Department for
Business, Energy
& Industrial Strategy

GOALS-BASED AND RULES-BASED APPROACHES TO REGULATION

BEIS Research Paper Number 8

May 2018

Author: Dr. Christopher Decker, University of Oxford

The final version of this paper was submitted by the authors in September 2015 and reflects research and policy as at that time.

The views and interpretations expressed are the authors' and do not necessarily reflect those of the Department for Business, Energy and Industrial Strategy.

Department for Business, Energy and Industrial Strategy
1 Victoria Street
London
SW1H 0ET
www.gov.uk/beis

BEIS Research Paper Number 8

Contents

Executive summary

This paper examines the characteristics, and assesses the merits, of two general approaches for the achievement of regulatory objectives – a rules-based regulatory (RBR) approach and a goals-based regulatory (GBR) approach. A fundamental consideration in choosing between regulatory approaches is the expected degree of congruence between the chosen approach and action consistent with the regulatory objective. The choice of regulatory approach has implications for the allocation of risk, the incentives and behaviour of regulatees, and, ultimately, on the achievement of regulatory objectives. It also has implications for the regulatory enforcement approach and style, including the capacity and expertise of the regulator.

A RBR approach generally involves rules that are precisely drafted, highly particularistic, and prescriptive; gives regulatees advance notice as to what actions they can and cannot engage in; and provides no or limited exceptions, and limited flexibility in any specific factual context. In contrast, a GBR approach typically involves the setting of goals, outcomes, principles or standards, usually cast at a high level; a lack of prescription about how regulatees achieve these requirements; and requires regulatees to exercise judgement to predict what actions will achieve the regulatory objective.

Various advantages and disadvantages are associated with the GBR and RBR approaches. Generally speaking, the pure GBR approach is seen to: be flexible; encourage experimentation and alternative approaches to compliance; encourage regulatees to take more responsibility and think through consequences of actions; be more adaptive to changes in the environment and market; and to allow the regulator to tailor its approach to enforcement. On the other hand, the pure RBR approach is seen as: more precise, and therefore potentially more certain for regulatees; more effective in constraining regulatory discretion; and better at ensuring that the regulator is ultimately accountable for the outcomes of the regulatory system.

A large number of contextual factors can impact on the appropriateness, and potential effectiveness, of each approach. These include: the timing and costs of intervention; the simplicity or complexity of the setting; the nature of risks being regulated, and potential for harm; the information available to the regulator at different points in time; the degree of innovation in a sector; the characteristics, capabilities and attitude of the regulated community; the ability to develop shared understandings of goals under the GBR approach; the regulator's ability to adapt to an alternative regulatory approach; the ability to formulate and develop a precise set of prescriptive rules in an area; the ability to identify, and accurately assess goals, outcomes and performance standards; and the relative risk aversion of the regulated community, particularly in relation to how this impacts on the incentives to comply under a GBR-approach.

There is limited empirical work that has sought to systematically examine the application of the two approaches. A brief survey of the application of the GBR and RBR approaches suggests the following insights:

- In practice, it is rarely the case that a 'pure' version of either GBR or RBR is implemented, and various 'hybrid' approaches are observed which combine elements of each approach to regulation (for example, goals can be accompanied by non-binding guidelines and 'safe-harbours', and prescriptive rules can be subject to qualifications and exceptions). It is, however, possible to characterise applications as 'more GBR-like' or 'more RBR-like' in nature.

- The GBR approach is seen as most suited to sectors which are fast moving and innovative (such as financial services), where significant market change is occurring (legal services) or where it would be too difficult to apply the RBR approach given the many and diverse risks that need to be regulated (health and safety). In some applications, regulatees appear to have embraced the responsibility given to them under the GBR approach. Regulators surveyed who have applied the GBR approach have observed some innovation in compliance practices, and in some cases, this innovation has allowed the notion of 'best practice' to keep abreast of technological developments.

- However, in some applications of the GBR approach, concerns have arisen about over- or under-compliance by smaller firms, which are often accompanied by the development of a 'compliance industry' of third-party consultants. In addition, concerns have been raised in some applications, about a lack of accountability under the GBR approach. Finally, a shift towards a GBR-type approach has sometimes been misinterpreted by some parts of the regulated community as signaling a more lax enforcement approach.

- Some applications of the RBR approach have involved an over-abundance of rules, which have imposed high compliance costs, created confusion and inconsistency in enforcement, and limited the scope for innovation. In some implementations, such as accounting, the application of a RBR approach has also been associated with creative or aggressive compliance practices. Further, the application of a RBR approach has been seen as inappropriate in some areas (such as the regulation of nursing homes) where there are inherent difficulties in capturing some of the regulatory objectives, which have subjective elements (like fostering 'a homelike environment'), in a set of prescriptive rules.

