Compliance, Enforcement, and Regulatory Excellence

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Exactly *how* should an excellent regulator intervene in the affairs of regulated organizations to ensure compliance (and arguably over-compliance) and facilitate enforcement? That question motivates this paper, which is about the "intervention strategies" used for compliance and enforcement rather than about "resource allocation." In the absence of any consensus as to what criteria an excellent intervention strategy should satisfy, I accept the convention that the principal criteria for choosing an intervention strategy should be effectiveness and efficiency. In the majority of cases, the effectiveness of any intervention in reaching a social or economic target (i.e., reducing social or economic harm) and its efficiency (i.e., doing so at least cost) will be the primary concerns of policymakers. Legitimacy or political acceptability, including positive public perceptions of the regulator, is also important.[1] As will become apparent, though, regulators inevitably confront trade-offs that must be made between all of these criteria.

There are, of course, many other aspects of regulatory excellence beyond just compliance and enforcement. But compliance and enforcement are nevertheless core concerns for any regulator, because laws that are not effectively implemented will rarely achieve their social and economic goals. This paper proceeds by summarizing seven different intervention strategies before identifying the strengths and weaknesses of each. It then goes on to argue that different strategies are suited to different contexts, and that account must be taken of the differing characteristics and motivations of various types of regulations and regulators, and that combinations of strategies often provide better outcomes than single strategies. Attention then turns the role of "beyond compliance" mechanisms, to the potential to harness third parties as regulatory surrogates, and to the need for adaptation and resilience. Although no single template exists for achieving regulatory excellence in all regulatory fields, nevertheless various signposts can be identified that point regulators towards that goal.

Choosing Intervention Strategies

Regulators from the United States, United Kingdom, Australia, and other countries have adopted a variety of distinctive intervention strategies – or ideal types – which have been discussed widely in the literature:[2]

1. Advice and persuasion
2. Deterrence
3. Responsive regulation
4. Risk-based regulation
5. Smart regulation
6. Meta-regulation
7. Criteria strategies

Each of these strategies, elaborated in Table 1, will be readily recognizable to students of regulation. Most of these strategies apply exclusively or primarily to implementation, but

Table 1:
Intervention Strategies: Models Identified in the Regulatory Literature

From a review of the regulatory literature, seven distinctive (but often mutually compatible) regulatory enforcement and compliance strategies can be identified.

Advice and Persuasion: Negotiation, information provision and education characterize this strategy. The threat of enforcement remains, so far as possible, in the background, and only to be actually invoked in extreme cases where the regulated entity remains uncooperative and intransigent.

Deterrence: This strategy is accusatory and adversarial. Energy is devoted to detecting violations, establishing guilt and penalizing violators for past wrongdoing. It assumes that profit-seeking firms take costly measures to comply with public policy goals only when they are specifically required to do so by law and when they believe that legal noncompliance is likely to be detected and harshly penalized.

Responsive Regulation: This strategy is premised on the view that the best outcomes will be achieved if inspectors adapt to (or are responsive to) the actions of regulatees. Regulators should explore a range of approaches to encourage capacity building but must be prepared to escalate up a pyramid of sanctions when earlier steps are unsuccessful. Escalation occurs only where dialogue fails, and regulators de-escalate when met with a positive response. Indeed, it is preferable to escalate up a pyramid of supports, praising and rewarding good behavior and only resorting to the pyramid of sanctions where such behavior is not forthcoming. Implicit in responsive regulation is a dynamic model in which the strengths of different forms of regulation compensate for each other's weaknesses.

Risk-Based Regulation: This strategy involves the targeting of regulatory resources based on the degree of risk which duty holders' activities pose to the regulator's objectives, and it calls for applying principles of identifying, assessing, and controlling risks in determining how inspectors should intervene in the affairs of regulated enterprises.

***Smart Regulation*:** This strategy is a form of regulatory pluralism that embraces flexible, imaginative, and innovative forms of social control, harnessing businesses and third parties acting as surrogate regulators in addition to direct government intervention. The underlying rationale is that, in the majority of circumstances, the use of multiple rather than single policy instruments, and a broader range of regulatory actors, will produce better regulation. As such, it argues that the implementation of complementary combinations of instruments and participants tailored to meet the imperatives of particular issues, can accomplish public policy goals more effectively, with greater social acceptance and at less cost to the state.

Meta-Regulation: This strategy involves government "regulating at a distance" by risk managing the risk management of individual enterprises. This implies requiring or encouraging enterprises to put in place their own systems of internal control and management (via systems, plans, and risk management more generally). These are then scrutinized by regulators who take the necessary action to ensure that these mechanisms are working effectively. The goal is to induce companies themselves to acquire the specialized skills and knowledge to self-regulate, subject to external scrutiny. Accordingly, the regulator's main intervention role is to oversee and audit the plans put in place by the regulated organization.

Criteria Strategies: These strategies provide inspectors and other decision-makers with a list of criteria they should consider in arriving at a decision in any given case. There is no prescriptive formula and which mechanism(s) to be used in any particular case will depend on the circumstances.

meta-regulation and smart regulation are constructs that apply equally to regulatory design. In addition, there is always the possibility of hybrid approaches which combine different strategies with varying degrees of success.

