Compliance Code Consultation,
Better Regulation Executive,
5th Floor, 22 Whitehall,
London,
SW1A 2WH

15 August 2007

Dear Sir/Madam,

Re: Consultation on the Compliance Code

The Centre for Corporate Accountability is charity concerned with the promotion of worker and public safety. Our particular focus is on the role of state bodies in enforcing health and safety law, investigating work-related deaths and injuries, and subjecting them to proper and appropriate prosecution scrutiny. You can find more information about our work at www.corporateaccountability.org.

We have a number of significant concerns about certain elements of this Compliance Code. It should be noted that our experience involves issues involving work-related health and safety, and therefore our comments are limited to how the proposed code impacts upon those regulatory bodies with enforcement responsibilities in that area – in particular the Health and Safety Executive (HSE) and Local Authorities (in their role as enforcing health and safety law). Our concerns may well however have wider resonance.

It should be noted that the Health and Safety Executive and local authorities are responsible for regulated organisations which between them cause every year about 240 deaths of workers, 90 deaths of members of the public and 28,600 major injuries to workers in traumatic incidents as well as 6000 deaths through occupational cancers and 4000 deaths from Chronic Obstructive pulmonary Disease[1]. No other organisation within the proposed jurisdiction of this code, has to engage with stopping regulated organisations causing this level of death and injury and dealing with those organisations that do. In light of this, in relation to the work of the HSE, the extraordinary emphasis being placed on 'reducing burdens' on the regulated community is in our view simply misplaced.

We would like an opportunity to meet with you to discuss our concerns set out in this note.

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[1] See: http://www.hse.gov.uk/statistics/overall/hssh0506.pdf, and http://www.hse.gov.uk/statistics/fatals.htm

Investigations into death and Injury

The explicit and implicit assumption of the Code is that the principle activity of regulators is preventative inspections or advice work. Yet about half of the HSE's inspectors' time is taken up with the investigation of work-related death and injury. The concepts and principles in the Code that may be relevant to activities that principally involve preventative action are not those are appropriate to investigation of injuries and death. Whilst in the investigation of every incident there is an element of direct preventative work[2], investigations of deaths and major injuries (unlike with most preventative inspections) raise a very significant 'accountability', 'justice' and 'deterrence' dimension to decisions about what enforcement action is appropriate.

The Code's failure to take these matters into account is reflected in para 1.3. This states that the Code,

> "stresses the need for regulators, in carrying out their regulatory activities, to adopt a constructive and preventative approach towards ensuring compliance by:
> - helping and encouraging regulated entities to understand and meet regulatory requirements more easily; and
> - responding proportionately to regulatory breaches.

It is simply not appropriate, in relation to HSE's investigations of deaths and serious injuries for its inspectors to undertake solely, a "constructive[3] and preventative approach", and an approach that "help[s] and encourag[es] regulated entities to understand and meet regulatory requirements". The reasonable expectation of society (and in particular those bereaved and injured), the importance of deterrence (ensuring that there are proper incentives on the regulated entities to avoid circumstances that increase the risk of injury and death), and the straightforward need to hold organizations and individuals to account following a criminal offence that has caused death or serious injury need to be considered. There is no appreciation of this in the Code.

This failure to recognise that a different approach is required for investigations into death and injury, is also reflected in the whole of section 4 of the Code on risk assessment. This assumes throughout that regulators are not involved in investigations of serious incidents involving death and injury. It is not clear at all for example how a 'risk assessment approach' can be used to decide either (a) how many of the reported injuries a regulated body should investigate and (b) which of those injuries the body will investigate

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[2] i.e to ensure that the incident does not happen again

[3] It is not clear what this word means in this context – but it seems to suggest, constructive for the benefit of the duty holder

What we are particularly concerned about is that the Code, in its current form, will (a) result in the HSE giving less emphasis to investigations into deaths and injuries and (b) justify or indeed require an approach that, subsequent to an investigation, fails to consider proper formal enforcement including prosecution. This concern is developed in relation to our criticisms of section 8 of the Code.

In the CCA's view the Code should either (a) make an explicit recognition that regulators dealing with criminal offences that are a cause of serious injury, disease or death should be able to take into account issues of justice, accountability, public interest and the need for deterrence when deciding on what enforcement action is necessary; or (b) remove investigations into deaths and injuries from the jurisdiction of the Code.

