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HEALTH AND SAFETY COMMISSION

Formal Cabinet Office consultation on proposed Regulators' Compliance Code - HSC response

A Paper by Julian Cooper

Advisor(s): Keith Pritchard, Steve Woolley, Tony Fausset

Cleared by Jonathan Rees on 28 June 2007

Issue

1. To provide a response to the Cabinet Office Better Regulation Executive (BRE) consultation¹ on a **statutory code of practice for regulators**, including HSE and English local authorities.

Timing

2. Responses to the consultation need to be received by 15 August 2007. Ministers are expected to issue the Code and make the Listing Order in the autumn, with the Code coming into force in April 2008.

Recommendation

3. The Commission is invited to:
 - i. Agree a reply to BRE, responding positively to these developments, which should not threaten HSE's (or local authorities) ability to enforce health and safety law in accordance with the Commission's Enforcement Policy Statement (EPS). A draft is included at Annex 1 and more detailed drafting points at Annex 2.
 - ii. Note that HSE will continue to engage with BRE and influence developments in this very important area.

Background

4. The proposal for a statutory code of practice for regulators derives from recommendation 12 of the Hampton Report - that its principles² should be

¹ *Consultation on the Draft Regulators' Compliance Code and Listing Order*, available on the Cabinet Office website: http://www.cabinetoffice.gov.uk/regulation/documents/consultation/pdf/compliance_code.pdf

² The Hampton principles are:

- allowing, or even encouraging, economic progress and intervening only where there is a clear case for protection;

incorporated into regulators' legal duties in order to make them more accountable for the way in which they do their work.

5. The **Legislative and Regulatory Reform Act 2006** (LRR Act) provides the legal basis for introducing the Code and requires regulators to have regard to the Code when setting general policy or principles on the exercise of their regulatory functions. The LRR Act also places a duty on regulators to have regard to the established principles of good regulation³ in exercising their regulatory functions (ie this applies to individual enforcement decisions). The Act establishes procedures for an order to be made listing the functions to which the principles and code would apply.
6. **Previous consultations:** BRE published a draft code on the web in March 2006, inviting public comment. Regulators, including HSE, responded individually with a range of concerns, particularly on prescriptive detail and the risk of legal challenge to enforcement decisions. In March 2007, BRE circulated a re-drafted code. HSE and other 'Hampton thematic regulators' contributed further concerns and suggestions in bilateral meetings and through the Heads of Regulators Group.
7. **Scope:** HSC/E's regulatory functions are included in the proposed listing order (see para 5), including giving advice to local authorities in England, Scotland and Wales. Ministers' regulation-making powers are exempted, and therefore also HSC/E's policy and advisory functions in that area.
8. In respect of the regulatory functions to which it applies, the Code will replace the existing Enforcement Concordat.

Argument

9. During development of the draft Code, HSE's key concerns had been:
 - Making clear the Code applies at the overall policy level and not, for example, to decisions by inspectors in individual cases.
 - Ensuring enforcement action was not ruled out where contact with a duty holder followed a request to the regulator for advice.
 - Potential cost implications relating to the 'Information and Advice' and 'Data Requirement' sections of the Code.
 - Ensuring the 'no inspection without a reason' principle does not conflict with our approach to enforcement in the major hazards sector.
10. These concerns have been resolved by working closely with the Better Regulation Executive (BRE) at official level, including correspondence between Geoffrey Podger and Jitinder Kohli (BRE Chief Executive). In particular:

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- using comprehensive risk assessment to concentrate resources in the right areas;
 - providing authoritative, accessible advice easily and cheaply;
 - no inspection without a reason;
 - businesses not being required to give unnecessary information, or the same information twice;
 - the few businesses that persistently break regulations should be identified quickly and face proportionate and meaningful sanctions;
 - regulators should be accountable for their activities while remaining independent in their decisions.