Which approach or approaches to intervention would an "excellent" regulator adopt? The relative strengths and weaknesses of various implementation strategies shown in Table 1 vary substantially with the context. The sheer variety of regulatory programs, rules, market structures, political environments, and social contexts, preclude definitive generalizations about when and to what extent any individual strategy is likely to "succeed" or "fail" in shaping the behavior of regulated entities.

Nevertheless there is much that is known, both about the strengths and limits of individual intervention strategies, and about the likely responses of regulatees. Drawing on this knowledge will enable excellent regulators to avoid common pitfalls and maximize the chances of success, as measured by the criteria identified earlier.

For example, the evidence suggests that *advice and persuasion*, while valuable in encouraging and facilitating those willing to comply with the law to do so, may prove disastrous against those who are not disposed to voluntary compliance. More broadly, advice and persuasion may actually *discourage* improved regulatory performance among better actors if agencies permit lawbreakers to go unpunished. Conversely, while a *deterrence strategy* can play an important positive role, especially in reminding firms to review their compliance efforts and in reassuring them that if they comply others will not be allowed to "get away with it," its impact is very uneven. Deterrence is, for example, more effective against small organizations rather than large ones, and better at influencing rational actors than the incompetent. Unless it is carefully targeted, it can actually prove counterproductive, particularly when it prompts firms and individuals to develop a "culture of regulatory resistance."[3] Moreover, "the psychological research evidence showing that rewards and punishments routinely accomplish short-term compliance by undermining long-term commitment is now overwhelming."[4]

Could the problems of the above strategies be overcome by building on their strengths while compensating for their weaknesses? This is one of the multiple aspirations of *responsive regulation,* which argues that because regulated enterprises have a variety of motivations and capabilities, regulators must invoke compliance and enforcement strategies which successfully deter egregious offenders, while simultaneously encouraging virtuous employers to comply voluntarily and rewarding those who are going "beyond compliance." This is to be achieved by a variety of mechanisms, including the pyramids of sanctions and supports referred to in Table 1.

However, in practice, a responsive approach, and the application of a "pyramid of sanctions" involving escalating intervention against regulatees who do not cooperate, is best suited to the regulation of organizations with which the regulator has frequent interactions. Only in such situations can a strategy of "tit for tat" play out[5] or (as in later iterations) can regulation be rendered "more relational where it counts."[6] While this problem can sometimes be mitigated,[7] the less intense and the less frequent is the level of inspection, and the less knowledge the

regulator is able to glean as to the circumstances and motivations of regulated organizations, the less practicable it becomes to apply responsive regulation[8]. Others have raised a number of other problems, not least the question of "whether responsive regulation can be scaled up to more diffuse, multiparty, logistically complex contexts, such as financial regulation."[9] Where responsiveness *is* applied, in practice there is qualified evidence of its virtues,[10] albeit that in its "tit for tat" form it has more effect on behavior than on attitudes.[11]

Like responsive regulation, *risk-based regulation* provides a strategy for regulators to determine their response to particular regulated entities, but it does so on the basis of risk to the regulator's objectives rather than on the basis of the regulatee's degree of cooperation or responsiveness to the regulator. Typically risks are identified and assessed, a ranking or score is assigned on the basis of this assessment, and inspection and enforcement are undertaken on the basis of these scores. Risk-based regulation has the attraction of enabling regulators to prioritize their regulatory efforts and to maximize cost effectiveness. However, while: "risk scoring may provide a very ready basis for detecting high-risk actors … it may offer far less assistance in identifying the modes of intervention that are best attuned to securing compliance."[12] This is clearly a serious shortcoming, in terms of intervention strategy. There is also a paucity of empirical evidence demonstrating the positive impact of this approach,[13] leading to the conclusion that a risk based intervention strategy scores much higher on legitimacy (providing a seemingly rational, cost-effective justification for regulatory responses) than it does on demonstrated effectiveness.

Smart regulation seeks to overcome the challenges for intervention strategy where interactions between regulators and regulatees are infrequent or otherwise challenging, by harnessing third parties as surrogate regulators.[14] Those who might fulfill this role include local communities and NGOs bringing complaints or acting to shame recalcitrant businesses into compliance or even business associations acting to police their members. To date the empirical research on smart regulation is supportive but not conclusive.[15] Perhaps the greatest challenge for this approach is coordinating government and third-party pressure, since this approach contemplates escalation of pressure by government, business or third parties acting in tandem. While it shows ways that such coordination might be achieved, its proponents concede that this will not always be possible.[16] The role of third parties in effective intervention strategy is revisited later in this paper.

