

Risk Management for Regulators – Part 3: Risk Assessment

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As discussed previously, risk management follows a systematic cycle beginning with risk identification and then moving on to risk assessment, risk treatment and monitoring and assurance. In this issue we look at risk assessment for the three areas in which a regulator is most likely to employ risk management, namely:

- for the entire organization,
- for specific initiatives and policies, and
- for an external review from the perspective of those most protected by the regulator.

The goal of the risk assessment stage is to understand and prioritize the risks that the organization has previously identified. Sometimes called risk analysis or risk evaluation, this step involves assessing the risk exposure itself and the impact of various ways of controlling the risk.

Risk Assessment for the Entire Organization

Each of the risks identified in the previous step need to be evaluated. First it is useful to assess the nature of the risk. How does the risk arise and what are its causes? For example, is a successful challenge of complaints investigations typically the result of the regulator not having clear procedures, staff not following those procedures, lack of adequate training or supervision, an unexpected change in legal

expectations or something else? There are various tools available to conduct this evaluation including scenario analysis, failure mode and effects analysis, a fault tree analysis, the “5 whys” and / or the use of the “fishbone diagram”.

Most importantly, the frequency and severity of the event needs to be quantified as much as possible. For some risks, such as the frequency of appeals and their success rate, objective data can be gathered. For other risks, such as whether appropriate cases are being referred to discipline, an element of judgment is required. However, being able to graph where on the following table the risk best fits is essential to assessing the priority and best control measures for the risk.

High severity Low frequency	High severity High frequency
Low severity Low frequency	Low severity High frequency

For example, a regulator with a limited budget should know how frequently a multiple-week discipline hearing, that would cost hundreds of thousands of dollars, will occur. If the frequency is quite low a different approach would be taken than if the frequency was higher. However, probability analysis is important here. Even if the frequency is low, there should be some evaluation of the variation of distribution of expensive hearings. If such hearings were to occur once every five years, like clockwork, the risk might be more manageable than if three could

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quite easily occur in one year with none for another twenty years.

The effects of various types of controls should also be analyzed. For example, does obtaining a prosecutorial viability opinion before referring a matter to discipline materially impact the risk of an unsuccessful prosecution? Examining the data from various regulators, at what point does the extent and method of training a committee result in substantially fewer successful appeals? How effective are other tools (e.g., use of decision-trees, offering internal appeals, legal counsel review of draft decisions, verbal communication with parties) in reducing the frequency of appeals?

A key part of the risk assessment is to identify the consequential impact of any changes to the risk under consideration. For example, how would reducing the language proficiency requirements for applicants for registration affect complaints about poor communication? How would certain quality assurance activities (e.g., compulsory jurisprudence courses) reduce complaints and enhance client satisfaction?

The above assessment should put the organization in a position to make knowledgeable decisions about addressing risks.

Risk Assessment for a Specific Initiative or Policy

The risk assessment process for a specific initiative (e.g., going paperless) or policy (e.g., using a different competency tool) follows the same approach. If a Council, Board or committee is going to exclusively use electronic documents, how would the likelihood and severity of a confidentiality breach

be affected? In all likelihood, there would be a lot fewer situations where the materials would be misplaced (e.g., left in a briefcase in a room with public access; thrown away in the garbage without shredding). However, the risk of unauthorized access of electronic information (e.g., hacking) would likely result in a much more extensive confidentiality breach.

The analysis would also consider, to the extent possible, the unanticipated consequences of the initiative. For example, where electronic documents are provided to a Council, Board or committee, there likely will be a trend towards posting both more and longer documents (since they do not have to be copied and shipped). At the same time, some individuals are less likely to read electronic-only documents or to highlight or make notes on them. The result could actually be less informed decision making.

On the other hand, with appropriate training, the features of electronic documents may make it easier to use them (e.g., hyperlinking referred to back-up information, sharing notes by all those reviewing the documents, search capabilities). In the right circumstances the information in the documents could be more easily understood.

Also, unless a deliberate decision is made not to permit it, the length of time each Council, Board or committee member spent reviewing the documents could be ascertained. This information could be beneficial (e.g., for self-assessment purposes) or harmful (e.g., in discovery during a legal challenge).

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Knowing as much as possible about the risk under consideration can significantly enhance the quality of decision making on specific initiatives or policies.

External Risk Officers

As noted previously, an external Risk Officer focuses on risks to the primary beneficiaries of the regulator, often the clients of those being regulated and the general public. This focus, which is also present in the other risk contexts described above, can help an organization achieve its goals. Assessing the risks (good and bad) to the public of a policy change constantly reminds the regulator of who it is serving.

For example, examining the complaints process from the complainant's perspective can result in an emphasis on prompt dispositions or verbal as well as written notification of the results to the complainant (even though the regulator's lawyer might prefer a different approach). An external Risk Officer would probably also examine the complaints process from the practitioner's perspective (which might, too, result in a heightened emphasis on prompt dispositions and, possibly even, verbal notification).

Systematically considering risks primarily from the perspective of the public, rather than to the organization itself, is a valuable regulatory tool.

Once the risk assessment process is complete, the next step is risk treatment, which will be discussed in the next issue of *Grey Areas*.