³ regulatory functions should be transparent, accountable, proportionate, consistent, and targeted.

a) On the issue of individual enforcement decisions, whilst it was never the intention that the Code should apply at that level, HSE and other regulators had concerns that duty-holders or others might seek to use it to **challenge enforcement decisions** in the courts. HSE drafting suggestions have helped clarify the scope of the Code.

b) On our approach to **major hazards**, there has been some discussion of how this fits against the principle that “there should be no **inspection without a reason**” - which seeks to ensure that inspections are justified and targeted on the basis of an assessment of risk. The HSC Policy Statement on Permissioning Regimes makes clear that an important focus of effort for the major hazards sector (eg nuclear and chemical industries) is in preventing rare but catastrophic events; focussing effort on the basis of hazard rather than risk.

There is clearly little room for argument that we have good reason to inspect in these sectors. In any case, para 2.5 of the Code allows us to conclude, after proper consideration, that its provisions are not relevant or are outweighed by other considerations. In discussion, BRE officials have agreed with our interpretation. Nevertheless, we think it would be useful for HSC to highlight the importance of public reassurance as a consideration in major hazards inspection regimes.

c) On the issue of **cost implications**, HSE had been concerned that the Code opened up the prospect of **demand for advisory visits** that would be impossible to resource. The consultation draft is much improved and only requires regulators to 'have regard' to providing 'advice services' and the phrase 'where practicable' further clarifies this obligation.

d) The Code states that two or more regulators requiring the same information from the same duty holders should seek to **share data** to avoid duplication of collection. While situations may arise where the sharing of electronic data becomes feasible, experience has shown that it is costly and difficult to achieve. There can also be legal impediments, some unconnected with data protection issues. However, provisions in the Code allow a fit for purpose, common sense approach to this. BRE's Impact Assessment acknowledges that regulators will “*balance the legal requirement to 'have regard to' the Code against other priorities and budgetary considerations – if the costs of a data-sharing scheme are not practicable for a regulator, the Code would not require the regulator to adopt the scheme*”. Therefore the data sharing provision does not appear to be a resource concern.

11. Following the changes made to the draft Code by BRE, HSC/E's legal advisors are of the view that we would be likely to defeat any challenges (based on the Code) to HSE's actions, providing we are acting reasonably in the context of our statutory obligations.
12. As a result, the Commission can respond positively to these developments, which should not threaten HSE's or local authorities' ability to enforce health and safety law in accordance with the Commission's Enforcement Policy Statement (EPS). The regulatory principles (see footnote 3) mirror those in the EPS, and HSC/E has endorsed the Hampton principles which the Compliance Code requires regulators to have regard to.
13. Initial internal consultation indicates that **existing HSC/E arrangements (ie the policies and principles underpinning regulatory activities) already broadly**

meet the requirements in the draft Code or have a reasonable regulatory need not to, as permitted by paragraph 2.5 the Code (see Annex 4 for a broad overview). This should enable us to comply with little additional work. Analysis will continue with a view to issuing a **public statement on how HSC/E complies** in time for the Code coming into force in April 2008. We will return to HSC with a draft statement in early 2008. The analysis will be carried out alongside HSE's work with BRE and the National Audit Office on the assessment of HSE's performance, ie the Hampton Implementation Review. This review will assess how compliant HSE is with the Hampton principles (see HSC/07/55).

Consultation

14. There has been extensive consultation across HSE throughout the Code's development, including the Operations Group, Policy Group, Legal Advisors Office, Economists and Local Authority Unit. There has been a steer from the Better Regulation Oversight Group, with Board level operational representatives, which helped shape our input to BRE. We have also consulted the Local Authorities Coordinators of Regulatory Services (LACoRS) on this paper.

Presentation

15. A positive response will reinforce the perception of HSC/E as a modern, independent regulator with a clear focus on ensuring harm is reduced, and whose policies and practices have led directly to the principles which the LRR Act and Code now seek to put in place for all regulators.