Meta-regulation also seeks to extend the reach of the regulator and, like risk regulation, is both a resource allocation and an intervention strategy. In terms of the latter, the role of the regulator is to oversee the effective development, implementation and monitoring of risk or other corporate management plans by the regulated organization itself. Meta-regulation has tended to be used explicitly,[17] in limited areas to which its application is particularly suited, such as Major Hazard Facilities.[18] The highly targeted use of meta-regulation is in part a consequence of limited circumstances in which it is likely to be effective. It requires specialist, high-quality regulators to oversee the risk management strategies of the regulated organization, and sophisticated and motivated regulated organizations to develop and implement such strategies successfully and to regulate themselves effectively. At the very least, a receptive corporate culture is a necessary, albeit not a sufficient condition, for its success.[19] Overall there is evidence

that meta-regulation has a positive impact on corporate behavior in targeted organizations, although relatively little is known about how this comes about. [20]

Finally, although a *criteria strategy* (or something closely approximating it) was identified as policy option in some of the early writings on regulation,[21] it has not subsequently found any identifiable academic advocates. This is likely because it is essentially a list of different criteria that a field officer can take into account in decision making. As such it is not a coherent intervention strategy in its own right,[22] capable of being developed theoretically or (given the vast discretion it provides to field officers) tested empirically.

Signposts to Regulatory Excellence

Taken overall, an examination of the various intervention strategies suggests that some have considerably more merit than others while the impact of a third group remains unproven. There are, at the very least, a number of helpful signposts provided by the theoretical and empirical literature that will assist the regulator striving for excellence, albeit there exists no single mechanism and no simple formula that will permit such a regulator to demonstrate that it has indeed achieved regulatory excellence. These signposts will be mapped out in the following sections which will also identify the importance of various contextual factors in determining which strategy or strategies to use in particular circumstances.

Invoke different strategies to engage effectively with different circumstances.

One striking feature of the intervention strategies described above is that they assume that a single strategy is appropriate to all. Certainly some of these strategies are flexible enough to take account of different motivations. For example, a criteria strategy usually includes culpability as one of its criteria but provides no coherent means for choosing between different criteria. In a far more coherent way, responsive regulation also takes account of different motivations as part of the "tit for tat" interaction, and risk-based regulation regards motivation as one important risk factor. Even so, each of these strategies prescribes a single approach – whether it be the application of criteria, escalating up an enforcement pyramid or a pyramid of virtue, or taking action on the basis of risk – for all regulatees in all circumstances. In short, none of the strategies described fully recognizes that different intervention strategies might be appropriate in different circumstances (although responsive and smart regulation come closest to doing so).

This is unfortunate because there is unlikely to be a single identifiable "best practice" approach that should be applied to all duty holders "across the board." Rather, because different duty holders confront different external pressures, and have different skills, capabilities, and motivations, what constitutes a best practice intervention strategy may vary with the context.

Risk-based regulation for example, is of little use when the regulator knows so little about the target population that it cannot make any reasonable assessment of the risks caused by different types of enterprise within it (as may be the case with small enterprises). Similarly, its use is problematic where only the risks of "routine" compliance failures can be measured, but not low-frequency, high-consequence events, as with the Global Financial Crisis of 2008-09. It is also the case that risk-based regulation may be far better at dealing with some risks than others

(occupational injuries for example, but not diseases which are hard to identify and have long latency periods).

Responsive regulation, too, is likely to work better when the regulator has the opportunity to make repeat visits, than where at most a single engagement is all that is practicable. For example, large enterprises are readily identifiable, and their size and impact often justify repeat visits from regulators, the building of trust, and an iterative strategy such as responsive regulation. In contrast, small and medium sized enterprises (SMEs) are often hard to identify, let alone too difficult to visit given the vast disparity between the number of such enterprises and the number of regulators. *An excellent regulator, therefore, has regard to the strengths and weaknesses of different intervention strategies and to the "fit" between a particular strategy and the characteristics of the regulatory challenge.*

Take account of the drivers of regulated enterprises.

By implication, an excellent regulator needs to understand why regulated enterprises behave the way they do. What makes regulatees cooperate with regulators? What makes them resist?

Robert Kagan, Dorothy Thornton, and I identified two sets of variable as critical, based on three empirical research projects over a nine year period, and consistent with other emerging strands of other research.[23] First, consistent with sociological explanations of law-abidingness in individuals, we found that regulatees are motivated by: (i) fear of detection and punishment by government enforcement agents; (ii) fear of humiliation or disgrace in the eyes of family members or social peers (social license); and (iii) an internalized sense of duty, that is, the desire to conform to internalized norms and beliefs about the right thing to do.

The second set of variables is what we termed a multi-sided "license to operate" involving an often-demanding "social license" along with economic pressures and the demands of government regulators. In combination, the social, economic, and regulatory licenses were found to be critical factors in shaping the behavior of regulatees. For example, social license pressures can affect regulatory performance by pushing managers to comply with their regulatory obligations and tightening the regulatory license by bringing political pressure to bear on law makers. This social license, moreover, is monitored by a variety of stakeholders. Environmental groups, for example, not only enforce the terms of the social license directly (e.g., through shaming and adverse publicity) but also seek to influence the economic license (e.g., generating consumer boycotts) and the regulatory license (e.g., through citizen suits).