- However, a predominantly RBR-approach is used by some regulators in circumstances such as where: EC directives are prescriptive; a step-change in behaviour is required in areas of bad practice; there are manifest hazards, high risks or a high level of societal concern about a particular issue; uncertainty needs to be reduced to a minimum; or where a simple rule is considered to be the most efficient way of achieving a particular outcome.

1. Introduction

This paper examines the characteristics, and assesses the merits, of two general approaches for the achievement of regulatory objectives – what are termed in this paper as a rules-based regulatory (RBR) approach and a goals-based regulatory (GBR) approach. Its purpose is to contribute to the collective understanding of the characteristics of the two regulatory approaches, and the circumstances in which each approach may be more or less appropriate. Among the specific aims of the paper are to:

- Define relevant concepts and identify the main conceptual differences between the two approaches.
- Describe the benefits and limitations of each approach, and set out various contextual factors that can impact on the application of each approach.
- Consider in a general way how each approach has been applied in practice across a range of regulated areas and activities, drawing out insights which may be generalised to other contexts.
- Propose factors which may be relevant in determining the appropriate balance between a GBR and RBR approach.

Choosing an appropriate regulatory approach to deploy in a specific factual context is critically important for a number of reasons. First, the choice of regulatory approach has implications for the allocation of risk: GBR approaches typically require that regulated parties (who I have termed 'regulatees' for the purposes of this paper)[1] take responsibility for ensuring that they act in a way consistent with regulatory objectives, while RBR approaches typically place greater responsibility on the regulator, and policy makers, to develop and enforce appropriate rules. Secondly, the choice of approach can impact on the incentives, and therefore behaviour, of regulatees, and ultimately on the achievement of regulatory objectives. Thirdly, the choice of regulatory approach has implications for the regulator in terms of the enforcement approach and style it adopts, and the type of expertise and knowledge that is required of it.

The analysis in this paper draws principally on academic and policy-related research that has focused on alternative regulatory strategies, both in abstract terms and in specific applications. This body of research is varied, and the relative merits of each approach have been examined in economic terms, normative terms, behavioural terms, or on the basis of various values such as democracy and accountability. The case studies presented in Part A of section 7 have also been informed by discussions with relevant regulatory agencies.

The paper is organised into six sections, and includes a summary of key points at the end of each section:

- Section 2 places this research in context by considering why the choice of regulatory approach is of importance. It also sets out some of the factors that appear to have led to an increased policy and academic interest in alternatives to the prescriptive RBR approach, and in the GBR approach in particular.

[1] The term 'regulatee' has been defined broadly in other contexts to refer to members of a regulated community, and can encompass natural persons or legal entities, including firms and other bodies subject to legally defined regulatory requirements.

- Section 3 defines, and distinguishes, the various concepts that are often discussed as alternatives to the traditional prescriptive RBR approach. This includes consideration of approaches labeled: performance-based regulation, outcomes-focused regulation, standards-based regulation, principles-based regulation and goals-based regulation. It also discusses the approach known as management-based regulation.

- Section 4 considers some of the perceived advantages and disadvantages of the GBR and RBR approaches.

- Section 5 considers various contextual factors that can impact on the suitability and effectiveness of the GBR and RBR approaches.

- Section 6 considers some of the general attributes of 'hybrid' approaches that have been adopted in practice which combine elements of the GBR and RBR approaches. It examines factors behind the emergence of these hybrids, as well as their potential benefits and risks.

- Section 7 presents brief insights from the experience of the application of the two approaches. Part A of this section comprises case-studies of the application of the GBR approach in three regulated areas in the UK: health and safety; the regulation of solicitors; and food safety regulation. Part B of this section draws out insights from the literature which has examined the application of the GBR and RBR approaches in a range of different areas of regulation around the world.

2. The shift towards alternative regulatory approaches

This section briefly considers some of the factors that appear to lie behind the policy interest in exploring alternative regulatory approaches, particularly the interest in a shift away from the prescriptive RBR approach towards a more flexible GBR approach. It also examines why the choice of regulatory approach can be of considerable importance, highlighting some examples where a chosen approach has been associated with significant consequential effects.

Policy interest in alternative regulatory approaches

Policy and academic interest in the relative merits of alternative regulatory approaches, particularly approaches which are less prescriptive and provide regulatees with more flexibility is not new. However, these discussions appear to have taken on an increasing prominence over the past two decades as a result of a wider policy focus in many parts of the world on 'better regulation' and reducing the regulatory burden on business.