Costs and Benefits

16. The costs and benefits for this proposal are covered in BRE's Impact Assessment (IA), which is included in the consultation document. The IA identifies the costs and benefits for regulators as a whole, not for each individual regulator. BRE has assessed the **total cost** of introducing the Code to be **£354.2M** (over a 10 year period), incurred by national regulators and local authorities in areas where they are not already compliant, eg re-wording policies, improving advisory services etc. The **total benefits** (to business and regulators) are shown as a range, **£321M - £811M**. No significant issues have been identified that warrant HSC comment on the Impact Assessment.

Financial/Resource Implications for HSE

17. Any implementation costs for HSE are expected to be minimal as we are substantially compliant with the Code. Such costs will be identified as work is completed to map HSE's existing level of compliance and draft the explanatory statement, which will be put to HSC in early 2008.
18. The cost of preparing the statement is estimated to be approximately £9,000 in staff costs and will be met from existing budget allocations.
19. Around £55,000 in staff costs have been incurred since 2005, inputting to development of the Code.

Environmental Implications

20. None.

Other Implications

21. The Code would apply directly to **local authorities** in England, but not in Scotland and Wales. However, it would apply to the guidance on enforcement activities that HSC gives to local authorities throughout Great Britain. For example, the Enforcement Policy Statement. The Code should, therefore, support HSC/E and LA partnership efforts to ensure continued consistency of approach in health and safety regulation.

Action

22. To agree a response to BRE on the proposed Compliance Code.

Dear

I am writing with the views of the Health and Safety Commission (HSC) in response to your consultation on the draft Regulators' Compliance Code and Listing Order. The Commission welcomes the opportunity to comment on this important development in the UK regulatory regime.

In developing its focus as a modern regulator, the Commission is committed to ensuring its approach to regulation is more effective and efficient, both for those regulated and the regulators. We have welcomed the work done by both Philip Hampton and Professor Macrory and the Government's acceptance of their findings. Since the early 1990s, HSC/E has followed the principles of good regulation. They are integral to our Enforcement Policy Statement, which formed the basis of the Government's Enforcement Concordat, and so apply to the health and safety regulatory activities of HSE and local authorities at both the general policy and individual decision level.

We welcome the Better Regulation Executive's (BRE) approach of closely involving the main thematic regulators, including HSE, in developing the draft Code. We are pleased that BRE has been responsive to HSE's main concerns. Some remaining drafting suggestions are provided as an annex to this letter. But we would also like to take this opportunity to highlight some key observations:

- On the principle of no inspection without a reason, an important focus of effort for the major hazards sector (eg nuclear and chemical industries) is in preventing rare but catastrophic events. We all recognise the need for public reassurance and this is a fundamental consideration for major hazards inspection regimes.
- The Commission regards maintaining consistency of enforcement across Great Britain as an important aim. We note that the draft Code does not apply to local authorities in Scotland and Wales, but are pleased that it does cover the guidance that we provide them on their enforcement activities. This will support the work we do in partnership with local authorities towards this aim.
- We fully support the aim of sharing data on duty holders with other regulators in a way which will deliver efficiencies for all concerned and contribute to the delivery of regulatory outcomes. What is possible to achieve in practice will, of course, be subject to technology and resource restraints and so we are pleased to note that the provisions of the Code will allow a sensible and fit for purpose approach towards this aim.

Throughout the development process for the Code, HSE officials have worked closely with the BRE and we look forward to continuing dialogue.