These findings have important policy implications. They suggest, for example, that business firms' social licenses provide a particularly powerful point of leverage, a point explored in discussing "beyond compliance" initiatives below. They also conclude that some significant level of legal enforcement is essential in generating and assuring compliance: first, in communicating regulatory norms and threatening credible levels of monitoring and legal sanctions for noncompliance; second, for its reminder effect ("check your speedometer!"); and third, for its reassurance effect ("you're not a fool to comply; we are really looking for, and finding the bad apples").

Overall, the good news is that "regulation-induced fear of legal punishment, social license pressures, and the normative commitments of a great many regulated enterprise managers, acting together, are sufficiently powerful to induce relatively high levels of regulatory compliance in a great many regulatory programs and contexts"[24]. Leveraging the various license terms, and harnessing fear and duty, provides regulators with considerable opportunities to pursue excellence, examples of which are provided in the sections below.

Apply combinations of compliance and enforcement strategies

Because all strategies have both strengths and weaknesses there may be value in using combinations of complementary strategies, thereby compensating for the weaknesses of one strategy with the strengths of another.

For example, Julia Black has shown how one agency deliberately created a more effective interventionist approach to regulation which involved requiring different inspectoral stances depending upon the organization's risk profile.[25] This case suggests the capacity for a meta-regulatory intervention strategy (relying on risk profiles) to be effectively connected to a strategy of responsive regulation applying a pyramid of enforcement mechanisms. Specifically, the combination of meta- and responsive regulation enables more and escalating enforcement responses to be invoked depending on the degree of cooperation of the regulated organization, with cooperation resulting in de-escalation down the enforcement pyramid and the converse response to resistance.[26]

However, some combinations can be problematic. For example, to what extent can a criteria and a risk-based strategy be successfully integrated? The answer is: it depends. If risk trumps other criteria to the extent of any inconsistency between them, then those criteria are rendered meaningless by the introduction of risk. This seems unlikely to have been the intent of policy makers. If, on the other hand, risk is simply one more factor to be taken into account (with no indication as to how conflict between different factors will be resolved), then the indeterminacy of the criteria approach is not addressed and the role of risk may be a modest one, perhaps at most tipping the balance in cases that otherwise are finely weighed between different factors.

Another option is to combine risk-based regulation with responsive regulation. However, they are not necessarily comfortable bedfellows. A risk-based strategy implies that the higher the risk to the social and economic objectives of regulation, the tougher the enforcement action that should be taken, with past experience of the individual operator being taken into account as one indicator of future risk. In contrast, under responsive regulation the regulator should approach the regulated entity assuming virtue and certainly without an evaluation of risk shaping its decision as to the appropriate form of intervention. Its normative basis is also quite different from that of risk-based regulation. Not least, responsive regulation appeals to the better nature of the regulatee and appears (and is) just, in a way that risk-based regulation, based as it is on utilitarian assumptions, is not. However, if these two strategies are used sequentially (resource allocation being determined on the basis of risk, responsive regulation as an intervention strategy) any such inconsistency is avoided.

Finally, it should be noted that the complementarity of the policy mix may vary over time, even in dealing with the same enterprise, because a firm's own motivation, corporate culture, or social, economic or regulatory licenses may themselves change. The result may be that intervention mixes that were appropriate at one point in time need to be adjusted at another to take account of changed circumstances.

Encourage Regulatees to Go Beyond Compliance

Strategies to encourage, facilitate, and reward beyond-compliance behavior may only resonate with a relatively modest number of large, reputation sensitive corporations, and in particular circumstances where they can identify "win-win" opportunities. Nevertheless, should an excellent regulator aspire to nudge good companies (further) beyond compliance? Or is it a misuse of scarce regulatory resources to focus on making the top 5-10 percent even better rather than concentrating on the most serious problems or on under-performers?

Much will depend upon the regulator's overall intervention strategy. A risk-based regulator, for example, would seek to identify and target the largest risks, and these are unlikely to involve refinements in the practices of already high performing regulatees. In contrast, a meta-regulator might identify companies going beyond compliance as particularly suited to "regulating at a distance." However, two other perspectives are much more likely to deliver effectiveness and efficiency.[27]

Responsive regulation, in its later iterations, would see the above approaches as failing to realize opportunities for raising the performance of *all* regulatees, from leaders through to laggards. John Braithwaite has argued that regulators should first look at the strengths of societal actors and then seek to expand them. In his view:

> Most environmental, healthcare or safety problems, for example, get solved by expanding the managerial capacities of regulated actors to solve them for themselves… [T]he idea of pyramids of supports is not just getting the performance of the most innovative actors through new ceilings, it is also about these players finding better ways of solving problem that make it easier to increase demands upon laggards.[28]

