

Regulatory Principles and the Professions

Introduction

Regulation is an integral part of professional life. Professionals interact with:

laws that govern behaviour, enforcement agencies that monitor and enforce their compliance;

- markets that trade in professional services; licensing and registration requirements for professional practice;
- social norms of professional life; and
- technology through which professionals conduct their work and/or market what they do.

Regulation of professionals can be local, national, international and/or global in its effect. Regulation can be imposed by both government and government agencies.¹ It may also be adopted by non-government actors including the professions themselves through peer pressure and processes, industry associations and standards organisations. There are also multi-lateral associations such as the World Trade Organisation, technical committees, trading partners and industry supply chains. Financial markets and provider entities have adopted the standards of self-regulatory institutions.² Such is the degree of regulation directly or indirectly affecting professional life, that professionals can rightly claim to be 'living in the age of the regulatory state'.³

Regulation, including regulation of professional activities, is an enormous topic influenced by debates in diverse fields. These include law, politics, economics, philosophy, public policy, sociology, psychology and management.⁴ This resource guide introduces the language, concepts and fundamental concerns of regulation by way of four topics:

1. The nature of regulation;
2. Techniques and instruments of regulation;
3. Compliance and enforcement of regulation; and
4. Future trends in regulation.

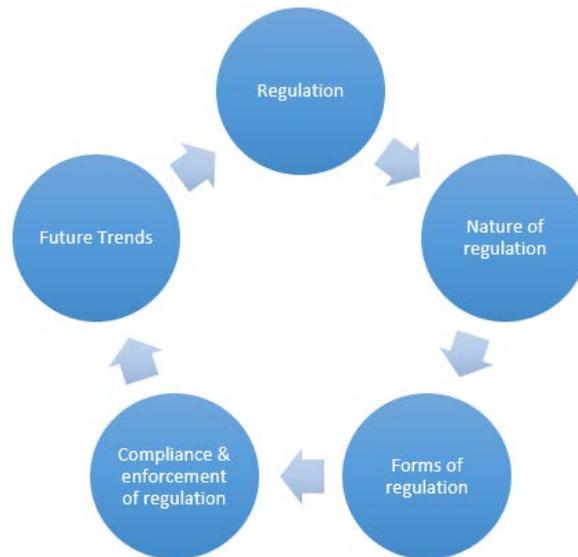
¹ Julia Black, 'Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory World' (2002) 54 *Current Legal Problems* 103. The term 'government' is used in this article in place of the term 'state' as it otherwise appears in academic writings on regulation.

² Neil Gunningham and Darren Sinclair, 'Smart Regulation' in Peter Drahos, *Regulatory Theory, Foundations and Applications* (Canberra, 2017) 134.

³ Giandomenico Majone, 'The Rise of the Regulatory state in Europe' (1994) 17 *West European Politics* 77; Michael Moran, *The British Regulatory State* (Oxford, 2003). Alternatively, 'the post-regulatory state' in acknowledgement that much regulation occurs outside of government spheres of influence. See Colin Scott, 'Regulation in the Age of Governance: The Rise of the Post Regulatory State' in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Cheltenham, 2004).

⁴ Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation* (Oxford, 2nd ed, 2011) 10-1.

Figure 1: Regulation processes



The Nature of Regulation

Whether imposed by government or non-government actors, the fundamental nature of regulation is the same. Regulation involves the intentional use of authority by one party to affect behaviour of a different party according to set standards. This may involve instruments of information-gathering and behaviour modification (a definition first offered by Philip Selznick and later refined by Julia Black).⁵ There are two core components. First, the issue of authority to regulate. Secondly, the capacity of the regulating person or entity to affect the behaviour of others.

In relation to authority, professional regulation can be bi-partite, for example involving government (as regulator) and members of a profession (as the regulated entities). However, it is increasingly seen as multi-partite, with numerous groups (government, professional association, market and consumer) influencing the behaviour of professionals.⁶ This shifting emphasis points to the rebadging of 'regulation' as 'regulatory governance'.⁷ Regulatory governance promotes regulation as in essence management or steering involving a range of interactions between institutions and structures of authority that may or may not involve government playing a central role.⁸

⁵ Philip Selznick, 'Focusing Organisational Research on Regulation' in Roger Noll, *Regulatory Policy and the Social Sciences* (Berkeley, 1985) 36; Julia Black, 'Decentred Regulation', above n 1.

