

Functions and powers of the regulator

FSLRC Research Team

Financial Sector Legislative Reforms Commission

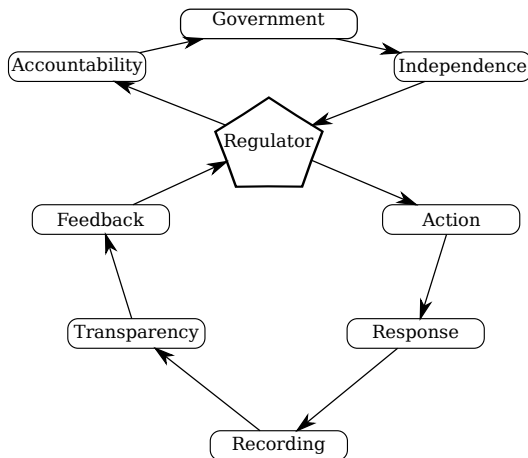
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Objectives of Legal Process

Organisation

- Regulators are Mini-governments
- 3 functions of regulators
 - 1 Legislative - Making subsidiary legislation
 - 2 Executive - Investigations and Enforcement
 - 3 Judicial - Judicial Review (legislative & Executive)
- Legal Process should govern all functions of Regulator

Completing the Cycle of Regulation



At each step of a regulatory structure legal process should govern the relationship

Areas of Legal Process

- **Create better processes for**
 - Rule making
 - Investigations and orders
 - Improve quality of adjudication

Legislative functions

Rule making

- Distinct from legislative rule making - legislature is representative in nature
- Agencies/depts. not popularly elected - thus the need for specialised legal process
- Need to elicit wide ranging views, facts, information before embarking on rule making process
- Important for effectiveness of intended rule(s) and legitimacy thereof
- Future reviews of rules may be easier as a consequence

Classification of subsidiary legislation

- What is a regulation: Mandated by legislation
- What is a circular?
- What is a notification
- What is order

Legislative Process

- Oversight by board only (no delegation)
- Principles for sub-ordinate legislation:
 - ① Only regulations
- effective public participation:
 - ① Approach paper
 - ② Jurisdiction clause,
 - ③ market failure addressed (objective)
 - ④ Cost Benefit Analysis
- Emergency rule making (deferred compliance)
- Parliamentary Review (separate committee)
- Judicial review of subordinate legislation (higher grounds)

Rule Making Process

- All demands for subsidiary legislation should be public
- All requests from government to be placed on board meetings
- All decisions should be publicly made and recorded
- All subordinate legislation has to be discussed at the board level and signed off by resolution

Publication process

- 1st Round publication
 - The jurisdiction to regulate
 - Problem identification and objective of regulation
 - Reason for choice of intervention
 - Draft Regulation
- 2nd Round publication
 - Comments from interested parties
 - Reasoned response to comments received
 - Final Regulation
 - Applicability date (adjustment period)

Consolidation

Suggestions

- Requirement of a modern website
- All regulations have to be on the website

Judicial Review

- Grounds are higher than parliamentary legislation
 - Constitutional
 - Governing law
 - Procedural compliance
 - Substantive value
- Judicial review should consider all publication by regulator
- Procedural compliance review should be strict
- All supporting documentation should be open to challenge

Tribunal Review

- Currently there no review
- Grant power to check compliance with
 - Procedural Compliance
 - Substantive value
 - 1 Statements in cost-benefit analysis, regulatory burden, proportionality
 - 2 Submission of evidence by challenging party

Operation of any regulation cannot be temporarily suspended by tribunal

Executive Functions

General Executive Powers

- ① Entry Restriction enforcement:
 - ① Checking the application documents
 - ② Approving the business for entry
- ② Inspections and investigations:
 - ① Regular inspections
 - ② Exceptional inspections/ investigations
- ③ Prosecution before judicial officer
 - ① Presenting evidence of misconduct
 - ② Suggesting Penalties
- ④ Compounding of offences
 - ① Involvement of independent an judicial officers
 - ② Record of compounding

Entry

- 1 All conditions to be in regulations
- 2 All rejection of applications to be reasoned
- 3 All rejections can be appealed
- 4 All decisions to be time bound
- 5 No documents other than those required in regulation

Solutions suggested

- 1 Duty of regulator to inspect based on risk and oversight
- 2 Document request limitations where already provided
- 3 Recording of reason for special investigation
 - *No dilution of no-complaint investigation*
- 4 Requirement to keep investigation private or declare *no-findings yet*
- 5 Limited temporary injunctions from judicial officers: lapses automatically

Prosecution

- 1 Provide documents relied on
- 2 Provide all documents including exculpatory evidence
- 3 Penalty suggested must be based on regulations guiding imposition of penalty

Compounding offences

- ① Penalty calculation record
- ② Recording of
 - ① Penalty amount decision
 - ② Calculation of compounding value
 - ③ Violations compounded
- ③ Involvement of FSAT or judicial officers
- ④ Clear model in law

Judicial Review

- Judicial Review of all executive actions (which adversely affect entities)
 - High procedural review
 - Low substantive review
- Standard of executive action is that it can be tested in judicial review and justified similar to bail and investigation

Judicial Functions

Adjudication and administrative process

- Distinct from - rule making; rules have general and non-case specific applicability
- Internal adjudication/decision making mechanisms and external review of the same
- Includes policy execution and quasi-judicial functions
- Transparency and fairness of orders, recognition of principles of natural justice and laws of the land, judicial review of administrative actions
- All actions/orders should be reasoned and 'speaking'
- Orders to be 'heard' by an internal body before issuance - quality control
- Internal separation of powers in each agency/dept. should be a must
- Access to advance rulings/informal guidance to be universal

Judicial Functions

- Separation of judicial officers
- Independence of judicial officers
- Procedure of judicial functions:
 - 1 1st level by judicial officers
 - 2 Review by judicial member of board
 - 3 Detailed procedure (public)

Application of Penalties

- Creation of three types of penalties
 - 1 Violation but no damage
 - 2 Violation and damage
 - 3 Punitive
- Range of penalty
- Linking penalty to offence

FSAT

Judicial Review and Appellate Tribunals

- Single Appellate Tribunal
- Design of FSAT:
 - ① FSAT to issue detailed regulations on procedure and publish the same
 - ② Standardise systems of, application of complaints and responses, implementation of temporary orders, introduction of evidence, hearing of arguments, determination of case and determination of penalty
- Accountability: publication of judicial statistics and individual cases by judicial members and officers, along with publication of filings by parties

Judicial Procedure

- Eligibility
- Grounds
- Manner of filing
- Evidence
- Hearing (Optional at AO, compulsory at FSAT)
- Written reasoned order
- Precedents

Modern Court

- 1 Electronic
- 2 Video recording
- 3 Public availability
- 4 No transportation required
- 5 Dedicated registry
- 6 Accountability through reporting