



OOCUR 10th Annual Conference - Bahamas

Theme: *“Utility Regulation in the Caribbean:
A Case for the Harmonization of Approaches to Regulation”*

Regulatory Compliance



*Effective Regulatory Strategies for
Monitoring Performance and Enforcing
Compliance.*

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- Introduction
- Determinants of Regulatory Compliance (RC)
- RC Framework - Key Components
- Review of RIC's Framework
- Recommendations



Introduction

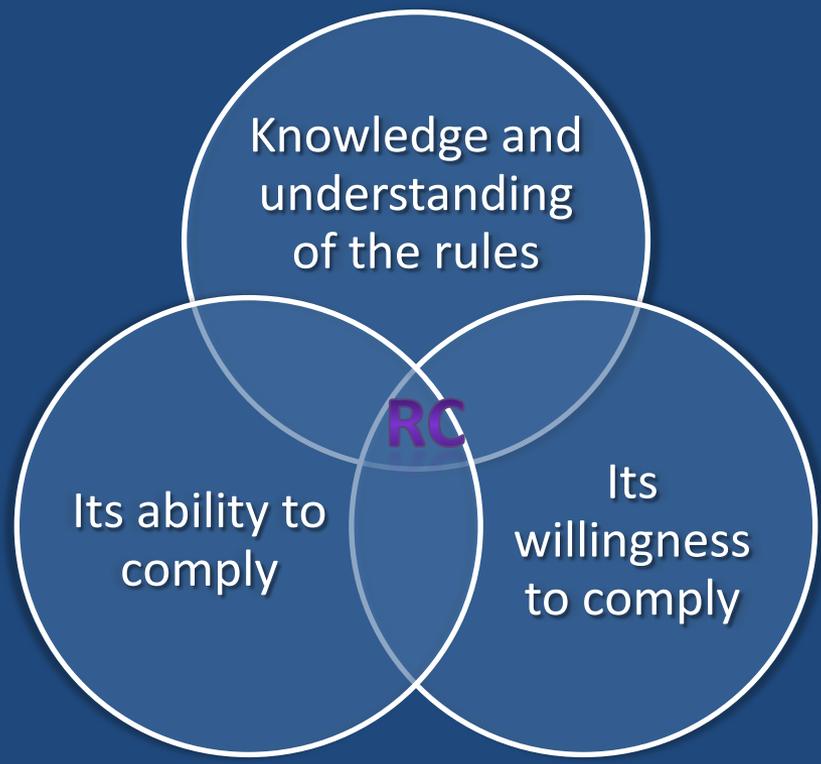
Regulatory Compliance - The Biggest Challenge!

- “Regulation that fails to elicit an adequate level of compliance not only fails to **meet** its underlying **policy objective** but also creates unnecessary cost, erodes general confidence in the use of regulation...” (OECD 2001).
- Sector-specific regulator pressures, new legislation and general trend toward regulatory tightening were ranked the top three drivers of regulation and compliance risk (Ernst & Young 2012).



Determinants of Regulatory Compliance

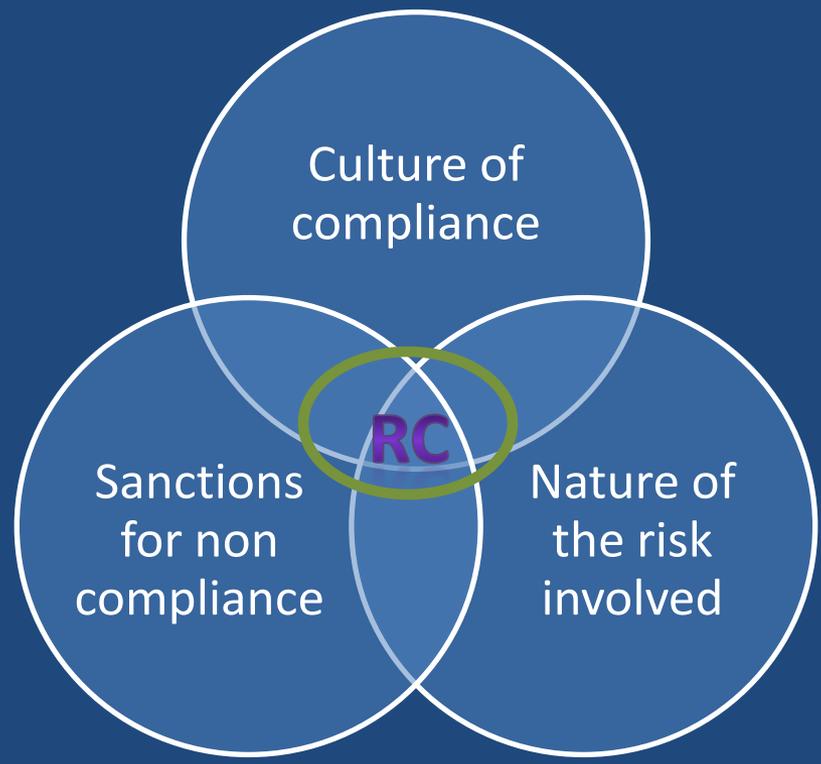
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Determinants of Regulatory Compliance