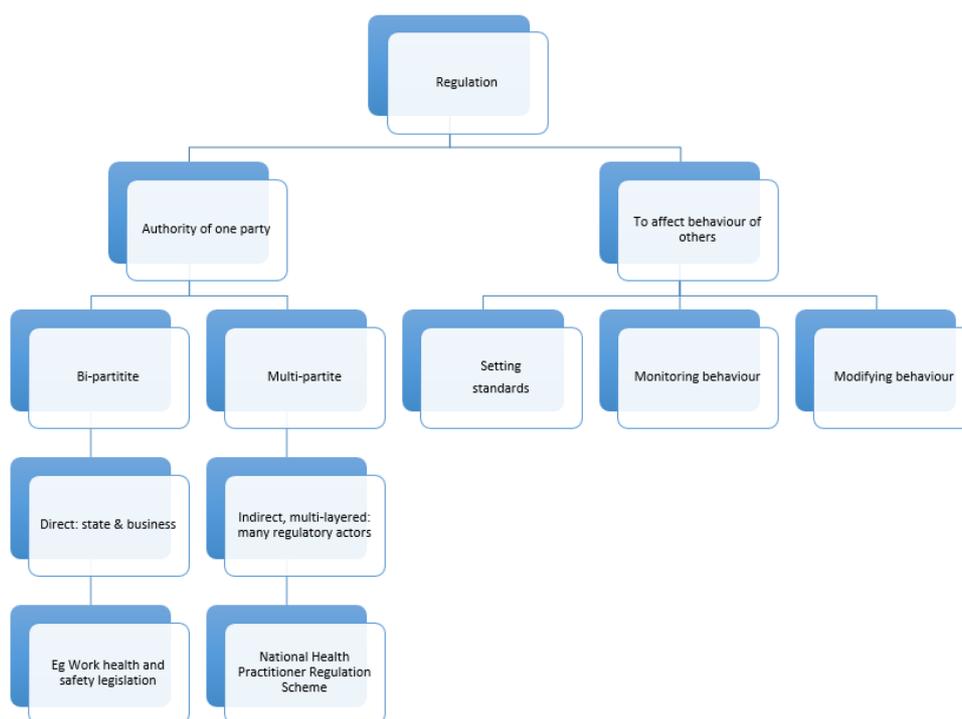
⁶ Gunningham and Sinclair, above n 2, 134.

⁷ Jacint Jordana and David Levi-Faur, 'The politics of regulation in the age of governance' in Jacint Jordana and David Levi-Faur (eds) *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar, 2004) 13.

⁸ Jan Kooiman, *Governing as Governance* (Sage, 2003) 4.

In relation to capacity to affect the behaviour of others, regulation typically occurs through standards setting, information gathering, and/or behaviour modification.⁹ Standards setting, such as those contained in laws, regulations, bye-laws and professional codes of conduct, makes possible a distinction between preferred and less preferred modes of behaviour in particular regulatory contexts.¹⁰ Information gathering and monitoring produces knowledge about current professional modes of behaviour and subsequent changes to those modes.¹¹ Behaviour modification anticipates the ability to change the currently existing state of behaviour in some way.¹² These processes are shown visually in Table 1 below.

Figure 2: Regulation behaviour modifications



Techniques and Instruments of Professional Regulation

Turning to the mechanics of professional regulation, the discussion now outlines the techniques and instruments of professional regulation used by governments and non-government regulators.¹³

⁹ Christopher Hood, Henry Rothstein and Robert Baldwin, *The Government of Risk* (Oxford University Press, 2001) 21.

¹⁰ Hood, Rothstein and Baldwin, above n 9.

¹¹ Hood, Rothstein and Baldwin, above n 9.

¹² Hood, Rothstein and Baldwin, above n 9.

¹³ Hood, Rothstein and Baldwin, above n 9, 79-104.