Another potentially fruitful way for regulators to think about the role of "beyond compliance" strategies might be through the lens of the "license to operate" framework described earlier.[29] What a company decides to do in terms of going beyond compliance can be explained largely by how it interprets and responds to the various license terms. Importantly, those terms are interconnected. For example, corporations fear that not meeting the requirements of the "social license" will ultimately result in increased regulation or greater economic costs to the company. Conversely, if regulators can provide not only economic rewards for going beyond compliance but also reputational benefits that strengthen the social license, then the combined effects will often exceed the impact of focusing on the regulatory license in isolation. As will be apparent, such an approach is consistent with responsive regulation's supports-based pyramid, which would equally applaud the provision of reputational rewards for "good apples" who have

gone "beyond compliance." A mechanism such as the US Toxic Release Inventory, which mandates the estimation and reporting of major toxic releases, can of course both reward the best performers while threatening the reputation of laggards.[30]

However, the above analysis should not be taken to suggest that that existing "beyond compliance" initiatives have necessarily achieved all that this approach might promise. On the contrary, many of the programs introduced by the Clinton administration in the United States, which placed particular emphasis on this approach, appear to have either made only marginal differences to regulatory outcomes or have failed to demonstrate any material difference and are unable to justify the resources devoted to them.[31] Equally, some have failed to distinguish between those businesses that are committed to going beyond compliance and those that simply seek the reputational benefits of participation in such initiatives without commitment to delivering beyond compliance outcomes. So too, there may substantive and procedural rule of law issues if firms can be granted "beyond compliance" privileges in the absence of clear and transparent criteria for inclusion in the program.[32] However, these problems are more a reflection of particular design flaws than of any inherent inefficiency or ineffectiveness of "beyond compliance" initiatives.

On this point, the findings of John Mikler's study of vehicle fuel efficiency standards in Europe, the United States, and Japan are salient.[33] Although the U.S. performs poorly in this regard and Europe somewhat better, the clear leader is Japan, which "presents a dramatic case of easily exceeding standards [...] [where] the industry appears to continuously improve the fuel efficiency of its cars even in the absence of increasingly strict government regulation."[34] Mikler's explanation suggests that "the state set[s] the strategic direction, to which industry responds as a challenge."[35] As one company or another develops a technological innovation that increases fuel efficiency, this best practice standard becomes the minimum requirement for all companies thereby "raising all boats." This approach – namely, moving up a pyramid of supports, in terms of responsive regulation[36] but underpinned by a strengths-based pyramid – provides better outcomes than traditional direct regulatory approaches, at least in the Japanese context.

Excellent regulators, therefore, should seek out opportunities to encourage enterprises to go beyond compliance, where these hold out the prospect of lifting the performance of all regulatees or at the very least, of improving the performance of those who go "beyond compliance" in a cost effective manner. Given the insights of past research, measurement and monitoring to demonstrate both costs and outcomes, coupled with external audit and review, will be crucial.[37]

Harness Third Parties

Excellent regulators recognize that they must use their scarce resources wisely and well and that this involves, among other things, what smart regulation would refer to as harnessing the capacities of third parties to act as surrogate regulators[38] and engaging in what responsive regulation would call networked escalation.[39]

A substantial body of empirical research reveals that numerous actors influence the behavior of regulated groups in a variety of complex and subtle ways, and that mechanisms of informal social control often prove more important than formal ones. For example, in the case of the environment, there is a case for focusing attention on the influence of: international standards organizations; trading partners and the supply chain; commercial institutions and financial markets; peer pressure and self-regulation through industry associations; internal environmental management systems and civil society in a myriad of different forms. In practical terms, this last category usually means NGOs and local community groups.[40]

Much will still depend on the context, of course. In the case of pesticide use by vegetable growers, supply chain and community pressure can play important roles; in the case of motor vehicle smash repairs, the insurance industry's role could be pivotal; and in the case of ozone protection, industry self-management may be the critical instrument.[41] Arguably, the most powerful forms of "civil regulation" are those in which environmental NGOs or communities have the capacity to threaten the social license and reputation capital of large corporations.

However, the participation of third parties, particularly commercial third parties, in the regulatory process is unlikely to arise spontaneously, except in a very limited range of circumstances where public and private interests substantially coincide. What is needed is strategic government intervention to create incentives for third parties to operate as d surrogate regulators.

To illustrate, for many years, the regulatory regime for the prevention of intentional oil spills (pursuant to an international treaty) was almost wholly ineffective, due in no small part to difficulties of monitoring, and, in some cases, to a lack of either enforcement resources or political will on the part of member countries. Furthermore, in the absence of government intervention and the imposition of penalties, third parties had no incentives to contribute significantly to the reduction of oil spills. However all this changed when a new regime required tankers to be equipped with segregated ballast tanks (SBTs), thereby facilitating initial surveys and inspections by non-governmental classification societies, and making it hard for non-confirming tankers to receive the classification and insurance papers needed to trade internationally. The new regime facilitated coerced compliance by three powerful third parties – namely non-state classification parties, ship insurers, and ship builders – and it achieved almost 100% compliance.[42]

The broader point is that by expanding intervention strategies to harness third parties, some of the most serious shortcomings of traditional approaches to compliance can and are being overcome. Third parties are sometimes more potent than government regulators. For example, the threat of a bank to foreclose a loan to a firm with low levels of liquidity is likely to have a far greater impact than any existing government instrument. Third parties are also often perceived as more legitimate. Farmers, for example, are far more accepting of commercial imperatives to reduce chemical use than they are of any government mandated requirements. In any event, government resources are necessarily limited, particularly in an era of fiscal constraint. Accordingly, it makes sense for government to reserve its resources for situations where there is no viable alternative but direct regulation. *An excellent regulator therefore, facilitates, catalyzes*

and commandeers the participation of second and third parties to the cause of improving regulatory outcomes.