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Regulatory Compliance Framework

Sets out the regulator's approach to achieving its regulatory objectives and lays the foundation upon which its compliance expectations are built.

In the UK, regulators' compliance policy are guided by a Statutory Code of Practice (COP) for Regulators. Developed by – Department for Business Enterprise and Regulatory Reform (BERR).

Excellent opportunity for OOCUR to play a leading role in Harmonize the Caribbean's approach to regulatory compliance by either developing our own COP for the region or developing a compliance framework for regulating State Owned Enterprises in the Caribbean.



Compliance Framework - Key Components

- Risk Identification and Assessment
- Compliance Verification
- Enforcement ←
- Compliance Promotion

Key Features of a Risk Based Approach (RBA) to RC:

- RI& RA are central to the process;
- Resources are targeted;
- Places responsibility for RC on SP;
- Report on breaches only; and
- Sanctions are proportional to breaches.





Risk Identification

- Register of Compliance
- SP's Compliance obligations (CO) are identified from all:
 - legislation (where the regulator has enforcement authority)
 - determinations/orders
 - licence conditions
 - quality of service standards
 - codes of practice
 - guidelines etc.
- Categorizing in specific groupings and further subdivided depending on the regulatory interest.



Risk Assessment

Risks/CO are assessed using a well defined methodology to assign a description, which reflects the severity of a compliance breach.

Description			Definition
High	1		breach that is likely to cause major damage, disruption or breach of licence condition
Medium	2		breach that is likely to cause major damage but may threaten the efficiency and effectiveness of service
Low	3		breach that is unlikely to occur and consequences are relatively minor.

Two key stages to the assessment of risk :

- an assessment of the potential impact in the event that an identified risk to an outcome materializes; and
- an assessment of the probability that the risk will materialize. (Ofwat 2012)

Risk Based Approach:

- Based on the risk profile of each CO - Different regulatory treatments



Compliance Verification (CV)

- CV refers to the process by which the regulator collects data and information and assesses it, to determine the extent to which the service provider is meeting its regulatory obligations.
- The tools used by regulators may include a combination of :
 - Reporting mechanisms;
 - Inspections; and
 - Audit activities.





CV - Reporting Mechanisms

Regulators usually have detailed procedures and guidelines, which specify the manner and form in which the service providers are required to submit information.

According to BERR's Code of Practice:

SPs should not have to give unnecessary information or give the same piece of information twice as there is a need for a balance between the need for information and the burden it places on service providers;

Regulators should involve the service provider in vetting data requirements and design of data capture instruments for clarity and simplification; and

Regulators should seek to collect data in a way that is compatible with the process of the service provider and those of other regulators who collect similar information.



CV - Reporting Mechanisms

SPs must have adequate processes and systems of control to assure data quality. Eg. *AS 3806:2006* or *ISO 31000:2009* Compliance Standards.

Some SP may not subscribe to the concept of principle centred compliance.

Regulators should only partly rely on self certification of information supplied.

Risk Based Approach:

Frequency of reporting non-compliance based on risk profile:

- High- Immediate
- Med. – 6 months
- Low - Annually

In instances of non-compliance, the SP's must provide a Breach Notification, which should contain at a minimum:

- a brief statement explaining the circumstance and reasons why the breach occurred;
- a brief statement explaining any delay in reporting the breach;
- relevant regulatory provision(s); and
- remedial measures with timeframes.



