duty of care** (diligence) of directors, officers and employees and of the **charter of the board of directors** of a legal person (public and private).
7. Managing integrity must be done by **assessing the risks** (identification, analysis, evaluation) and taking **appropriate measures** (choosing options, development and implementation of plans, monitoring and review).¹
8. The risk of **reputational harm** and the related consequences are part and parcel of the risks to be assessed.
9. The **expectations of the media** and the **various stakeholders** should be taken into consideration in assessing the risks, even if such expectations may appear to be ill founded or exaggerated.

¹ See *Need to Know* newsletter, "Directors and Risk Management", Lavery, May 2011.

10. Various measures to reduce risks should be implemented, including:

a) General measures

- ▶ Ascertain that the **persons hired**, particularly members of management, are **honest** and share the values of the legal person
- ▶ Develop, **implement** and maintain a **culture of integrity** within the legal person
- ▶ Implement **risk management** at all levels, promoted, validated and monitored by the board of directors by conducting first a **critical review** or a due diligence on the current ways of doing things by internal resources or your external legal counsel

b) Specific measures to be adopted

- ▶ Code of conduct and policies
- ▶ Whistleblowing procedure
- ▶ Approval systems (double or multiple)
- ▶ Regular **transfers** of employees within the organization
- ▶ Publicity and **employee training** (including reminders, exams, capsules, cartoons, etc.)
- ▶ Controls and internal **audits** on the respect of integrity
- ▶ **Programs to assist employees** who may face psychological or financial problems
- ▶ Availability of **resource persons** to advise employees on ethical issues
- ▶ Validation of the integrity of **suppliers**, including agents, mandataries or intermediaries working abroad, etc.

Crisis Management

11. Crisis **management** must be **coordinated** and **effective**.
12. Crisis management should **address** the **concerns** from within the legal person as well as those raised by the media and stakeholders (shareholders, members, clients, customers, suppliers, communities, etc.).
13. Crisis **management preparation** forms an **integral part** of risk management.
14. Among others, the **following measures** should be implemented both **internally** and **externally**:
 - a) inform the **board of directors** and management immediately, report to them on a regular basis and obtain their approval as to the orientations and measures
 - b) collect, validate and protect the **information**, particularly by obtaining advice from legal counsel on ways to **protect your rights and privileges**, including the right to professional secrecy
 - c) call upon internal and/or external **specialists** (public relations and communications experts, lawyers, etc.) as soon as possible
 - d) notify **insurers** forthwith and avoid taking actions or make statements which may invalidate your insurance coverage
 - e) entrust the **coordination** of the entire operation to a person responsible
 - f) identify a **spokesperson**, **avoid leaks** and ensure that no other employee talks to third persons without approval or assistance
 - g) **communicate** in a transparent and honest manner the state of the situation, the measures taken and those considered
 - h) quickly consider the option of conducting an **independent investigation** and determine who should be entrusted with it
 - i) take all reasonable means
 - ▶ to **protect the employees and stakeholders** who may be affected and
 - ▶ to **remedy problems** while ensuring that they will not occur again
 - j) consider the option of **suspending** any employee who is accused or suspected of having participated in a criminal act or an offence, taking care to respect the employee's rights; and

- k) keep in mind the preservation or, according to the case, the restoration of the **trust of stakeholders** in the legal person
15. In respect of **regulatory authorities**, among others, the following additional measures should be taken:
- a) **cooperate** honestly while **preserving your rights**, including the right to a full answer and defence in the context of the investigations and proceedings and the right to professional secrecy and other privileges
 - b) secure a **copy of your documents and tools** necessary for a full answer and defence and the continuation of your operations
 - c) review the **precedents** as well as the possible sanctions and develop a **strategy** for managing the relation with the regulatory authority; and
 - d) **assess** the benefits and disadvantages of a quick **settlement** as well as the chances of success of a **contestation** and then take the appropriate decisions with the prior approval of your insurers, if required
16. In respect of the **media**, among others, the following **additional measures** should be taken:
- a) **determine the message** to be communicated and **restrict yourself to it**
 - b) determine the media and **persons** from the media whom it is **preferable to contact**
 - c) prepare and issue **press releases**
 - d) make a **resource person** available to the media; and
 - e) **monitor the media**
17. In respect of **customers, distributors and suppliers**, in the case of a defective or contaminated product, among others, the following **additional measures** should be taken:
- a) assess the **risks of damages** or problems to health and property, as well as **reputational issues**
 - b) quickly **determine** the cause and source of the problem
 - c) establish the **chain of contacts** of the product
 - d) adequately and promptly **inform the potential victims** as well as all persons in the chain by providing full information on the preventive measures these persons should take

- e) if the problem originates from a **supplier**, determine and implement replacement solutions; and
- f) determine the other measures to be taken, including a **possible product recall**, while reviewing with care the legal consequences of each measure considered

Searches

18. A search is the attempt to find material items of evidence in a physical location and, by extension, dematerialized items, such as electronic documents.
19. In the absence of consent from the person responsible for the location within the legal person (the "person responsible for the location"), a search is subject to prior authorization by a justice of the peace on the basis of a sworn denunciation which must state some specific reasons (offence committed, items of property having been used for committing the offence or which may be used as evidence, property on site). The justice of the peace may only authorize the search if he or she is convinced that the **grounds** alleged are **reasonable**.
20. The person who executes the search warrant must identify himself or herself, state the offence, allow the person responsible for the location to read the warrant and ask that person to deliver the property which is referred to in the warrant.
21. The **warrant generally authorizes** the person who is responsible for executing it to take some actions, including a search and the use of force.
22. **Claiming privileges** – for example, right to professional secrecy – renders the implementation of a search protocol mandatory (immediate measures are required). **These privileges must be claimed forthwith.**
23. An **action plan** applicable in the event of a search should be developed as a **preventive measure** and include, among other things, the determination of the identity of the persons responsible and external resources to contact (lawyers, computer specialists, etc.), the rights to be protected, the provisional measures to be taken and the approach to adopt with the person responsible for executing the warrant.
24. This **action plan** should be designed in **such a way as** to allow the legal person to be able to **continue to operate** after the search (documents, electronic support, tools, etc.) and should favour the **immediate presence of a lawyer on site.**

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This text is a summary of the main elements of the verbal presentations given at the Lavery seminar on May 5, 2016. It is not intended as legal opinion and does not contain all the applicable elements, nuances, reservations and exceptions.