

# Compliance & Ethics Professional

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# Risk assessment and the law

**R**isk assessment is—one way or the other—part of nearly every compliance and ethics (C&E) program. And it should be that way—given the importance that risk assessment plays in the key legal standards that articulate what a C&E program should include. But not all programs are up to legal “snuff” when it comes to risk assessment.



Kaplan

The most important such standard (at least for US companies) is that contained in the Federal Sentencing Guidelines for Organizations (the “Guidelines”). The operative provisions

there state, in relevant part: “In implementing [the requirements of an effective compliance and ethics program], the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify *each* requirement set forth in [the Guidelines’ definition of an effective program] to reduce the risk of criminal conduct identified through this process.”<sup>1</sup>

Of course, many companies do use the results of their risk assessments to design, implement, and modify *some* elements of their programs—particularly training and auditing—but a large number do not do so for “each requirement.” Among the required program elements, for which risk assessment is not used in some companies, are governance, management, monitoring, and incentives.

A second way in which some companies fall short of what the Guidelines require concerns what is actually assessed about C&E risks. Virtually all analyze the likelihood and potential impact of wrongdoing, as they should do, but the Guidelines also mention assessing the “nature” of risks.<sup>2</sup>

This is concededly a somewhat vaguer expectation than are those concerning likelihood and impact, but what I think is meant here (based on my risk assessment experience with clients and what I have seen done at other companies) is identifying the most foreseeable factual context of a violation. That is, it is not enough to say that, as a general matter, an antitrust violation is somewhat likely and, if it happened, would be impactful. Rather, the “nature” dimension calls for a company to assess what product/market the risk is in and what kind of violation it would be (such as bid rigging).

**Among the required program elements, for which risk assessment is not used in some companies, are governance, management, monitoring, and incentives.**

Finally, other official standards’ risk assessment provisions must be borne in mind too. Among these are parts of various enforcement agencies’ policies or guidance documents on competition law<sup>3</sup> and bribery compliance<sup>4</sup> programs. \*

1. United States Sentencing Commission, 2015 Guidelines Manual, §8B2.1 (emphasis added)
2. Idem.
3. Competition Bureau of Canada, Corporate Compliance Programs, June 3, 2015, Section 4.2
4. Serious Fraud Office of the United Kingdom, The Bribery Act 2010: Guidance, Principle 3.

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