CV - Inspections Mechanisms

NERC's Implementation Plan for 2010

Spot-Check and Compliance Inquiry (CIQ) as part of its Compliance Violation Investigations (CVI). The CIQ is a validation process which allows NERC to gather information and data quickly for analysis.

BERR's Regulatory COP

Most effective when they are justified and targeted on the basis of an assessment of risk especially where there is a high probability of non-compliance by the service provider ; and

Regulators should use only a small element of random inspection in their programme to test their risk methodologies or effectiveness of their regulatory intervention.



CV- Audit Mechanisms

7 - Key Issues

Scope

- Determined by the regulator. However, the regulator may seek the assistance of the SP on very technical matters;

Frequency

- Normally annually. However, one off or more regular targeted audit may be preferred if there are any concerns;

Cost

- Usually met by the service provider;

Independent Process

- the auditor must not have any direct or indirect interest in the SP;



CV- Audit Mechanisms

7 - Key Issues - Continued

Choice of auditor

- Regulator/Service Provider appoints the auditor. The regulator may select the auditor if it is not satisfied with the choice of the auditor by the SP;

Audit report

- How compliance was demonstrated with each obligation. In instances of poor compliance/breaches/potential breaches recommendations for improvement. SP should be given a fixed time to respond to the regulator about inaccurate reporting and implementation of recommendations.; and

Transparency

- Publication of key findings and recommendations of the audit report.



Enforcement

The range of options that are available would be dependent upon the limited powers contained in the regulator's primary legislation, its subsidiary legislation and the terms and conditions outlined in the licence.

Action range from less formal and less punitive under administrative action to more and increasingly substantive, which are primarily punitive in its statutory based responses.