Policy interest in alternatives to traditional prescriptive regulatory approaches is evident both at the multinational level and in individual countries.[2] The OECD, for example, has long adopted the position that regulatory policy should include a preference for GBR wherever possible.[3] In the United States, both the Bush and Clinton administrations endorsed the GBR approach, particularly in the area of environmental regulation.[4] In Australia and New Zealand, interest in GBR approaches dates back to at least the late 1990s and early 2000s.[5] Section 7 of this paper presents some examples of where a GBR approach has been adopted in practice, but a more general interest in alternative regulatory approaches can be seen across a broad range of areas including: professional services; air and water quality; building and fire safety; consumer product safety; energy efficiency; food safety; forest practices; nuclear power plan safety; pipeline safety; railroad safety and worker safety.[6]

In the UK, there has also been longstanding policy interest in alternatives to traditional regulation across a range of areas and activities. The regulatory approach adopted for the utility industries during the 1980s and 1990s has a number of the attributes of a GBR approach (particularly where it provides firms with greater flexibility in key dimensions of choice), while the approaches adopted for the regulation of health and safety and financial services have

---

[2] Deighton-Smith (2008) notes that the substantial shift in some OECD countries towards GBR has been almost unanimously welcomed and indeed often vigorously promoted by regulatory reformers.
[3] OECD (2012:7).
[4] See May (2003:381 and 387) who cites a Clinton administration document that states that*: "environmental regulations must be performance based, providing maximum flexibility in the means of achieving our environmental performance goals while requiring accountability in results."*
[5] Council of Australian Governments (2004) *note "Regulation should have clearly identifiable outcomes and unless prescriptive requirements are unavoidable in order to ensure public safety in high-risk situations, performance-based requirements that specify outcomes rather than inputs or other prescriptive requirements should be used. This principle should also apply to any standards that might be referred to in regulation."* See also New Zealand Government (1999) *"Principle and performance based standards are more appropriate where the outcome can be measured (to ensure compliance) and where innovation is likely to be an important consideration…Prescriptive standards are useful when information costs are high and there is little scope for innovation"* (cited in Deighton-Smith (2008)).
[6] This includes MBR as well, see May (2007).

both incorporated important aspects of the GBR approach. A 2014 report of the National Audit Office discusses the potential merits of GBR and contexts where it might be applied.[7]

A number of factors appear to be driving this policy interest in alternative regulatory approaches:

- One factor, already noted, is recognition across a range of regulatory domains, that the choice of regulatory approach has important incentive effects on those subject to regulation, and, that in some circumstances, allowing regulatees greater flexibility can result in beneficial innovation and more efficient outcomes.

- A second factor may be the growth in policy and academic interest in alternative regulatory approaches, such as 'new governance', 'smart regulation' or 'meta-regulation'. These approaches reject the traditional and rigid 'command and control' approach, and emphasize a need for regulatory approaches to 'fit' the contextual circumstances. A key characteristic of a number of these new approaches is a shift in regulatory responsibility from governmental actors to non-governmental actors.

- A third factor is that the intuition behind GBR – that regulatees should focus on complying with regulatory objectives and goals rather than on simply ticking off rules – is simple, compelling and, as some commentators have noted, in many ways unarguable.[8]

- Finally, wider political factors have sometimes been seen to lie behind an interest in GBR. For example, some have argued that governments and policy makers have used GBR as a point of regulatory differentiation to attract business to their jurisdiction.[9] In this respect, the GBR approach has been seen to signal that a regulatory system is mature, and works on the basis of principles, rather than applying a bureaucratic, one-size-fits-all prescriptive approach. Others have argued that, in areas like financial services, policy makers have been attracted to GBR because it involves devolving responsibility, and therefore potential culpability, for regulatory failures onto regulated parties.[10]

Notwithstanding this general policy interest, there remain questions about how widely, and in what areas, a GBR approach might have scope for application. Some commentators argue that the approach has potential for relatively widespread application, including to public health problems that turn on consumer behaviour (such as smoking or drinking or salt reduction);[11] in areas where the government is regulating risks which, because of their heterogeneous nature, are not capable of being subject to a rigid RBR approach (such as domestic or homeland security); and in areas where complex statutory or regulatory goals do not lend themselves to a traditional RBR approach based on uniform rules.[12]

However others doubt GBR will ever completely supplant RBR approaches, and argue that that in some policy areas – such as in simple contexts with recurring characteristics – it would be inappropriate and costly for it to do so. In addition, some argue that RBR-type approaches

[7] See NAO (2014).
[8] See May (2003:384) and Sugarman (2009) who notes that it is abstractly very appealing to leave it to regulated parties to figure out the best way of achieving a regulatory objective.
[9] Cunningham (2007:1415) discusses this in the context of Ontario and British Columbia for securities regulation.
[10] See Akinbami (2013:30).
[11] See Sugarman (2009).
[12] See Bamberger (2006).