Regulator's Compliance Code – Consultation

Health & Safety Commission response – detailed drafting comments

1. Para 4.5: The current unqualified requirement for regulators regularly to review and improve their risk methodologies does not allow for the possibility that, following review, there is no need for change. We suggest amending the first sentence to read:
“Regulators should regularly review their risk methodologies, with a view to improvement.”
2. Para 5.5: As currently drafted, the requirement could be misinterpreted as applying to specific enforcement actions (ie offering compliance advice). We suggest the following:
“5.5 Regulators should have policies to ensure that, when offering compliance advice, they should distinguish between statutory requirements and advice or guidance aimed at improvements above minimum standards, and that the advice should be confirmed in writing if requested.”
3. Para 6.3: Read in conjunction with the scope of the Code (ie section 2), we interpret this requirement as allowing a common sense and fit for purpose approach; it does not seek to have general policies requiring staff to collaborate and co-ordinate with non-homogeneous regulators. As long as our interpretation is correct, we are content; otherwise the diversion of resource would be disproportionate.
4. Para 8.5: As currently drafted, the requirement could be misinterpreted as applying to specific enforcement actions (ie reasons for any formal enforcement action). We suggest the paragraph should begin: “Regulators’ policies”.
5. Para 9.2: To ensure that it is clear this provision does not apply to intermediate outcomes of enforcement action (eg numbers of prosecutions), the first bullet point should refer to footnote number 8, ie at page one of the Code.

The Draft Regulators' Compliance Code (as at May 2007)

PART I: GENERAL INTRODUCTION

1. Purpose of the Code

1.1 Effective and well-targeted regulation is essential, whether in supporting economic progress and promoting fairness or protecting from harm. The Government believes that, in addition to achieving other legitimate objectives, regulation and its enforcement should be proportionate and flexible enough to boost the growth and competitiveness of regulated entities, particularly small firms.

1.2 This Code supports the Government's policy and is based on the recommendations in the Hampton Report⁴. Its purpose is to promote efficient and effective approaches to regulatory inspection and enforcement which improve regulatory outcomes without imposing unnecessary burdens on business, the Third Sector⁵ and other regulated entities⁶.

1.3 The Code stresses the need for regulators, in carrying out their regulatory activities, to adopt a positive and proactive approach towards ensuring compliance by:

- helping and encouraging regulated entities to understand and meet regulatory requirements more easily; and
- responding proportionately to regulatory breaches.

The Code does not detract from regulators'⁷ responsibility to deliver the desirable regulatory outcomes⁸ nor relieve regulated entities of their responsibility to comply with their obligations under the law.

2. Background and Scope

2.1 This Code has been prepared and laid before Parliament by [*minister's title....*] and has been approved by both Houses of Parliament in accordance with section 23(4) of the Legislative and Regulatory Reform Act 2006 ("the Act"), after having consulted persons appearing to him to be representative of persons exercising regulatory functions and such other persons as he considered appropriate.

2.2 The Minister issues the Code under section 22(1) of the Act on [x date]. The Code builds on the Better Regulation Commission's Principles of Good Regulation⁹ and the principles set out in the Hampton Report ("the Hampton principles").

⁴ *Reducing Administrative Burdens: Effective Inspection and Enforcement*, Philip Hampton, March 2005.

⁵ This term defines non-governmental organizations that include voluntary and community organizations, charities, social enterprises, cooperatives and mutuals.

⁶ Throughout this Code, the term 'regulated entities' includes businesses, public sector bodies, charities and voluntary sector organisations that are subject to regulation.

⁷ The term 'regulator' is used in this code to refer to any person who exercises a regulatory function.

⁸ That is, the 'end purpose' of regulatory activity (for example, reduction in accidents/disease, less pollution etc).

2.3 The Code only applies to those regulatory functions specified by order under section 24(2) of the Act. Any regulator whose functions are so specified **must have regard to** this code:

- (a) when determining general policies or principles about the exercise of those specified functions (section 22(2)); or
- (b) when exercising a specified regulatory function which is itself a function of setting standards or giving general guidance about other regulatory functions (whether their own functions or someone else's functions)(section 22(3)).

2.4 The duties to have regard to the Code under section 22(2) and (3) of the Act **do not** apply to the exercise by a regulator or its staff of any specified regulatory function in individual cases. This means that while an inspector or investigator should operate in accordance with a regulator's general policy or guidance on, for example, inspections, investigations and enforcement activities, the Code does not apply directly to the work of that inspector or investigator in carrying out any of those activities.