Table 1: Forms of Regulation of Professional Activity by Government

Regulatory instrument	Definition	Example
Command and control	Government enacted legal rules that prohibit specific conduct underpinned by sanctions if the prohibition is violated.	Australian Competition and Consumer Act 2004 (Cth) ('ACCA') s 52: a corporation shall not engage in misleading or deceptive conduct.
Competition	Financial incentives (positive or negative) that encourage desired behaviour. Positive incentives reward a participant for acting in a particular way. Negative incentives impose a charge for acting in an undesired way.	Charges, taxes, subsidies, tradeable rights and changes in liability rules.
Consensus	Techniques that rely on consensus and co-operation between regulatory agencies and participants including self-regulation and co-operative partnerships.	Enforceable undertakings, e.g. ACCA s87B and ASIC Act 2001 s 93AA.
Communication	Use of communication strategies to enrich and inform participants about regulation with the intention of facilitating changes in their behaviour that is consistent with that regulation.	Public education campaigns, regulatory guidelines, voluntary and mandatory disclosure regimes.
Code/architecture ¹⁴	Regulation that seeks to eliminate undesirable behaviour by designing out the possibility of that behaviour occurring.	<ul style="list-style-type: none"> o Software to shape the architecture of technology and cyberspace. o Nudge strategies (Structuring the architecture of decisions so that it is easier for regulatory participants to decide to act in ways that are consistent with regulation).¹⁵

¹⁴ Alternatively described as 'direct action and design solutions': see Baldwin, Cave and Lodge, above n 4, 121.

¹⁵ Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* (Penguin Press, 2008). For criticism of 'nudge', see Baldwin, Cave and Lodge, above n 4, 123-126 and Karen Yeung, 'Nudge as Fudge' (2012) 75 *Modern Law Review* 122.

Government regulation is never static largely because of unrelenting demands for ‘better regulation’ reforms and regulatory improvements.¹⁶ A range of so-called ‘new governance’ regulatory techniques continues to emerge¹⁷ including principles-based regulation;¹⁸ meta regulation;¹⁹ risk-based regulation;²⁰ strategies of enrolment;²¹ and ‘smart’ regulation.²²

Table 2: New Governance instruments

New Governance instruments	Definition	Example
Principles based regulation	Principles, rather than precise rules, are used to outline regulatory objectives and values. Participants are left to devise their own systems for achieving those principles	<i>Corporations Act 2001</i> (Cth) s 912A: general obligations of a financial service licensee.
Meta regulation	Processes in which the regulator oversees a risk or	ASIC Act s 93AA: enables acceptance of enforceable

¹⁶ See, e.g., Commonwealth of Australia, *Best Practice Regulation* <<https://www.pmc.gov.au/regulation/best-practice-regulation>> (accessed 1 August 2017); OECD, *Recommendation of the Council on Regulatory Policy and Governance* (2012) <<http://www.oecd.org/governance/regulatory-policy/2012-recommendation.html>> (accessed 1 August 2017).

See also Robert Baldwin, ‘Better Regulation: the Search and the Struggle’ in Robert Baldwin, Martin Cave and Martin Lodge (eds), *Oxford Handbook of Regulation* (Oxford University Press, 2010), Chapter 12.

¹⁷ John Braithwaite, ‘The New Regulatory State and the Transformation of Criminology’ (2000) 40 *British Journal of Criminology* 222; Julia Black, above n 1; Colin Scott, above n 3; Christie Ford, ‘New Governance, Compliance and Principles-Based Securities Regulation’ (2008) 45 *American Business Law Journal* 1.

¹⁸ Julia Black, ‘Forms and Paradoxes of Principles Based Regulation’ (2008) 3 *Capital Markets Law Journal* 425; Julia Black, ‘Regulatory Styles and Supervisory Strategies’, Niamh Moloney, Eilís Ferran, and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (Oxford University Press, 2015) 218.

¹⁹ Christine Parker, *The Open Corporation* (Cambridge University Press, 2002), Cary Coglianese and Evan Mendelson, ‘Meta-Regulation and Self-Regulation’ in Baldwin, Cave and Lodge, *Oxford Handbook*, above n 16. For a discussion of the challenges posed by meta regulation, see Baldwin, Cave and Lodge, above n 4, 152-7.

