



**PENN PROGRAM ON  
REGULATION**

## **Reflections on Regulatory Excellence**

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## **The Importance of the Individual Employee to Regulatory Excellence**

What do we require of regulators as people? Several years ago I completed a major project on road safety. My sense then was that while road safety may seem pretty mundane, it still requires people to develop some highly sophisticated skills and human character traits that we often call virtuous or good. For example those charged with responsibility for monitoring and fixing pot-holes in roads are expected to be skilled regulators and to be virtuous if they are to fulfill their mission of improving safety for those using roads. If we require this of those charged with responsibility for fixing pot-holes, then surely much the same is required of regulators who oversee the safety of air traffic systems, the soundness of banking operations, and other major risks created by economic activity.

A very concrete example of the need for responsible, virtuous individuals arises in a slightly different context today. In private companies, managers recognize the important role that individual employees play in an organization. For example, Toyota gives extensive training to everyone who works on their assembly lines because they recognize the important role that front-line workers play in the quality of their products and the ultimate success of their business. Steven Spear, in his book *The High Velocity Edge*, offers a very good account of the sophisticated training and the high expectations created for a person who is responsible for installing the front seat in a car on the Toyota assembly line in Kentucky.

## **Irreconcilable Conflicts in a Regulator's Mission: The Importance of Context**

“Context” plays a key role in defining regulatory excellence. For example, it might be asked whether a regulator whose mission included competing goals could be described as an excellent or best in class regulator. What if a regulator's mission includes competing goals that are irreconcilable? For example, the U.S. Department of Interior was both responsible for promoting offshore drilling and for regulating it. Can a regulator be excellent if it faces such a core tension in its mission?

Answering this question requires first answering another question: When can the elements of a mission be described as “irreconcilable”?

One way of answering this latter question is to move away to trying to define mission conflict as merely a “regulatory” problem. There may not be any a priori way for a regulator, or others, to assess whether potentially conflicting parts of a regulator's mission are actually irreconcilable. Rather it may be that the “state of a system” – the context – that renders potentially conflicting goals in a mission actually irreconcilable.

For example, in the Deepwater Horizon blow-out, it seems that the whole system had moved into an area of operational space that was unsafe. (James Reason argues that organizations with a safety culture are able to map where they are in “safety space.”) Both industry, including head contractors and subcontractors, and regulators were part of a system that had “drifted into failure.” (See David Woods et al, *Behind Human Error*). This means that BP and its subcontractors had lulled themselves into the belief that that they could regularly sacrifice safety of their workers and of the environment for increases in productivity. The regulators in this instance seemed to have been part of the process that led to the emergence of a set of practices that significantly increased the risk of harm.

The point about this kind of drift into failure is that it is possible for the participants to fail to see that “normal” work practices are actually unsafe. There are many examples of systems being either in an unsafe and unethical state. These include the widespread use of asbestos in the earlier part of the last century, the sales of tobacco products for many years, and the failure of a number of major organizations in society to adequately respond to the sexual abuse of children.

If a system is in an unsafe state, it is nearly inevitable that a regulator will face irreconcilable conflict between competing goals. This is because in this unsafe state, a continued focus on productivity by regulators or industry participants will expose workers, consumers, and others to unacceptable risks of harm. By this I mean that consumers, workers, and others will be exposed to a risk of harm that no regulator or company could define as reasonable. In these circumstances, having a clearly defined mission for a regulator may simply be part of the problem. It may gloss over the fact that the regulator, by continuing to participate in a set of practices, has become part of a “drift into failure.”

In such a context, rather than seeing the challenge of an excellent regulator as being one of acting in the face of a mission with irreconcilable conflict, it may be better to describe the excellent regulator's challenge as being one of “mission-shifting.” This is what David Kessler faced in the 1990s when he confronted the question of whether the FDA should regulate tobacco products. Kessler had to shift the FDA’s mission by identifying the unsafe state of the system and taking steps to move stakeholders to transform their perception of smoking as being a “normal” state of affairs into one in which they came to see smokers and others as being exposed to an unreasonable risk of harm. As the FDA pursued its work on tobacco, the President of the United States -- and others -- came to see the marketing of cigarettes to young kids as one of exposing a vulnerable class of people to a clearly and manifestly unreasonable risk of harm.

A regulator who is shifting its mission may not have, and probably should not have, a clearly defined mission. Instead, it needs a “lodestar” or guiding light to identify the underlying problem even though it will not have a clear mission nor even a clearly defined plan to implement that mission. This may be the challenge for the FDA in future as it addresses the problems associated with nutrition and obesity (see, e.g., Ted Ruger’s excellent chapter in Cary Coglianese, ed., *Regulatory Breakdown*).

Another example of this problem comes out of the work of Richard Locke, *The Promise and Limits of Private Power*. In this book, Locke argues that the working conditions in factories

making goods for large brand names will only improve where there is some local regulatory initiative that makes it important to improve these conditions. Private power alone cannot improve conditions even where the private organizations may themselves have some commitment to improving conditions for workers. The literally unsafe working conditions for these workers will not improve until a governmental entity -- a regulator -- is able to shift its mission and lead people to see shift their perception of these unsafe working conditions. Once actors in local political systems come to see poor wages and unsafe conditions as unacceptable and as needing change, then it will be possible for the government regulator to leverage the private power of brand name firms to move the system to a state in which there are better working conditions for workers.

A much older example of this kind of mission-shifting can be found in the work of Louis Brandeis in reforming the life insurance industry in Massachusetts in the 1880s. And in my own lifetime, I think that the Australian Competition and Consumer Commission shifted its mission as it changed its approach to regulating life insurance in the 1980s.

But many regulators are not participants in industries that are in an unsafe state. For example, as far as we know the regulation of civil aviation seems to be an industry that is working within known and generally accepted parameters. In this context it may well be possible for a regulator to simultaneously pursue competing goals that may include efficiency, safety, and productivity. Regulators working in these circumstances are in a mission-sustaining state. They are keeping a system in a form of dynamic equilibrium, rather than trying to disrupt it entirely. They are adapting to change and they are working with complexity to maintain a system in this state of dynamic equilibrium. Donella Meadows describes this as “dancing with systems.”

In this mission-sustaining state, it is quite right to say that the mission should be clearly defined and that there should be an effective plan to implement carry out the mission. This plan would include indicia of excellence that others have discussed. Yet it is important to note that even a state of dynamic equilibrium is not a stable state. It requires continuing change and adaptation by regulators and other stakeholders to keep a system in a state of dynamic equilibrium.

In summary, then, context may matter in how we define regulatory excellence. It will not be dependent just on what regulators do or don't do. Rather it will be dependent on the state of the system in which the regulator is a part. Where that system finds itself in an unsafe state, a regulator faces an irreconcilable conflict between competing goals. In these circumstances, “excellence” may involve courageous steps to shift the mission. By contrast, where the system is in a state of dynamic equilibrium in which stakeholders are exposed to known and generally acceptable risks, a regulator may be able to pursue competing goals simultaneously. In these circumstances, excellence will include the list of attributes that many have raised.

If we see the work of some regulators as involving mission shift, we may think somewhat differently about what constitutes best in class. We may see that some uncertainty in the mission and some conflict in the implementation of the mission is appropriate – even desirable – as the regulator seeks to move the industry it oversees to a new dynamic equilibrium. The important part of moving to a new dynamic equilibrium is that everyone in the system, that is, all

stakeholders, will have to modify their relationships as the system moves to a new equilibrium. This will always be a choppy and uncomfortable process. And the regulator may well not be viewed in the most favorable terms along the way.