2.5 The duty on a regulator to "have regard to" the code means that the regulator must take into account the Code's provisions and give them due weight in developing their policies or principles or in setting standards or giving guidance. The regulator is not bound to follow the Code if they *properly* conclude that the provisions of the Code are, in a particular case, either not relevant or are outweighed by other relevant considerations. But if there are no such relevant considerations, the regulator should follow the Code.

2.6 Section 22(4) of the Act provides that the duty to have regard to the Code is subject to any other legal requirement affecting the exercise of the regulatory function, including EC law obligations.

2.7 In accordance with section 24(3) of the Act, which places restrictions on the extent to which the duties to have regard to the Code may apply to regulatory functions exercisable in Scotland, Northern Ireland and Wales, this Code does not apply to:

- regulatory functions in Scotland to the extent that the functions relates to matters which are not reserved;
- regulatory functions in Northern Ireland to the extent that the functions relates to transferred matters;
- regulatory functions exercisable only in or as regards Wales

2.8 This Code supersedes the 1998 Enforcement Concordat for all the regulatory functions to which the Code applies.

PART II: SPECIFIC OBLIGATIONS OF THE CODE

This section outlines the underlying Hampton principles on which this Code is based, and sets out the specific provisions that elaborate these principles. The Hampton principles and the paragraphs in italics do not form part of the Code's requirements, but set the context in which the specific obligations set out below should be interpreted.

⁹ *Regulation – Less is More: Reducing Burdens, Improving Outcomes*, March 2005

3. Supporting economic progress

Hampton Principle: 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.

Good regulation and its enforcement act as an enabler to economic activity. However, regulation that imposes unnecessary burdens can stifle enterprise and undermine economic progress. To allow or encourage economic progress, regulators must have regard to the following provisions when determining general policies or principles or when setting standards or giving general guidance about the exercise of regulatory functions.

3.1 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. They should only adopt a particular approach or tool if the benefits justify the costs and it entails the minimum burden compatible with achieving desired regulatory objectives.

3.2 When regulators set standards or give guidance in relation to the exercise of their own or other regulatory functions (including the functions of Local Authorities), they should allow for reasonable variations to meet local government priorities, as well as those of the devolved administrations.

4. Risk Assessment

Hampton Principle: Regulators, and the regulatory system as a whole, should use comprehensive risk assessment to concentrate resources in the areas that need them most.

Risk assessment involves the identification and measurement of capacity to harm and, if such capacity exists, an evaluation of the likelihood of the occurrence of the harm. By basing their regulatory work on an assessment of the risks to regulatory outcomes, regulators are able to target their resources where they will be most effective and where risk is highest. As such, in order to carry out comprehensive and effective risk assessment, regulators must have regard to the following provisions when determining general policies or principles or when setting standards or giving general guidance about the exercise of regulatory functions.

4.1 Regulators should ensure that the allocation of their regulatory efforts and resources is targeted where they would be most effective by assessing the risks to their regulatory outcomes. They should also ensure that risk assessment precedes and informs all aspects of their regulatory activity, including:

- data collection and other information requirements;
- inspection programmes;
- advice and support programmes; and
- enforcement and sanctions.

4.2 Risk assessment should be based on all relevant, good-quality data available¹⁰. It should include explicit consideration of the combined effect of:

- the potential impact of non-compliance, i.e. its adverse effects on regulatory outcomes; and
- the likelihood of non-compliance.

4.3 In evaluating the likelihood of non-compliance, regulators should give consideration to all relevant factors, including:

- past compliance records and potential future risks;
- the existence of good systems for managing risks, in particular within regulated entities or sites
- evidence of recognised external accreditation;
- management competence and willingness to comply.

4.4 Regulators should consult and involve regulated entities and other interested parties in designing their risk methodologies, and publish details of the methodologies.

4.5 Regulators should regularly review and improve their risk methodologies. In doing so, they should take into account feedback and other information from regulated entities and other interested parties.

5 Information and Advice

Hampton Principle: Regulators should provide authoritative, accessible advice easily and cheaply.