Develop Adaptive Learning and Resilience

As indicated earlier, much of our knowledge about compliance and enforcement strategies, and in particular about what works and when, remains tentative or incomplete. This suggests that excellent regulators need to engage in adaptive learning and treat policies as experiments from which they can learn and which in turn can help shape future strategy.

From this perspective, it is important to ask: "How may mechanisms that promote policy learning … be strengthened? To what extent do policy-making institutions provide mechanisms for learning from experience and altering behavior based on that experience"[43]. This might imply, for example, monitoring, *ex post* evaluation, and revision mechanisms. In Dan Fiorino's terms, it means "building reliable feedback mechanisms into policy-making, strengthening learning networks, creating conditions that would lead to more trust and more productive dialogue and enough flexibility into the policy system so that it is possible to respond to lessons drawn from one's on experience or that of others."[44]

In particular, adaptive learning is heavily dependent on the depth and accuracy of an agency's statistical database and other information sources. Only with adequate data collection and interpretation, can a regulator know how effective or otherwise a particular regulatory strategy has been. Moreover, in the absence of credible self-evaluation regulators will be unable to demonstrate to themselves, to regulatees, or to external audiences whether or to what extent they are achieving their objectives or whether the resources at their disposal are being well spent. Such a failure accordingly will also threaten their legitimacy.

Recognizing the pervasiveness and inevitability of changing circumstances, the challenge might also be couched in terms of how best to build resilience into implementation strategy. Resilience thinking and resilience management has been influential in areas such as natural resource management, and there is now an extensive literature addressing how social-ecological resilience might be achieved.[45] However, there has been little written as to how regulation and governance might gain from the insights of the wider resilience literature[46] and even less as to how it might be applied to implementation strategy. Having said this, it is worth noting that the strategy of using combinations of instruments advocated earlier is essentially a resilience strategy: compensating for the weaknesses of individual strategies by integrating them with others that have complementary strengths.

Measured in terms of adaptability and resilience, different intervention strategies would score very differently. Responsive regulation in particular "assumes the strategies advanced in its name will fail very often. It is designed to learn from these failures by repairing pyramids through adding layers that cover the weaknesses of failed strategies with varieties of new or reformed strategies"[47]. Smart regulation, too, with its reliance on harnessing multiple parties and a comparable escalation strategy, in conjunction with industry sequencing, triggers, and buffer zones, is better capable of adapting to changing circumstances than, for example, risk-based regulation. The latter is often focused on established risk and may miss emerging problems. It

also faces the inherent danger of: "model myopia" – the possibility "that regulatory officials become committed to a historically captured set of risk indicators and assessment criteria" that inhibit the regulator from taking account of data not captured by that model. [48] *Accordingly an excellent regulator needs to be constantly self-evaluating, learning and adapting its approach, identifying emerging problems and acting promptly when it does so.*

Maintain Legitimacy

Maintaining legitimacy is of particular importance for regulatory agencies even where this conflicts with what might otherwise be judged to be the most appropriate strategy. This is for the simple reason that proposals that cannot gain political acceptance are unlikely to be adopted no matter how effective they may be.[49] The point for present purposes is that legitimacy usually trumps effectiveness and any intervention strategy must take account of this reality.

For example, consider responsive regulation, under which the regulator is expected to intervene initially at the bottom of an enforcement pyramid (assuming virtue on the part of the regulatee) and only escalate to enforcement action if this assumption proves incorrect. There may well be circumstances where the regulator cannot credibly maintain this strategy in the face of threats to its legitimacy, such as in terms of political risk or community pressure. For example, suppose there has been a major incident or "near miss" involving an industrial facility situated close to a residential area. Here there will be considerable pressure to take decisive and immediate action, and to do so in ways which are visible to external audiences – the most obvious being the initiation of a prosecution – with the consequence that the matter will be publicly adjudicated. Even if there is evidence that the regulatee had very limited culpability (their past record being exemplary, the causes of the incident not being reasonably anticipated), the need to preserve legitimacy will be paramount.

For the regulator who wishes to maintain the trust of a regulatee who is a "good apple," the situation is a challenging one. Their difficulties may be lessened if the relevant compliance and enforcement policy *requires* advice, persuasion, or enforcement action in specified circumstances, in which case the regulator can legitimately plead that the decision is out of its hands. The regulator may also seek to preserve its relationship with the regulatee by exercising discretion as to what enforcement action it takes, such as by prosecuting for a less serious offence or agreeing on a "reasonable" penalty. By whatever means a regulator tries to maintain its relationship with the regulatee, the need to maintain legitimacy in the eyes of the broader community and to minimize political risk will almost certainly prove more compelling. So too with "beyond compliance" initiatives that do not demonstrably treat like firms alike – they risk a legitimacy deficit that may ultimately be their undoing.[50].