²⁰ Julia Black and Robert Baldwin, ‘Really Responsive Risk-Based Regulation’ (2010) 32 *Law and Policy* 59; Julia Black, ‘Regulatory Styles and Supervisory Strategies’ in Niamh Moloney, Eilís Ferran and Jennifer Payne, *The Oxford Handbook of Financial Regulation* (Oxford University Press, 2015) Chapter 8; Julia Black and Robert Baldwin, ‘Driving priorities in risk-based regulation: what’s the problem?’ (2016) 43 *Journal of Law and Society* 565.

²¹ Julia Black, ‘Enrolling Actors in Regulatory Processes: Examples from UK Financial Services Regulation’ (2003) *Public Law* 62.

²² Peter Grabosky and Darren Sinclair, *Smart Regulation* (Oxford University Press, 1998).

New Governance instruments	Definition	Example
	control management system rather than carry out regulation directly.	undertakings by ASIC as a method of settling an enforcement action. The settlement can include a requirement that the participant implement internal changes to identify, correct and prevent future wrongdoing.
Risk based regulation	System of regulation that seeks to assess and control identified risks rather than secure compliance with a set of prescribed rules.	<ul style="list-style-type: none"> o <i>Corporations Act 2001</i> (Cth) Chapter 7 – Regulation of Financial Services.²³ o Australian Prudential Regulation Authority – risk-based regulator.²⁴
Strategies of enrolment	Involving other persons or bodies (government and non-government) to perform regulatory functions under a regulatory regime. For e.g. as gatekeepers.	<i>National Health Law</i> – medical colleges are gatekeepers for medical specialist registration in Australia.
Smart regulation	A regulatory process involving mixtures of institutions and instruments or modalities to create a multi-layered, responsive approach to regulation.	Environmental regulation. ²⁵

²³ For a detailed discussion of how this regulation is risk based and the consequences of that approach for retirees, see Gail Pearson, 'Risk and the Consumer in Australian Financial Services Reform' (2006) 28 *Sydney Law Review* 99.

²⁴ David Lewis, 'Risk-Based Supervision: How Can We Do Better? An Australian Supervisory Perspective', *Conference Paper, Toronto Centre Program on Supervisory Experiences in Implementing Global Banking Reforms*, Toronto, 19 June 2013, <<http://www.apra.gov.au/Speeches/Documents/David%20Lewis%20-%20Risk-Based%20Supervision%20-%20Toronto%20Centre%202013%20June.pdf>> (accessed 1 August 2017).

²⁵ For an analysis of the smart regulation initiatives in environmental regulation, see Neil Gunningham and Darren Sinclair, 'Designing Smart Regulation', *OECD Outreach*, <<https://www.oecd.org/env/outreach/33947759.pdf>> (accessed 1 August 2017).

In some instances when regulation is exercised by non-government actors, it may be referred to as self-regulation, to distinguish it from regulation by governments.²⁶ Self-regulatory schemes were historically the regulatory method of choice for professional associations. This was argued on the grounds that their members were more efficiently and effectively able to determine and regulate the relevant levels of expertise and technical knowledge required for their own professions.²⁷ However, concerns that professional self-regulation was subject to the private interests of the professional member organisations involved, and perceptions of lack of democratic accountability, led over time to regulatory reforms involving combinations of self-regulation and other regulatory forms.²⁸ Five of these combinations are considered here: co-regulation; enforced self-regulation; meta regulation; smart regulation; and networks. Each involves some form of government oversight of the self-regulatory body with other parts of the process undertaken by a government agency.

Table 3: Forms of Mixed Government and Non-Governmental Regulation

Regulation involved non-government actors	Definition	Example
Co-regulation	Industry self-regulation with some oversight or ratification by government agency.	Health Practitioner Regulation National Law Co-regulation by: <ul style="list-style-type: none"> o National boards for 14 health professions. o Australian Health Practitioner Regulation Authority.²⁹
Enforced self-regulation	Sub-contracting of regulatory functions to regulatory participants. ³⁰	The Telephone Information Services Standards

²⁶ Anthony Ogus, 'Rethinking Self-Regulation' (1995) 15 *Oxford Journal of Legal Studies* 97; Julia Black, 'Constitutionalising Self-Regulation' (1996) 59 *Modern Law Review* 24.