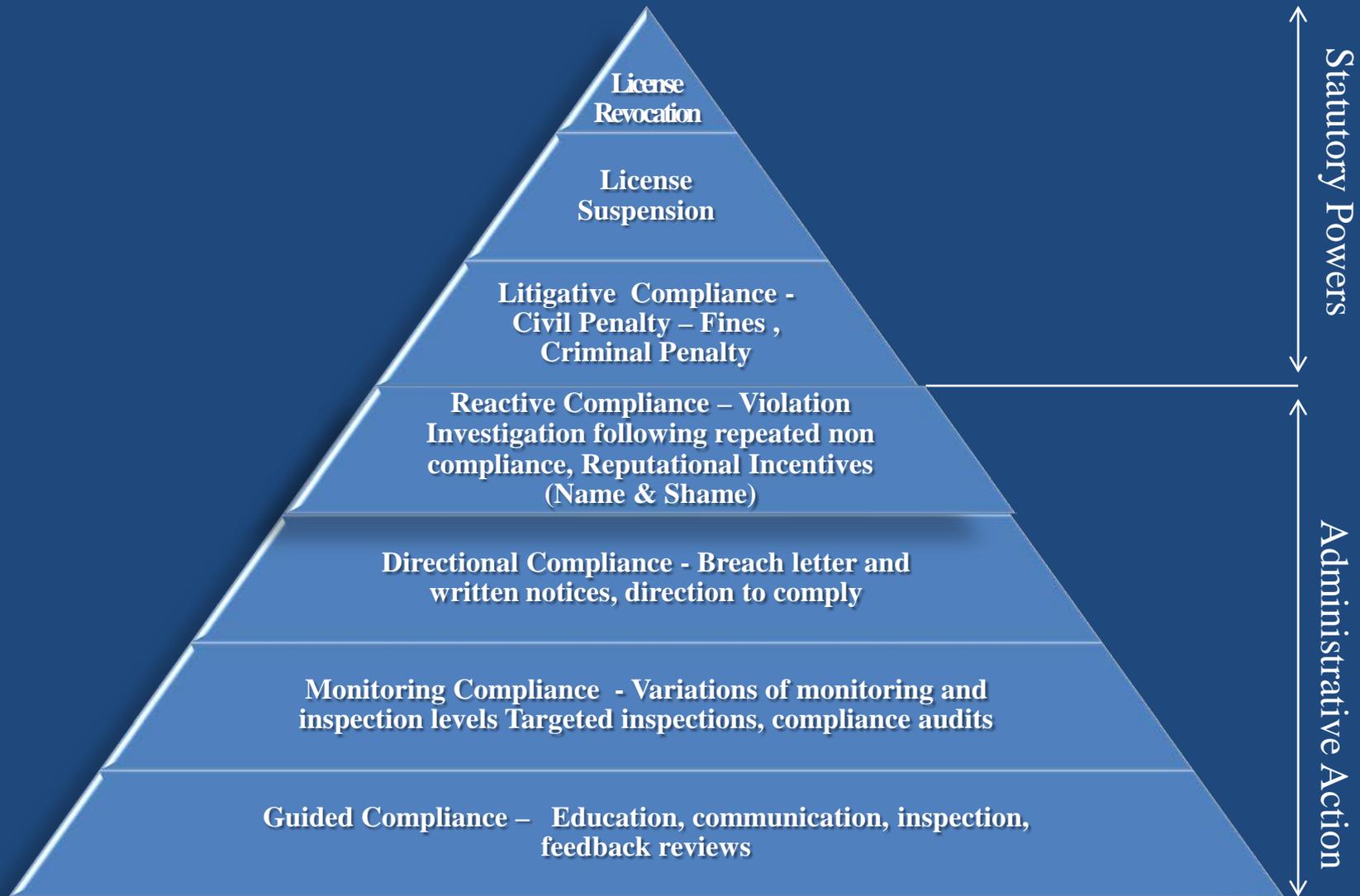


BERR's Code of Practice

Sanctions and Penalties should:

- Aim to change behaviour of offender;
- Aim to eliminate any financial gain or benefit from non-compliance;
- Be proportionate to the nature of the offence;
- Aim to restore harm caused; and
- Aim to deter future non-compliance.

Typical Hierarchy of Compliance and Enforcement Strategies



Adapted from I. Ayres and J. Braithwaite, *Responsive Regulation*, Oxford 1992



Enforcement

In the Australian jurisdiction restorative justice has been successfully utilised in the regulatory environment.

A SP who breaches the law, offers to the regulator an undertaking to take certain action, and if accepted through negotiations with the regulator, the undertaking is enforceable in court.

- Enforceable Undertakings - a promise to cease the unlawful conduct, measures to protect against recurrences of the misconduct, and remedial action to address any harm caused.

The regulator must have discretion to undertake appropriate action in response to any breach. However, it may consider the following:

- The service provider's compliance history;
- The intent and knowledge of the breach by the SP; and
- The impact of the non-compliance.



Rewards Programme

The Department of Water Affairs, Republic of South Africa (DWA) launched, in late 2008, a certification program to reward water services authorities with Blue and/or Green Drop Status if they comply with drinking water and wastewater legislation and other best practices required by DWA.

BERR's Code of Practice

Regulators should seek to reward those SPs that have consistently achieved good levels of compliance, through positive incentives. Eg. Lighter inspections and reporting requirements based on risk assessment.

The Green Drop status is given to municipalities that comply with good wastewater discharge standards for 90 percent of the time



Compliance Promotion

- It is the process that increases awareness, educates, motivates or change behaviour and encourages voluntary compliance with the various regulatory objectives;
- Involves providing compliance assistance, technical advice, and developing guidelines etc.



BERR's Code of Practice - Regulators should provide authoritative, accessible advice easily and cheaply and should involve the regulated entities in developing both the content and style of regulatory guidance.



Review of the RIC's RC Framework

Caveat

The best practises came from jurisdictions that have a very mature regulatory framework and which appear to be in either Stage 3 or 4 on slide 6;

Best practices is continually evolving it may be awkward and even inappropriate in some instances to assess the RIC's performance in relation to these best practices;

At times best practice in one jurisdiction may not be applicable in another;

Nevertheless, it is vitally important for any regulator to continuously scan the environment to see where they are in relation to their peers; and

All RIC's reference relates to the Electricity sector because regulatory policies are in place.



Review of the RIC's RC Framework

Area	Performance	Comments
First Compliance policy framework (Old)	Good start	Enforcement was not addressed in detail as the RIC felt that this issue was adequately covered in the RIC Act.
New Compliance policy framework (RRCM)	Excellent Improvement	All areas covered.
Risk Identification (Old)	Good	all the regulatory obligations identified, but not collated in one document.
Risk Identification (RRCM)	Excellent	all the regulatory obligations identified, and collated in one document.
Risk assessment (Old)	Different Process	process seems to be based on its knowledge of the sector rather than following an explicit clear methodology.
Risk assessment (RRCM)	Different Process	RIC is not in favour of a risk based approach because it allows the service providers to report on breaches only. It feels that this approach would not allow for the effective monitoring of the array of obligations that must be met by T&TEC.