Conclusion

In this paper, I have sought to advance the debate as to *how* to intervene by arguing, contrary to conventional wisdom, that rather than seeking to identify a single intervention strategy, what an excellent regulator needs to do is to consciously apply different intervention strategies according to their suitability to particular regulatory contexts. Different types of regulatees confront different external pressures and have different skills, capabilities and

motivations. The economic and social risks posed by different operations are also intrinsically different. Accordingly, there is no single formula for achieving regulatory excellence.

Although excellent regulators will apply different intervention strategies in different circumstances, there are nevertheless numerous signposts that can steer all regulators towards the goal of regulatory excellence. These signposts include: invoking different strategies to engage effectively with different circumstances; facilitating, catalyzing and commandeering the participation of second and third parties as surrogate regulators; and constantly self-evaluating, learning and adapting their approach**.**

Notes

[1] Procedural legitimacy is not considered in this paper.

[2] Neil Gunningham, "Enforcing Environmental Regulation," *Journal of Environmental Law* 23 (2) (2011): 169-201, doi:10.1093/jel/eqr006.

[3] Eugene Bardach and Robert A Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness*, (Philadelphia: Temple University Press, 1982).

[4] John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000), 558.

[5] John Braithwaite and Ian Ayres, *Responsive Regulation: Transcending the Deregulation Debate*, (New York, Oxford University Press, 1992), 62-63.

[6] John Braithwaite, "Relational Republican Regulation," *Regulation & Governance* 7 (2013): 124, doi:10.1111/rego.12004.

[7] Ibid.

[8] Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: System and Sanctions*, (Oxford: Oxford University Press, 1999), 123–129.

[9] Cristie Ford, "Prospects for Scalability: Relationships and Uncertainty in Responsive Regulation," *Regulation & Governance* 7 (2013): 14, doi:10.1111/j.1748-5991.2012.01166.x. See also John Braithwaite, "Relational Republican Regulation."

[10] For reviews see Robert Baldwin and Julia Black, "Really Responsive Regulation," *The Modern Law Review* 71 (2008): 59-94.

[11] Vibeke Lehmann Nielsen and Christine Parker, "Testing Responsive Regulation in Regulatory Enforcement," *Regulation & Governance* 3 (2009): 376-399, doi:10.1111/j.1748-5991.2009.01064.x; see also Peter Mascini and Eelco Van Wijk, "Responsive Regulation at the Dutch Food and Consumer Product Safety Authority: An Empirical Assessment of Assumptions

Underlying the Theory," *Regulation & Governance* 3 (2009): 27-47, doi:10.1111/j.1748-5991.2009.01047.x.

[12] Julia Black and Robert Baldwin, "Really Responsive Risk Based Regulation," *Law and Policy* 32 (2) (2010): 189-190, doi: 10.1111/j.1467-9930.2010.00318.x.

[13] Julia Black, "The development of risk-based regulation in financial services: just 'modelling through'?," in *Regulatory Innovation: A Comparative Analysis*, eds. Julia Black, Martin Lodge and Mark Thatcher, (Cheltenham: Edward Elgar, 2005) 156; Black and Baldwin, "Really Responsive Risk Based Regulation," 181-213.

[14] See generally Neil Gunningham, Peter Grabosky and Darren Sinclair, *Smart Regulation: Designing Environmental Policy* (Oxford: Oxford University Press, 1998) Chapter 6.

[15] See for example Judith Van Erp and Wim Huisman, "Smart regulation and enforcement of illegal disposal of electronic waste," *Criminology & Public Policy* 9 (3) (2010): 579-590, doi:10.1111/j.1745-9133.2010.00652.x.

[16] Gunningham, Grabosky and Sinclair, *Smart Regulation: Designing Environmental Policy*, Chapter 6.

[17] Implicitly, as Julia Black has argued, meta-regulation may be inevitable because of the massive disparity between regulatory resources and the number, size and complexity of regulated enterprises. See Julia Black, "Paradoxes and Failures: 'New Governance' Techniques and the Financial Crisis," *The Modern Law Review* 75 (6) 2012: 1037-1063, doi:10.1111/j.1468-2230.2012.00936.x.

[18] On meta-regulation generally, see especially Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (New York: Cambridge University Press, 2002). For a review of the 'safety case' literature see Neil Gunningham, "Designing OHS Standards: Process, Safety Case and Best Practice," *Policy and Practice in Health and Safety* 2 (3) (2007).

[19] Neil Gunningham and Darren Sinclair, "Organizational Trust and the Limits of Management-Based Regulation," *Law and Society Review* 43 (2009): 865-900.

[20] For a review see Neil Gunningham, *Mine Safety: Law, Regulation, Policy* (Sydney: Federation Press, 2007) Chapter 3.