²⁷Ogus, above n 26, 97.

²⁸ Ogus, above n 26, 98-9, Baldwin, Cave and Lodge, above n 4, 144.

²⁹ Australian Health Practitioner Regulation Agency, *AHPRA* <<https://www.ahpra.gov.au>> (accessed 1 August 2017).

³⁰ Julia Black challenges this definition, contending that self-regulation best describes a collective group that imposes regulation on its components: Julia Black, 'An Economic Analysis of Regulation: One View of the Cathedral' (1997) 16 *Oxford Journal of Legal Studies* 699, 706.

		Council (TISSC), a self-regulatory body for telephone information services. ³¹
Meta regulation	Oversight by a regulatory authority of a control or risk management system run by a non-government entity or association. Role of the regulator is to audit, monitor and incentivize the system.	Australian Prudential Regulation Authority, meta regulator for banks, credit unions, building societies, general insurance and reinsurance companies, life insurance, private health insurance, friendly societies and most members of the superannuation industry. ³²
Smart regulation	Optimal mix of regulatory strategies (see earlier discussion) including self-regulation and/or co-regulation strategies.	Environmental regulation. ³³
Regulatory networks	Strategies for co-ordinating complex regulation that involves multiple regulatory actors, including regulatory agencies, standard setting bodies and industry certification bodies.	The Australian Climate Change Policy Network. ³⁴

³¹ Simon Curtis, 'Enforcing Self-Regulation in the Telecommunications Information Services Industry' (2005) 167 *Communications Update* 10 <<http://www.austlii.edu.au/au/journals/CLCCommsUpd/2005/5.pdf>> (accessed 1 August 2017).

³² Australian Health Practitioner Regulation Agency, *AHPRA* <<https://www.ahpra.gov.au>> (accessed 1 August 2017).

³³ Gunningham and Sinclair, above n 2.

³⁴ Harriet Bulkeley, 'Discourse Coalitions and the Australian Climate Change Network' (2000) 18 *Environment and Planning C: Politics and Space* 727.

Compliance and Enforcement of Professional Regulation

Issues of compliance and enforcement of regulation can accentuate the human dimension of regulation.³⁵ Compliance concerns the processes by which regulators monitor and ensure that participants, such as professionals, comply with their regulatory responsibilities. Enforcement concerns the actions that can be taken to ensure non-complying participants comply with their regulatory responsibilities. Both compliance and enforcement are dynamic, messy and increasingly complicated processes. This is particularly the case as regulation shifts from its traditional binary model (regulator and regulated) to contexts involving multiple participants.³⁶ Traditionally, enforcement involved the regulator seeking to impose sanctions against regulatory participants for failing to comply with their regulatory responsibilities. It can also involve informal elements such as education, advice, persuasion, negotiation and settlement of compliance disputes. While these systems of enforcement, usually seen in command and control regulation, continue to exist, the shifting regulatory context away from the binary model means enforcement need no longer be the exclusive domain of regulators.

Regulatory compliance and enforcement responsibilities are increasingly shared tasks, often involving a range of non-state actors such as professional associations and professional personnel on statutory boards. For example, compliance and enforcement functions under the *Health Practitioner Regulation National Law*, which regulates Australian health service professionals including doctors and nurses are the subject of a co-regulatory arrangement involving the government regulator, the Australian Health Practitioner Regulation Agency ('AHPRA') and various National Boards for each health service profession. The National Boards are made up of statutorily appointed members of the relevant profession. The expansion of parties involved in delivering professional services makes it essential that the motivations and behaviours of multiple participants are considered.³⁷

³⁵ Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007) 151.

³⁶ Brigit Hutter, *Compliance, Regulation and Environment* (Oxford University Press, 1997).

³⁷ Baldwin, Cave and Lodge, above n 4, 9; Sunstein and Thaler, above n 15.