will always be a necessary backstop in situations where the conduct being regulated could result in widespread and catastrophic harm (e.g.: a nuclear power accident).[13]

The importance of the choice of regulatory approach

In practice, the choice of approach – GBR or RBR – in specific contexts can have significant consequential effects. Various assessments have associated the adoption of the RBR-type approach in a particular area with the poor performance, or even failure, of the relevant regulatory system. For example:

- A 1979 US Presidential Inquiry into the Three-mile Island nuclear accident concluded that the regulatory system had created 'rule-following automatons' and that the training program for staff gave insufficient emphasis to the 'principles of reactor safety'.[14]
- Some studies have attributed the high-profile failures of Enron and Worldcom to the creative compliance practices that accountants employed under the RBR approach embodied in accounting standards.
- Closer to home, the 2011 independent farming taskforce attributed many of the problems in farming to a box-ticking mentality and emphasized a need to focus more on outcomes rather than means.[15]
- The application of RBR approaches to nursing home regulation in the US has been found to have resulted in 'absurd behaviour',[16] while poor performance in some areas of social regulation in the US – such as occupational health and safety and environmental regulation – has also been attributed to the use of 'rigid, highly bureaucratized command and control regulation'.[17]

However, the adoption of a GBR-type approach in some areas has also been associated with regulatory problems. In particular (and as discussed more fully in section 7):

- The application of a GBR-type approach to building regulation in New Zealand is argued to have contributed to what has become known as the 'leaky buildings crisis'. The problems of poor weathertightness, which was seen to follow from the failure in regulatory arrangements, has been estimated to have affected some 42,000 homes, at a cost of $11.3 billion.[18]

Notwithstanding the potentially significant effects of the choice of regulatory approach, it is generally accepted that there is a paucity of empirical work that systematically evaluates the relative performance of the two approaches. Perhaps because of this, there is a concern among some commentators that the decision to apply one approach over another is often not subject to critical assessment and, in practice, has led to the indiscriminate adoption of approaches.[19] In addition, some have identified a tendency to shift between regulatory

[13] See May (2010:16) and Deighton-Smith (2008).
[14] See Kemeny (1979:49) and Braithwaite (2002:66).
[15] See Independent Farming Regulation Task Force (2011:4).
[16] Braithwaite (2002).
[17] See Sunstein (1991:627).
[18] See Mumford (2011:39).
[19] See Deighton-Smith (2008).

approaches as a knee-jerk reaction to specific events;[20] with the old regulatory approach being cast as the cause of all ills, and the new approach cast as the cure.

[20] See Ford (2010: 306) and House of Commons Regulatory Reform Committee (2009).

3. Defining and distinguishing regulatory approaches

This section seeks to anchor the analysis that follows. It does this, first, by drawing a conceptual link between the development of regulatory objectives and the approach adopted for the achievement of those objectives. It then defines the various concepts which feature in this paper – such as goals-based regulation, rules-based regulation and management-based regulation – by reference to what are considered to be the core attributes of each approach. As part of this exercise, it considers whether there are any substantive differences attached to the labels that are used to describe the alternatives to the prescriptive RBR approach.

The link between regulatory objectives and approaches

The foundation assumption that underlies the analysis in this paper is that there is a need for some form of regulation of a particular activity or area. That is, there is a well-identified 'problem' to which regulation needs to be directed, and alternatives to government regulation – such as self-regulation or other market solutions – have been assessed as being insufficient to address the problem identified. Assuming that a regulatory objective has been established, a critical design question arises: what is the best approach for achieving that objective?

Achieving congruence between objectives, approaches and action

The choice of regulatory approach is sometimes cast as a question of the 'form' that regulation should take once a regulatory objective is established. In choosing between regulatory forms perhaps the most important consideration is the expected degree of congruence between the chosen approach and action consistent with the regulatory objective.[21] To take a concrete example, if the regulatory objective is to minimise accidents on motorways, the choice becomes one of deciding whether a system of rules setting out precise speed limits (70 mph) is more likely to achieve that objective, or whether a more general standard (drive safely at all times) will result in action by drivers which better fulfills the regulatory objective.

RBR approaches rely on the assumption that if regulatees comply with the precise rules the regulatory objective will be fulfilled.[22] In contrast, goals-based approaches tend to rely on the regulatee's judgement as to what actions will best serve a regulatory objective.[23] The underlying assumption is that, if regulatees are given autonomy or agency, they will think more carefully about how the objective can best be achieved having regard to their specific circumstances.