Without knowing or understanding what regulations require of them, regulated entities will find it difficult to comply. Regulators can, however, improve compliance through greater focus on support and advice. Regulators must, therefore, have regard to the following requirements when determining general policies or principles or when setting standards or giving general guidance on advice and information services.

5.1 Regulators should ensure that all legal requirements relating to their regulatory activities, as well as changes to those legal requirements¹¹, are promptly communicated or otherwise made available to relevant regulated entities.

5.2 Regulators should provide general information, advice and guidance to make it easier for regulated entities to understand what they need to do to meet regulatory requirements. Such guidance, advice and information should be provided in plain, accessible language and in a range of appropriate formats and media¹².

¹⁰ An example of risk methodology, which the Hampton Review recognised as “best practice” (see *Hampton Report*, at page 32) is the Environmental Protection – Operator & Pollution Risk Appraisal scheme (EP OPRA).

¹¹ This includes when a regulatory requirement has been removed and considered no longer relevant or applicable.

¹² A good example of online advice is the Environment Agency's NetRegs (www.netregs.gov.uk) an internet based plain language guidance system for business

5.3 Regulators should involve regulated entities in developing both the content and style of regulatory guidance. They should assess the effectiveness of their information and support services by monitoring regulated entities' awareness and understanding of regulations, including the extent to which they incur additional costs obtaining external advice in order to understand and comply with regulatory requirements.

5.4 Regulators should provide targeted and practical advice that meets the specific needs of regulated entities. Such advice may be provided in a range of formats, such as through face-to-face interactions, telephone helpline and online guidance. In determining the appropriate formats, regulators should seek to maximise the reach, accessibility and effectiveness of advice while ensuring efficient use of resources. There may remain a need for regulated entities with particularly complex practices to use specialist or professional advisors as appropriate.

5.5 When offering compliance advice, regulators should distinguish between statutory requirements and advice or guidance aimed at improvements above minimum standards. Advice should be confirmed in writing, if requested.

5.6 Regulators should ensure that regulated entities can reasonably obtain 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.

5.7 Advice services should generally be provided free of charge, but regulators may charge a fee for services in appropriate circumstances, i.e. to cover relevant costs. Regulators should, however, take account of the needs and circumstances of smaller regulated entities and others in need of help and support.

6. Inspections

Hampton Principle: No inspection should take place without a reason.

Inspections can be an effective approach to achieving compliance, but are likely to be most effective when they are justified and targeted on the basis of an assessment of risk. So, in order to ensure the effectiveness of their inspection programmes, regulators must have regard to the following provisions when determining general policies or principles or when setting standards or giving general guidance on inspections.

6.1 Regulators should ensure that inspections and other visits to regulated entities only occur in accordance with a risk assessment methodology (see paras 4.2. and 4.3), except in circumstances where visits are requested by regulated entities, or where a regulator acts on specific intelligence. Regulators should use only a small element of random inspection in their programme to test their risk methodologies.

6.2 Regulators need to focus their **greatest** inspection effort on regulated entities where risks assessment shows that both:

- a compliance breach or breaches pose serious risk to regulatory outcomes; and
- there is high likelihood of non-compliance by regulated entities.

6.3 Where two or more inspectors, whether from the same or different regulators, undertake planned inspections of the same regulated entity, regulators should have arrangements for collaboration to minimise burdens on the regulated entity, for example, through joint or coordinated inspections and data sharing.¹³

7. Data Requirements

Hampton Principle: Businesses should not have to give unnecessary information or give the same piece of information twice.

Effective regulatory work, including risk assessment, requires accurate information. However, there are costs to its collection both to the regulator and to regulated entities. So, it is important to balance the need for information with the burdens that entails for regulated entities. As such, regulators must have regard to the following provisions when determining general policies or principles or when setting standards or giving general guidance on data requirements.