Section 8 of the Code: Compliance and Enforcement Actions

The CCA has significant concerns about section 8 of the Code, titled, "Compliance and enforcement actions." We would like to make the following points about it:

1. The principle states: "The few businesses that persistently break regulations should be identified quickly and face proportionate and meaningful sanctions."

   We do not know what is the evidential basis for either Hampton or the Better Regulatory Executive stating that only "few" businesses "persistently break regulations." It is true to say that formal enforcement action is taken infrequently in response to breaches – but that is not at all the same as suggesting that health and safety regulations are not persistently broken. In fact inspectors will tell you that any inspection of a construction site or factory will in most cases uncover many regulations that have been broken; their response to them is more often than not using means other than formal enforcement.

   The use of this language is rhetorical, without factual foundation and should not be used in this Code.

2. The Code goes onto state: "By facilitating compliance through a positive and proactive approach, regulators can achieve higher compliance rates and reduce the need for reactive enforcement actions."

   It is not clear exactly what is meant by a 'positive and proactive approach' - however the context suggests, that the words are *code* for "provision of advice without formal enforcement'. It is simply wrong, however, for the Code to suggest that there is sufficient evidence to support this contention. It is a very different claim from one which the Code is entitled to make – that

action suggested by the Code will reduce burdens on business. The Code seems to conflate “reducing burdens” with “increasing compliance”. The code cannot make or imply that this is the case.

Greenstreet Berman, in its report to the HSE in 2004 on “*Building an evidence base for the Health and Safety Commission Strategy to 2010 and beyond: A literature review of interventions to improve health and safety compliance*” summarised the research in the following way:
“It is clear from research that:

- Enforcement activity is an important element in securing and motivating compliance both in the individual organisation and as a deterrent to others;
- There is a consensus that a mix of both punishment and persuasion is the best policy (e.g. Hopkins 1995);
- The prospect of enforcement action is a driver for large and high risk operators, as well as smaller firms.”

3. Section 8 goes on to state: “However, regulators should be able to target those who deliberately or persistently breach the law.”

We have real concerns about this sentence. It seems to suggest that regulatory bodies should only undertake formal enforcement action against those who “deliberately or persistently” breach the law. Whilst, clearly action should be taken against those who act in this fashion, the question that this raises is: what about those who don’t breach the law ‘deliberately” but breach it ‘negligently’, ‘gross negligently’ or ‘recklessly’? Do they not deserve attention? The HSE rarely, if ever, presents any case to court involving a ‘deliberate’ breach of the law – evidence always revolves around the seriousness of the breach and the consequences caused. In addition, the concept of ‘persistence’ is highly problematic – how will regulators obtain information about ‘persistence’ when the Code itself is suggesting fewer inspections. What happens for example, if a major injury is the result of a serious breach of law – but (due to lack of prior inspections) there is no evidence whether the employer has or has not been in persistent breach.

This paragraph could have the effect of forcing the Health and Safety Commission to make significant changes to its Enforcement Policy Statement (EPS) so that prosecutions – and indeed the use of enforcement notices - would occur in far fewer set of circumstances. At present, *over and above* deliberate and persistent breaches, the EPS expects prosecution to take place when:

- death was a result of a breach of the legislation;
- the gravity of an alleged offence, taken together with the seriousness of any actual or potential harm, or the general record and approach of the offender warrants it;

- there has been reckless disregard of health and safety requirements;
- work has been carried out without or in serious non-compliance with an appropriate licence or safety case;
- a duty holder's standard of managing health and safety is found to be far below what is required by health and safety law and to be giving rise to significant risk;
- there has been a failure to comply with an improvement or prohibition notice; or there has been a repetition of a breach that was subject to a formal caution;

The problem with the way in which the Code is currently worded is that it gives the impression that only when 'deliberate' or 'persistent' breaches take place should there be formal enforcement action. This is entirely inappropriate.

4. Para 8.1 of the Code states that "Regulators should seek to reward those regulated entities that have consistently achieved good levels of compliance through positive incentives, including lighter inspections and less onerous reporting requirements, where risk assessment justifies this."

   We are not sure of the value of this. A good record will in itself result in less inspections – as a result of the process of risk assessment.