This assumption that greater congruence between regulatory objectives and regulatee action can be achieved by allowing regulatees more autonomy has pedigree in other areas in regulatory practice. Most clearly there is a link here with some of the so-called mechanism design literature in relation to the regulation of public utilities of the late 1970s and early

[21] See Di Lorenzo (2012:47) who argues that regulatory regimes should be evaluated by assessing their success in achieving congruence with legislative purposes.
[22] As Sullivan (1992:58) observes a rule captures a background policy in a form that from then on operates independently.
[23] Sullivan (1992:58) notes that this general approach collapses decision-making back into the direct application of the background policy to a fact situation.

1980's.[24] An important conclusion of this literature was that the efficiency and performance of firms will be improved if, rather than being subject to fixed regulated rates or prices, firms are given broad revenue targets across a range of activities, and are incentivised to use the information available to them to set prices efficiently and therefore best meet the regulatory objective.[25] A more general insight from this work is that different regulatory approaches and strategies create different incentives for regulatees to act efficiently and to innovate. This reasoning has also been applied to 'social regulators' (such as those in the area of environment and health and safety) where it is argued that attention should be paid to the incentive effects of regulatory strategies, and focus given to ends (in terms of pollution reduced, or lives saved) rather than the means of achieving these ends. In part, this is because means (and technologies) are, it is argued, often best left to the market to determine and not bureaucrats.[26]

A conceptually similar approach is evident in the use of cap and trade schemes in environmental policy, where industry is given a goal or target for emissions reductions and then has autonomy to allocate permits among itself to ensure that the target is met.[27] Under these arrangements, if one industry or firm is over-emitting harmful substances this can be offset by another industry or firm which is under-emitting harmful substances within the ceiling established by the emissions target. Critically, because the high-emitting firm has to compensate the low-emitting firm this creates incentives for it to take measures to reduce emissions.

Defining concepts

While most commentators seem to have a common understanding of what they mean by 'rules' and a rules-based regulatory approach, this is often contrasted with an alternative regulatory approach which is variously labeled as: standards-based regulation; performance-based regulation; principles-based regulation; outcomes-focused regulation; or goals-based regulation.[28]

Some commentators consider the different labels – such as standards and principles – as largely synonymous, while others see substantive differences between the concepts and argue they should be distinguished. While this might appear to be something of an academic debate, it has relevance insofar as the terminology used in policy discussions, and by practitioners, also varies. For example, as discussed in section 7, the Solicitors Regulatory Authority in England and Wales distinguishes between 'principles', which underpin all regulatory requirements, and 'outcomes', which describe what regulatees are expected to achieve to be in compliance with the principles in specific contexts.

[24] See Decker (2014: chapter 5).
[25] In fact, this approach is called 'Performance Based Regulation' in the US.
[26] See Sunstein (1991:633).
[27] Sugarman (2009:92) says that performance based regulation and cap and trade have many functional similarities and that they may have just been accidentally framed around different labels.
[28] The lack of a standard terminology to describe the 'non-RBR' approach may be part of a more general problem associated with regulatory discourse - see Coglianese and Mendelson (2009:3). There also appear to be some differences between the meanings ascribed to these terms by the academic community and those of practitioners. For example, Black, Hopper and Band (2007) argue that the label principles based regulation as used by the UK Financial Services Authority actually referred to a number of different approaches.

The key question for the purposes of the analysis in this paper is whether there are notable substantive differences between what are described, variously, as a: principles based approach; standards based approach; performance based approach; outcomes based approach or a goals based approach.

The various labels attached to 'non-rules based regulatory' approaches

Some commentators use the terms 'principles-based approach' and 'standards-based approach' interchangeably, particularly when the principles appear to involve behavioural principles related to policy objectives.[29] Other commentators, however, distinguish between principles and standards, noting that the former are defined by (moral or ethical) values while the latter are defined by policy objectives and are used to measure performance and conduct.[30] However, even within the label of 'principles-based' regulation there appears to be some ambiguity as to the use of the term.[31] For example, it has been argued that the UK Financial Services Authority used the label 'principles based regulation' to refer to a number of distinct approaches, including what might be better characterized as forms of 'outcomes based-regulation' or 'management-based regulation'.[32]

The terms 'performance-based regulation' and 'outcomes-based regulation' are also frequently used interchangeably, and appear on the face of it, to be conceptually similar. Outcome-based regulation is generally considered to involve a focus on the achievement of specific regulatory outcomes, while performance based regulation has been described as an approach where regulatees are directed to achieve, or avoid, a specific outcome which is related to a regulatory goal, or where a regulator sets performance goals for the outcome of behaviour.[33]