7.1 When determining the data they may require, regulators should undertake an analysis of the costs and benefits of data requests to regulated entities. Regulators should give explicit consideration to reducing costs to regulated entities through:

- varying data requests according to risk, as set out in section 4.3;
- limiting collection to specific regulated entities sectors/sub-sectors;
- reducing the frequency of data collection;
- obtaining data from other sources;
- allowing electronic submission;
- requesting only data that is legally required.

7.2 If two or more regulators require the same information from the same regulated entities, they should seek to share data to avoid duplication of collection. Regulators should note the content of the Information Commissioner letter¹⁴ when applying the Data Protection Act in order to avoid unnecessarily restricting the sharing of data.

7.3 Regulators should involve regulated entities in vetting data requirements and form design for clarity and simplification. They should seek to collect data in a way that is compatible with the processes of regulated entities and those of other regulators who collect similar data.

7.4 Regulators should keep their policies and guidance under review with a view to ensuring that their data collection and other information requirements in relation to regulated entities do not involve:

- the imposition of burdens which are unnecessary; or
- the maintenance of burdens which have become unnecessary

¹³ The Retail Enforcement Pilot provides a good example of how inspectors can coordinate with each other over inspection visits and reduce overlaps in their requirements.

¹⁴ A letter from the Information Commissioner's giving advice on "data protection and the sharing of regulatory data on businesses" is available at: <http://www.cabinetoffice.gov.uk/regulation/documents/data/pdf/letter.pdf> (dated 22/01/07)

8. Compliance and Enforcement actions

Hampton Principle: The few businesses that persistently break regulations should be identified quickly and face proportionate and meaningful sanctions.

By facilitating compliance through a positive and proactive approach, regulators can achieve higher compliance rates and reduce the need for reactive enforcement actions. However, regulators should be able to target those who deliberately or persistently breach the law. To ensure that they respond proportionately to regulatory breaches, regulators must have regard to the following provisions when determining general policies or principles or when setting standards or giving general guidance on the exercise of compliance and enforcement functions.

8.1 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. Regulators should also take account of the circumstances of small regulated entities, including any difficulties they may have in achieving compliance.

8.2 When considering formal enforcement action, regulators should, where appropriate, discuss the circumstances with those suspected of a breach and take this into account when deciding on the best approach. This paragraph does not apply where immediate action is required to prevent or respond to a serious breach or where to do so is likely to defeat the purpose of the proposed enforcement action.

8.3 Regulators should ensure that their sanctions and penalties policies are consistent with the principles set out in the Macrory Review¹⁵. This means that their sanctions and penalties regime should:

- aim to change the behaviour of the offender;
- aim to eliminate any financial gain or benefit from non-compliance;
- be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
- be proportionate to the nature of the offence and the harm caused;
- aim to restore the harm caused by regulatory non-compliance, where appropriate; and
- aim to deter future non-compliance.

8.4 Regulators should also act in accordance with the following Macrory characteristics:

- publish an enforcement policy;
- measure outcomes not just outputs;
- justify their choice of enforcement actions year on year to interested parties;
- follow-up enforcement actions where appropriate;
- enforce in a transparent manner;
- be transparent in the way in which they apply and determine penalties; and

¹⁵The report of the Macrory Review, which the Government has accepted, is available at: http://www.cabinetoffice.gov.uk/REGULATION/reviewing_regulation/penalties/index.asp.

- avoid perverse incentives that might influence the choice of sanctioning response.

8.5 Regulators should ensure that clear reasons for any formal enforcement action are given to the person or entity against whom any enforcement action is being taken at the time the action is taken. These reasons should be confirmed in writing at the earliest opportunity. Complaints and relevant appeals procedures for redress should also be explained at the same time.

8.6 Regulators should enable inspectors and enforcement officers to interpret and apply their regulations and enforcement policies fairly and consistently between like-regulated entities in similar situations, and where appropriate, ensure that they do.

9. Accountability

Hampton Principle: Regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take.