Review of the RIC's RC Framework

Area	Performance	Comments
Compliance Verification (Old)	Good start	<p>The PMR framework was a good start but from inception, there have been problems because of data capture, quality and consistency;</p> <p>The RIC should have sufficiently and systematically utilized compliance investigations in areas where it had enforceable powers; and</p> <p>The RIC could have utilized the independent reporter.</p>
New Compliance Verification (RRCM)	Excellent Improvement	<p>The RRCM addresses deficiencies;</p> <p>Some noteworthy proposals with respect the audit process; and</p> <p>The auditor will be required to assess compliance with respect to regulatory accounts and PMR using standard confidence and compliance grades. The grading system would be utilized to assess the reliability of each category of relevant data.</p>



Review of the RIC's RC Framework

Compliance Verification – Audit Process

- The auditor is appointed by T&TEC but approved by the RIC;
- If not approved, T&TEC has to re-submit an appropriate nominee;
- Once approval conveyed, T&TEC issues the audit engagement letter;
- The RIC's approval of an auditor ends either on expiration of the letter of engagement or on termination of the engagement;
- The RIC may also brief the auditors to ensure that the RIC's audit scope and requirements are clearly understood;
- The primary duty of care of the approved auditor is to the RIC and T&TEC must not:
 - require or seek changes to be made to an auditor's report;
 - unreasonably withhold payment or terminate any contract with the auditor over a disputed finding.



Review of the RIC's RC Framework

Area	Performance	Comments
Enforcement (Old)	Fair	<p>Limited range of enforcement options available to the RIC.</p> <p>Some constraints in RIC's legislative framework and other enabling instruments;</p> <p>Pursuing matters through the Courts may appear to be protracted and might not yield the best regulatory outcome;</p> <p>RIC pursued a light hand approach.</p>
Enforcement (RRCM)	Excellent Improvement	<p>The RRCM provides more enforcement options;</p> <p>The RIC has hinted to some measure or regulatory innovation especially when dealing with government owned monopolies.</p>



Review of the RIC's RC Framework

Enforcement - RRCM

- Tools available consistent with Best Practice;
- Additional Administrative Tool - Proactive Compliance
Up-front deduction of revenue requirement until regulatory obligation achieved;
- Process is not unidirectional and the RIC may choose to forego certain steps in respect of certain breaches but escalating any action as necessary; and
- Application of sanctions should be consistent with the principles of natural justice and administrative law.





Review of the RIC's RC Framework

Area	Performance	Comments
Compliance Promotion (Old)	Excellent	<p>Strong and rich history of consultation and stakeholders engagement on all regulatory policy matter;</p> <p>Service providers was involved in developing the content and format of the templates used for regulatory reporting;</p> <p>Assisted T&TEC in developing the content of its Capital Contribution Policy</p>
Compliance Promotion (RRCM)	Excellent	<p>Followed best practice</p> <p>“Regulatory compliance requires increasing attention to all elements of the chain of regulatory action – from problem identification, regulatory design to compliance monitoring. ... the RIC will encourage annual meeting with T&TEC’s top management to discuss any area of concern over compliance.”</p>



Recommendations

- Request the service provider to develop its own compliance policy on how it intends to discharge its regulatory obligation and achieve regulatory compliance;
- Provide incentives to the service providers to implement compliance standards similar to *AS 3806:2006* or *ISO 31000:2009*. This would provide the level of assurance needed in terms of data quality and consistency;
- Continue to pursue legislative changes to ensure that the RIC has the appropriate enforcement powers, which it can easily apply;
- Conduct compliance inquiry on a schedule basis on areas of concern;



Recommendations

- Consider the introduction of positive reinforcement (rewards system) to encourage and motivate the service providers to continually foster the ideals of principle-based compliance;
- Provide additional opportunities to the service providers and other stakeholders to discuss compliance issues on a frequent basis to further develop the compliance promotion process;
- Establish formal collaborative mechanism with other regulators on areas of concern in which they have enforcement powers; and
- Establish the concept of restorative justice through negotiated settlements, which can be enforced in the Courts of Trinidad and Tobago.



END OF PRESENTATION THANK YOU