Although the term 'goal-based regulation' does not feature as prominently in the academic literature, it is more commonly used in policy and practitioner documents (for example, by the health and safety authority, in food safety and by the National Audit Office). The goals-based regulatory approach has been defined as an approach whereby a regulator sets out an objective rather than specifying precise rules.[34]

Arguably, whether the differences between these various terms are substantive cannot be decided in the abstract, and the real differences depend on the understandings and practices of those who have to comply with, enforce, or interpret a regulatory provision.[35] Adopting this position, it is clear that the characteristic common to all of these terms is that they involve a shift away from an approach based on compliance with specific and prescriptive rules towards a strategy where regulatees have to behave in ways consistent with open-textured and less precise regulatory directives (which might be goals, outcomes, targets or performance standards).

---

[29] See, for example, Braithwaite (2002:47).
[30] See Park (2012:131) and Cunningham (2007). The legal philosopher Ronald Dworkin is often quoted in this regard who says that some standards are 'goals' to be reached which generally involve an improvement in some economic, political or social feature of the community. These can be contrasted with principles which are standards that might also involve issues of just or fairness or some other dimension of morality - see Dworkin (1967:23). Sunstein (1995:959) observes that this confusion may have its origins in the fact that the term 'principle' has two meanings in law: it can refer to the moral or political justifications which *lie behind* rules, or it can refer to relevant considerations which come into play in the resolution of specific cases.
[31] Black (2008) and Black (2010) sets out different forms of principles based regulation.
[32] See Black, Hopper and Band (2007).
[33] See Coglianese and Mendelson (2009) and Coglianese, Nash and Olmstead (2002:1).
[34] See National Audit Office (2014:16).
[35] See Sunstein (1995:959).

For the purpose of this paper I have therefore chosen the term ‘goals-based regulation’ (GBR) as the global comparator for the RBR approach.[36] On this basis, it is possible to identify and compare some of the core attributes of ‘pure’ versions of a GBR approach and a RBR approach.

The core attributes of a rules-based regulatory approach

The attributes of a RBR approach are widely recognised and generally non-contentious. Most commentators refer to such an approach as one that features one or more of the following attributes:

- Rules that are precisely drafted and highly particularistic in specifying regulated actions.
- Rules which are prescriptive and tell regulatees what actions they can and cannot engage in.
- Rules which give advance notice to the regulatee about how to comply, and provide no, or limited, exceptions and limited flexibility when applying the rule to a specific factual context.
- Rules which entail the advance (*ex ante*) determination of what conduct is permissible by a regulator. Accordingly, regulatees make largely mechanical decisions by applying the facts to a crisply formulated directive.[37]
- Enforcers of the rules make largely mechanical decisions and collect facts for the purposes of determining whether or not the regulated party has complied with the rules.

The example most frequently used to illustrate the attributes of the RBR approach is that of the setting of a precise speed limit for a road – such as 70 miles per hour on a motorway. In this example, the interpretation of a regulatory goal (safe motorways) has been determined *ex ante* by the regulator, and has been crafted into a precise and particular rule which gives advance notice to the driver as to what action is permissible. Accordingly, the driver simply need ensure that her actions do not contravene the rule (i.e.: she does not exceed 70 mph), while those who are required to enforce the rule (such as police officers) simply have to investigate whether the driver was or was not exceeding 70 mph. Such an investigation can be aided by various technologies – such as speed cameras or radar guns. The question of whether driving at that speed in any particular conditions, in fact, operated to achieve a safe motorway, does not fall to be considered.

[36] I have done so for a number of reasons. Firstly, there is some uncertainty about whether the term principles-based regulation is intended to capture only policy related principles or also includes wider ethical and moral values. Secondly, although the term ‘standards-based approach’ is commonly used in the academic literature as the opposite of a rules-based approach, it too can potentially be interpreted to encompass a wide range of standards such as behaviours, performance and ethical standards. Thirdly, the use of outcomes-based and performance-based regulation is conceptually similar to the definition used in this paper of a goals-based approach, and I therefore consider them to be synonymous with what I have categorized, and discuss, as a goals-based approach.

[37] See Schauer (2003) on this point.

