Grey Areas
A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION
SML Steinecke Maciura LeBlanc Barristers & Solicitors

Risk Management for Regulators – Part 4: Risk Treatment

by Richard Steinecke
January 2015 - No. 192

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 the risk treatment stage.

Once the risks of a regulator have been identified and analyzed, the regulator needs to choose the optimal response to each risk, starting with the highest priority one.

Risk managers often talk about four or five categories of risk treatment:

- Avoid the risk– get out of the activity;
- Modify the risk – change what is being done so as to reduce either the frequency or the severity of the negative risk;
- Transfer the risk – have someone else assume the risk, for example, by purchasing insurance;
- Retain the risk – accept the risk as either inevitable or preferable to any other option;
- Exploit the risk – by taking advantage of the opportunity.

Some of these options are inconsistent and cannot be done simultaneously. For example, a regulator could not avoid a risk and retain it at the same time. Some options are not available to the regulator for some risks. For example, many of the activities of the regulator are statutorily mandated and cannot be avoided (e.g., registration, complaints, discipline). In addition, many of the consequences of a regulator's activities cannot be insured (e.g., administrative appeals, adverse publicity).

On the other hand, some risks can be addressed by a combination of treatments. For example, a risk that a practitioner will make a mistake that can seriously harm the public can be addressed by one or more of the following:

- Avoiding it by prohibiting practitioners from engaging in that activity (if that is possible);
- Modifying it (after finding the root cause of the mistake) by enhancing education for that activity in schools, publishing guidelines on the activity for existing practitioners and assessing / inspecting the performance of that activity as a part of a quality assurance program;
- Transferring it by calling the risk "mere negligence", denying that the mistake is a matter for professional regulation and referring harmed members of the public to the civil courts to sue the practitioner for "malpractice";
- Retaining it by accepting that such mistakes are not completely avoidable; and
- Exploiting it by a concerted campaign to prevent the mistake from occurring (including the regulator providing courses for which members can be charged a fee), monitoring the reduction of the frequency of the mistake occurring and publishing that data as an

FOR MORE INFORMATION
This newsletter is published by Steinecke Maciura LeBlanc, a law firm practising in the field of professional regulation. If you are not receiving a copy and would like one, please contact: Richard Steinecke, Steinecke Maciura LeBlanc, 401 Bay Street, Suite 2308, P.O. Box 23, Toronto, ON M5H 2Y4, Telephone: 416-626-6897
Facsimile: 416-593-7867, E-Mail: rsteinecke@sml-law.com

example of the regulator enhancing the protection of the public.

Regulators should be innovative in finding responses to each risk. For example, clients of practitioners could be recruited to be part of the solution by alerting the public to the risk and educating them to first of all check the regulator's website for information about the practitioner's record in the area and then to ask the practitioner the appropriate questions that will reduce the chance of the risk occurring. Publishing outcome data about practitioners' success (or otherwise) with the procedure will motivate improved performance even if virtually no one checks the data.

Some treatment options can be used for many risks. For example, a business continuity plan can become essential for any disruption of operations regardless of the cause (e.g., fire, flooding, storm, terror attacks, utilities breakdown). An even better example is that a flexible communications strategy can reduce the severity of almost any risk regardless of its source (e.g., a disruption of services, the unexpected loss of senior management, an operational misstep, a financial setback, a regulatory failure, reputational and strategic challenges).

Some risks are common across organizations and the regulator can adapt treatment plans that are fairly standard (e.g., for hazards, regulatory compliance, human resources, cyber crimes). However, some risks will be fairly unique to the regulator and a tailored treatment plan will be required (e.g., strategic risks associated with specific regulatory failures).

It is essential that the impact of each proposed treatment option be fully considered. For example, a contingency plan that enables staff to work remotely from home opens up multiple opportunities for highly sensitive information to be inadvertently released to the public. Some data breaches could create significant expense (to contain the release and notify those affected by it), result in extensive media reporting and create doubt within government as to the competence of the regulator. On the other hand, setting up the infrastructure to permit staff to work off-site might result in staff wanting to do so regularly. The implications of that development should also be considered. Will this result in greater staff productivity and satisfaction? Will it mean that it will be more difficult for the regulator to convey core values and supervise staff performance?

Once finalized, the treatment plan should be reduced to writing setting set out who is to do what by when.

It would be useful at this time to also identify what information will be collected as a part of the implementation of the treatment plan. Some of that information will simply confirm that the plan has been implemented. However, of more long-term significance would be collecting data that will show the effectiveness of the treatment plan. For example, staff surveys of their satisfaction could be useful. So would the systematic collection and analysis of client-expressed concerns about the delivery of service by the regulator.

The next issue of *Grey Areas* will look at implementing, monitoring and then assuring the effectiveness of the treatment plan.