[21] See in particular two early and classic studies Keith Hawkins, *Environment and Enforcement* (New York: Oxford University Press, 1984) and Bridget Hutter, *Compliance, Regulation and the Environment* (Oxford, Oxford University Press, 1997).

[22] It does bear a superficial resemblance to "principles-based" regulation, on which see Julia Black, "The Rise (and Fall?) of Principles Based Regulation," in *Law Reform and*

Financial Markets, eds. Kern Alexander and Niamh Moloney (Cheltenham: Edward Elgar Publishing, 2011).

[23] Robert Kagan, Neil Gunningham, and Dorothy Thornton, "Fear, Duty and Regulatory Compliance: Lessons from Three Research Projects," in Christine Parker and Vibeke Lehmann Nielsen (ed.), *Explaining Compliance: Business Responses to Regulation*, Edward Elgar Publishing, Cheltenham UK, pp. 37-58.

[24] Ibid. at 54.

[25] Julia Black, "Managing Regulatory Risks and Defining the Parameters of Blame: A Focus on the Australian Prudential Regulation Authority," *Law and Policy* 28 (1) (2006): 1-30, doi:10.1111/j.1467-9930.2005.00215.x and Black, "The development of risk-based regulation in financial services: just 'modelling through'?," 156.

[26] See also John Braithwaite, "Meta Risk Management and Responsive. Regulation for Tax System Integrity" *Law & Policy* 25 (1) (2003): 1-16, doi:10.1111/1467-9930.00137.

[27] The large majority of beyond compliance initiatives tend to score well on legitimacy because they are voluntary and encourage dialogue with local communities concerning beyond compliance goals and the means of achieving them.

[28] John Braithwaite, "The Essence of Responsive Regulation" *University of British Columbia Law Review* 44 (3) (2011): 480-481.

[29] Neil Gunningham, Robert Kagan and Dorothy Thornton, "Social License and Environmental Protection: Why Businesses Go Beyond Compliance," *Law and Social Inquiry* 29 (2) (2004): 307-341.

[30] Shelley H. Metzenbaum and Gaurav Vasisht, "What Makes a Regulator Excellent? Mission, Funding, Information, and Judgment," paper prepared for Penn Program on Regulation's Best-in-Class Regulator Initiative, June 2015.

[31] See for example Neil Gunningham and Darren Sinclair, *Leaders and Laggards: Next Generation Environmental Regulation* (Sheffield: Greenleaf Pub, 2002) and Cary Coglianese and Jennifer Nash, "Performance Track's Postmortem: Lessons from the Rise and Fall of EPA's 'Flagship' Voluntary Program," *Harvard Environmental Law Review* 38 (2014): 1-86.

[32] Ibid 80.

[33] John Mikler, *Greening the Car Industry: Varieties of Capitalism and Climate Change*, (Cheltenham: Edward Elgar Publishing, 2009).

[34] Ibid 101.

[35] Ibid 106.

[36] John Braithwaite, "The Essence of Responsive Regulation," 480 - 490.

[37] Coglianese and Nash, "Performance Track's Postmortem: Lessons from the Rise and Fall of EPA's 'Flagship' Voluntary Program."

[38] Gunningham, Grabosky and Sinclair, *Smart Regulation: Designing Environmental Policy*, 408,413.

[39] John Braithwaite, "The Essence of Responsive Regulation," 507, 512.

[40] See generally Gunningham, Grabosky and Sinclair, *Smart Regulation: Designing Environmental Policy*, Chapter 6.

[41] See Gunningham and Sinclair, *Leaders and Laggards: Next Generation Environmental Regulation*.

[42] Ronald B Mitchell, *Intentional Oil Pollution at Sea, Environmental Policy and Treaty Compliance* (Cambridge: MIT Press, 1994).

[43] Dan Fiorino "Rethinking Environmental Regulation: Perspectives from Law and Governance" *Harvard Environmental Law Review* 23 (2) (1999)441-69, at 468.

[44] Ibid.

[45] See for example Lance H. Gunderson, Craig R. Allen and C.S. Holling (eds) *Foundations of Ecological Resilience* (Washington: Island Press, 2009); Brian Walker and David Salt (eds) *Resilience Thinking: Sustaining People and Systems in a Changing World* (Washington: Island Press, 2006).

[46] Perhaps the closest in this regard is Ahjond S. Garmestani and Craig R. Allen (eds), *Social-Ecological Resilience and the Law* (New York: Columbia University Press, 2014).

[47] John Braithwaite, "Relational Republican Regulation", 135.

[48] Black and Baldwin, "Really Responsive Risk Based Regulation."

[49] Fiona Haines, "Regulatory Failures and Regulatory Solutions: A Characteristic Analysis of the Aftermath of a Disaster" *Law & Social Inquiry* 34 (1) (2009) 34, doi:10.1111/j.1747-4469.2009.01138.x

[50] Dennis D. Hirsch, "Bill and Al's XL-ENT Adventure: An Analysis of the EPA's Legal Authority to Implement the Clinton Administration's Project XL" *University of Illinois Law Review* (1) (1998) 129-172.

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