5. Para 8.1 goes onto say: "Regulators should also take account of the circumstances of small regulated entities, including any difficulties they may have in achieving compliance." This is extremely vague. What circumstances should be taken into account? What difficulties can justify failure to comply? This paragraph is a charter for non-compliance by small businesses – providing them excuses to their non-compliance, and making it difficult for regulators to enforce the law.

6. Para 8.2 contains a further vague sentence. "When considering formal enforcement action, regulators should, where appropriate, discuss the circumstances with those suspected of a breach and take these into account when deciding on the best approach." What circumstances are extenuating and what circumstances are mitigating? Will it be necessary for the regulator to investigate the accuracy of any claims made by a duty holder? This sentence opens wide the possibility of duty holders simply providing an array of excuses to explain any breach, none of which can actually be corroborated.

Section 3 of the Code: Economic Progress

We also have real concerns about section 3 of the Code. The principle states that: "Regulators should recognise that a key element of their activity will be to

allow, or even encourage, economic progress and only to intervene when there is a clear case for protection."

In our view it is entirely inappropriate that a "key element of" the activity of the HSE or indeed any other safety body should be to allow or encourage economic progress. It will, in our view result, over time, in an unacceptable distortion of how the HSE undertakes its work and prevent important health and safety reforms taking place.

This section will mean that prior to determining policies or principles or setting standards or giving guidance, the HSE will have to consider whether or not it "encourages economic progress." How are they supposed to do this? How will they make that estimation? – they certainly do not have the expertise in making such an evaluation. How can the HSE evaluate claims by business that any particular general regulatory policy will or will not encourage economic progress? A statement of this kind about economic progress will inevitably have a significant impact upon HSE's capacity to carry out its statutory obligations.

Section 6 of the Code: Inspections

We are extremely concerned about the intention that "Regulators should use only a small element of random inspection in their programme to test their risk methodologies." The first point to make here is that 'random' or unplanned inspections currently constitute a very important element of the work of the HSE and local authorities. This is because many of the types of workplaces that require such inspections are precisely the same type of workplaces in which risks are likely to be relatively unknowable or are workplaces from which it is not possible to gather specific intelligence. This is particularly the case in sectors that are dependant upon contracted or casualised labour. So, for example HSE regularly uses inspection 'blitzes' in the types of workplaces in which specific knowledge of risks is difficult to gather. Such programmes of unplanned inspections give regulators the flexibility to deal with risks and provide an crucial deterent effect in so far as they make employers aware of a possibility of an HSE inspection, even if they have no enforcement or inspection history.

Further Points

1. Surely the order of words in paragraph 1.1 is wrong: "Protecting from harm" is clearly a more significant aim than "supporting economic progress" and should be first. (See our criticism of the use of 'economic progress' above.)

2. In para 2.3, the second bullet point is not clear.

3. We very much agree with para 2.4: HSC/E should be following its own policy in relation to regulatory actions

4. Paragraph 3.1 states that regulators "should consider the impact that their regulatory interventions may have on economic progress, as well as on perceptions of fairness, effectiveness and costs of regulation."

   It is not clear whose perceptions of fairness, is being referred to here. Fairness of business or fairness to workers or members of the public who would be protected by a possible regulatory intervention

5. Section 5 of the Code states that "Without knowing or understanding what regulations require of them, regulated entities will find it difficult to comply." Whilst we accept that the regulatory bodies should provide clear information and materials that allows busineses to understand the law and its effect on them, and what they need to do, this sentence seems to 'infantlise' regulated bodies – which actually do surely have a responsibility to take some action themselves and should not simply be spoon fed. This section therefore needs to be revised to ensure that it is clear that regulatory bodies have a responsibility also to find the law and understand its significance to them.

6. Para 5.6. states that "Regulators should ensure that regulated entities can reasonably seek and access advice from the regulator without directly triggering an enforcement action. In responding to such an approach, the regulator should seek primarily to provide the necessary advice and guidance to help ensure compliance."

   We do not understand the meaning of 'reasonably' here. Moreover, we do not this that this should apply when an inspection identifies dangerous circumstances which require remedying.

The CCA is not on your list of consultees – and would request that in the future the Better Regulation Executive places us on its list of formal consultees

Yours sincerely

David Bergman
Executive Director