The core attributes of a goals-based regulatory approach

While, as noted, there is some debate regarding the terminology used to label what I have called a GBR approach, in general terms there appears to be some agreement regarding certain attributes of this type of approach:

- A defining characteristic is the lack of prescription about how regulatees achieve specific regulatory goals (which can involve engaging in, or avoiding, specific actions).
- Goals can be established at varying degrees of specificity, however they are generally cast at a high level, setting out broad principles, outcomes or standards that regulatees' actions must seek to achieve or satisfy. Goals involve both private and social goods/objectives.
- Compliance involves a focus on the substantive achievement of a regulatory goal. This can require regulatees to be forward looking and to exercise judgement to predict what actions will be considered in accordance with the regulatory goal. It follows that the content of the regulation is determined at the moment of application (i.e.: *ex post*). That is, the substantive content of the regulation is only determined through the actions of the regulatee.
- In determining how best to comply with a regulatory goal, regulatees are encouraged to use the information available to them and exercise judgement in making compliance decisions.
- The enforcement task involves assessing whether or not the actions of the regulatee accord with the required goals, and, if not, imposing penalties. Practically, this can involve establishing what constitutes an acceptable or desired level of achievement of the regulatory goals (a performance standard or outcome), and then applying some method of assessment of actual or expected performance against that performance standard or outcome. Where performance/outcomes cannot be assessed directly (e.g.: where regulation is directed at mitigating future risks) this can require the use of expert judgement.

In terms of our driving example, a GBR approach might require drivers to not 'drive faster than is prudent in all the circumstances' (see discussion in section 7 below). Here the regulation sets out a broad standard (drive prudently) and drivers are entrusted to exercise judgment in interpreting what the term prudent means. It follows, whether or not a driver's actions are assessed as prudent will only be determined at the time of driving (*ex post*), and therefore drivers need to be constantly mindful of whether or not they are driving prudently given any particular circumstances. Similarly, enforcers (such as police officers) have to exercise judgment as to whether or not, in a given set of conditions, a driver has acted prudently.

Management-based regulation

A final concept relevant to this paper is what is often called management-based regulation (MBR). Both GBR and MBR are similar insofar as they involve a shift away from prescriptive RBR-type strategy, towards a more flexible approach where regulatees take more responsibility for ensuring that their actions are consistent with wider regulatory objectives. However, GBR and MBR differ in that while GBR focuses on the achievement of goals or outcomes, MBR focuses on *process*.[38] Specifically, MBR requires regulatees to engage in planning and internal rule making efforts in ways that move towards the achievement of regulatory goals.

In a comprehensive survey of this approach,[39] MBR is found to focus regulatory attention on the planning stage and to direct regulatees to engage in a planning process that, if fulfilled, should be congruent with the regulatory objective. This is seen to place the regulator in what might be described as a 'meta manager' role that guides regulated parties towards actions which are consistent with regulatory objectives. MBR is seen as an effective strategy in circumstances where it is not possible to determine or monitor performance and achievement of outcomes or goals, and where regulatees are heterogeneous. Forms of MBR have been employed in a range of areas from food safety, environmental regulation, occupational health and safety, mine safety and railway regulation.[40]

As with GBR, the application of MBR can vary from minimal requirements on regulatees to simply develop a plan, to more specific forms of oversight where firms are required to develop plans according to various specific criteria as set out by the regulator, or to submit plans to the regulator for approval. Enforcement, in relation to an MBR strategy involves the regulator assessing whether regulated parties have prepared adequate plans and systems and are complying with them, and does not involve the assessment of the outcomes of those plans or processes.

[38] For this reason, MBR is sometimes referred to as process-based regulation or system-based regulation.
[39] See Coglianese and Lazer (2003).
[40] See Coglianese and Lazer (2003:693) and Gunnigham and Sinclair (2009) who examine two case studies of the application of MBR.

Summary

This section has sought to define and distinguish some of the key concepts which are examined in this paper. Table 1 below summarises some of the main conceptual differences between the GBR and RBR approaches in terms of a number of essential attributes of each approach.

Table 1: Conceptual differences between pure GBR and RBR

Factor	Goals-based regulation	Rules-based regulation
Degree of particularity or precision	Directives are generally imprecise and open-textured, leaving scope for interpretation	Specific and precise prescriptions for behaviour
Who decides on content of provision	Regulatees interpret the goal and make judgments as to how best to comply with the goal	Those drafting the rule, such as a regulator
When is content determined	At the time the regulatee interprets the goal and takes action	At the time of the drafting of the rule
Congruence with a regulatory objective	Encourages regulatees to take actions and exercise judgements directly consistent with the regulatory objective	Assumed that the rule is congruent with the objective, and so if regulatees comply with the rule the objective will be achieved
Enforcement approach	Investigate whether the regulatee's actions are consistent with the goal	Investigate whether the regulatee has complied with the rule

An important point to emerge from the analysis in this paper, discussed in section 6 below, is that, while sharp distinctions are often made between the GBR and RBR approaches for the purposes of exposition, in practice, the distinctions are less clear cut, and various forms of 'hybrid' approaches are adopted which combine elements of each approach to regulation.[41] For this reason it is better to think of approaches as being either more GBR-like or more RBR-like, rather than in terms of pure versions of GBR and RBR.