This expansion of participants has tended to shift the regulatory focus from emphasising monitoring and enforcement towards a problem-centred approach to compliance (i.e. what is the problem/risk and has it been managed or contained).³⁸ The government appointed regulator remains the 'top cop', but the regulator's role is increasingly said to be one of steering and managing compliance, rather than direct regulatory enforcement.³⁹ In the AHPRA context noted earlier, complaints of misconduct (which may come from a patient in a multi-professional setting such as a hospital) are made to AHPRA but referred initially to the National Board for the relevant health discipline for determination and resolution. The regulator's role is to ensure that there are control systems in place for minimising the risk of problems occurring in the first place.⁴⁰

Future Trends

Regulation is never static. Its creation, implementation and enforcement is often caught in the crossfire of political, social and economic debates and trends that affect contemporary life. Regulation is inevitably called on to respond to and/or answer for both expected and unexpected events, problems, crises and failures as they occur.⁴¹ Principal amongst them at present is disruption caused by technology and the impact of new technologies on regulation is a growing field of research.⁴² The financial crisis of 2007 also produced much soul searching about the related causes of regulatory failure. With post-crisis austerity and the resultant pressures on regulators to do more with less, there has been renewed interest in measuring the

³⁸ Malcolm Sparrow, *The Regulatory Craft* (Brookings Institution, 2000).

³⁹Jordana and Levi-Faur, above n 7.

⁴⁰ Julia Black and Robert Baldwin, 'Really Responsive Risk Based Regulation' (2010) 32 *Law and Policy* 181; Robert Baldwin and Julia Black, 'Driving Priorities in Risk-based Regulation: What's the Problem?' (2016) 43 *Law and Policy* 565.

⁴¹ Julia Black, 'Paradoxes and Failures: 'New Governance' Techniques and the Financial Crisis' (2012) 75 *Modern Law Review* 1037-39.

⁴² Julia Black, Martin Lodge and Mark Thatcher (eds), *Regulatory Innovation* (Edward Elgar, 2005); Roger Brownsword, Eloise Scotford and Karen Yeung, *The Oxford Handbook of Law, Regulation and Technology* (Oxford University Press, 2017); Dirk Zetsche, Ross Buckley, Douglas Arner and Janos Barberis, 'From FinTech to TechFin: The Regulatory Challenges of Data-Driven Finance' European Banking Institute Working Paper Series, 2017/6, *Oxford Faculty of Law Blog* (Financial Regulation) <<https://www.law.ox.ac.uk/business-law-blog/blog/2017/05/fintech-techfin-regulatory-challenges-data-driven-finance>> (accessed 1 August 2017); Australian Securities and Investments Commission, 'ASIC proposes next steps on regtech', Media Release 17-155MR (26 May 2017), <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2017-releases/17-155mr-asic-proposes-next-steps-on-regtech/>> (accessed 1 August 2017).

efficacy of regulatory regimes and how to evaluate the performance and accountability of regulators.⁴³ Consistent with that trend is a global pressure for regulators to implement risk-based regulation, a strategy supported by the OECD's better regulation agenda.⁴⁴ The traditional model of command and control regulation, rules backed up by sanctions for non-compliance, still lies at the heart of many regulatory schemes. However, the OECD's endorsement illustrates the impacts of globalisation and the global nature of the modern regulatory debate. It also indicates that networks of regulatory actors are involved and so must be a feature of any informed regulatory analysis. The upshot is that an understanding of future regulatory influences on any profession requires constant review and appraisal of the networks of regulatory participants and their influence and impact on professional activities.

⁴³ George Gilligan, Jasper Hedges, Paul Ali, Helen Bird, Andrew Godwin and Ian Ramsay, 'Regulating by numbers: the trend towards increasing empiricism in enforcement reporting by financial regulators' (2016) 9 *Law and Financial Markets Review* 260.

⁴⁴ Julia Black, 'Paradoxes and Failures', above n 41.

Summary

The definition of regulation as the deliberate use of authority by one person to affect the behaviour of others is deceptively simple. It is best understood in the context of traditional direct bi-partite regulation, between government and regulatory participants. However increasingly regulation of professional activity is shifting away from this model towards multi-party regulation involving networks of regulatory participants and strategies. These include approaches such as risk regulation and meta regulation in which governments may play a more indirect role. These changes are yielding different concepts of the role and functions of the regulator and the regulatory paradigm with an increasing emphasis upon risk management.

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