By establishing effective accountability and transparency structures regulators will make their activities accessible and open to scrutiny. This should increase the legitimacy of regulatory activities and enable regulators and regulated entities to work together to achieve regulatory compliance. So, regulators must have regard to the following provisions when determining general policies or principles or when setting standards or giving general guidance on the exercise of regulatory functions.

9.1 Regulators should create effective consultation and feedback opportunities to enable continuing cooperative relationships with regulated entities and other interested parties.

9.2 Regulators should identify and explain the principal risks against which they are acting. They should, in consultation with regulated entities and other interested parties, set and publish clear standards and targets for the regulator's service and performance. These standards should include:

- regulatory outcomes (capturing the principal risks)
- costs to regulated entities of regulatory interventions;
- perceptions of regulated entities and other interested parties about the proportionality and effectiveness of regulatory approach and costs

9.3 Regulators should measure their performance against the standards in paragraph 9.2 and regularly publish the results. To aid understanding, Regulators should also explain how they measure these outcomes.

9.4 Local authorities are exempt from the provisions of paragraphs 9.2 and 9.3.

9.5 Regulators should ensure that their employees provide courteous and efficient services to regulated entities and others. They should take account of comments from regulated entities and other interested parties regarding the behaviour and activity of inspectors and other enforcement staff.

9.6 Regulators should provide effective and timely complaints procedures (including for matters in this Code) that are easily accessible to regulated entities and other interested

parties. They should publicise their complaints procedures, with details of the process and likely timescale for resolution.

9.7 Complaints procedures should include a final stage to an independent, external person. Where there is a relevant Ombudsman or Tribunal with powers to decide on matters in this Code, the final stage should allow referral to that body. However, where no such person exists, a regulator should, in consultation with interested parties, provide for further complaint or appeal to another independent person, for example, an independent professional body.

Mapping HSE's existing arrangements against Code requirements

Initial assessment

Supporting economic progress

Examples of where we currently achieve this in our policies:-

- HSC Strategy to 2010
- Sensible HSW (Interventions Strategy)
- Enforcement Policy Statement (EPS)
- 'Section 18 guidance' (from HSC) to enforcing authorities

Examples where it is not appropriate to do this, and we will rely on the proviso in paras 2.5 and 2.6 of the Code:-

Major hazards - "... the duty of enforcing authorities, whether inspectors or local authorities, is to have regard to the health and safety of members of the public. If steps which they think should be taken to improve safety would have an adverse economic effect on the business enterprise in question, so be it." (excerpt from judge's summing up in *Harris v HSE & Evans*)

Risk Assessment

Examples of where we currently do this in our policies:-

- HSC Strategy to 2010 (partnerships, FIT3)
- Reducing Risks, Protecting People (R2P2)
- Sensible HSW (Interventions Strategy)
- EPS –Targeting - paras 17-20
- Enforcement Management Model (EMM)

Information and Advice

Examples of where we currently achieve this in our policies:-

- HSWA section 11 function of HSC, re provision of information and advisory service
- HSC Strategy to 2010
- Sensible HSW (Interventions Strategy)
- HSE Corporate Communications Strategy and Commercial Strategy
- HSE statement on providing accessible advice and support
- EPS
- Common Commencement Dates

Inspections

Examples of where we achieve this in our policies:-

- HSC Strategy to 2010
- Sensible HSW (Interventions Strategy)
- EPS

Data Requirements

Examples of where we currently achieve this in our policies:-

- Corporate Data Management Policy
- Forms Gatekeeper procedure
- HSC/E Simplification Plan
- RIDDOR webpages and the ICC

Compliance and Enforcement actions

Examples of where we currently achieve this in our policies:-

- Sensible HSW (Interventions Strategy)
- EPS/EMM
- Programme directed inspection & Inspection Rating System

Accountability

Examples of where we currently achieve this in our policies:-

- Framework Management Statement
- HSC Strategy to 2010
- EPS
- HSE Policy Statement on Working with Victims
- HSC and HSE Revised Policy Statements on Openness