[41] See Cunningham (2007:1413) who argues that the classifications are too crude to describe or guide the design of regulations and law, and that different provisions sit on a continuum rather than precisely fitting into two neat categories.

4. Benefits and limitations of each approach

This section considers some of the perceived advantages and disadvantages of GBR and RBR. It considers first the merits of each strategy at a general level based on 'pure' versions of GBR and RBR, which will not necessarily correspond to how they are applied in practice. Accordingly, section 5 below considers various contextual factors that might impact on the suitability of each strategy, while an overview of the experience of implementation is discussed in section 7.

A substantial body of research considers the advantages and disadvantages of the GBR and RBR approaches.[42] Generally speaking, it is uncommon to see a strong preference expressed for one regulatory strategy over another, and it is more common for commentators to be circumspect in advocating for any one approach by recognizing the limitations of both approaches, and the importance of the context in which it will be implemented. In part, this may reflect what some commentators have referred to as the paradoxes associated with each approach; meaning that the strength of each strategy in one setting, may be a weakness of the same strategy in another context.[43]

Advantages of goals-based regulation

A key attribute of the GBR approach is that it shifts the focus away from the detail of individual rules, which seek, in combination, to achieve a regulatory outcome, to the goal or outcome itself. One high-level benefit of this shift is that it should encourage regulatees to think more carefully about how best to achieve a particular regulatory goal or objective, and not to simply mechanistically follow (or avoid through technical loopholes) the rules that have been laid out by the regulator. In short, GBR can change the mindset of regulatees by requiring them to 'think through' the consequences of their actions and how they correspond to a particular regulatory goal. In the words of the former CEO of the UK Financial Services Authority the potential impact of the approach on mindset is that it:

> *"...helps emphasise that what really matters is not that any particular box has been ticked but rather that when making decisions, executives will know that they will be judged on the consequences – the results of those actions"*[44]

Allied to this point, regulatees are afforded the flexibility to choose how their actions can best satisfy a regulatory objective. This flexibility can allow firms to best utilize the information they have available to them in order to meet the overall regulatory goal. Such flexibility is often cited as having proved beneficial in the performance-based regulation of utilities, and in cap and trade type schemes, by allowing regulatees to organize their affairs within a general regulatory constraint, which is seen to have led to efficiency gains.[45]

---

[42] See for example, Sullivan (1992); Sunstein (1995); Ford (2008); National Audit Office (2014). In setting out the advantages and disadvantages this section has drawn on literature covering standards, performance and principles based regulation. I have also recognised the point made by Schlag (1985) that they are necessarily stereotypes.

[43] See Black (2008).

[44] Sants (2009a).

[45] For example, allowing regulated firms to set prices for different services within an overall regulatory constraint (like a price control) can lead to an efficient set of prices emerging. Similarly, Sugarman (2009) argues that

The flexibility of the GBR approach is also argued to create incentives for regulatees to experiment and seek out better and more innovative methods of achieving a regulatory goal. To the extent to which this reduces costs, this can have impacts on competition, as each regulatee seeks out methods and practices which can reduce compliance costs and improve its position relative to its competitors. Such experimentation can have longer term benefits in the development of best practice approaches to regulation through spillover effects across an industry or sector. This can be used to define the content of best practice regulation over time.[46]

The GBR approach can also allow regulators to be innovative, for example by developing new supervision and oversight methods.[47] It offers scope for the treatment of regulatees to be tailored to their circumstances (including their size and risk profile), thus avoiding a 'one-size-fits-all' approach. The ability to apply differential regulatory treatment can also allow the regulator to reward firms who have a good compliance history, thus creating incentives for regulatees to establish constructive relationships with the regulator.[48]

GBR is also argued to facilitate technological innovation (not just compliance innovation) by allowing regulatees the freedom to experiment, within less prescriptive regulatory arrangements, with alternative processes and technologies, which might lower production costs or improve quality.[49] The approach is also seen as more durable in the face of technological or other contextual change, which can be beneficial to regulators. This follows from the fact that the 'goals' of the regulatory regime are typically high-level, and so can be adapted, and interpreted in accordance with changes in context over time without the need to introduce a set of new rules. In short, the GBR approach can more rapidly accommodate changes in market conditions or the emergence of new hazards and risks.[50] As discussed in section 5 below, this adaptive characteristic of GBR is seen as particularly important in contexts where there is significant change and flux (such as in industries where technology is changing rapidly) and where the regulatory regime needs to keep pace with these changes.

Another potential high-level benefit of the GBR approach is in terms of enforcement. Specifically, because GBR discourages checklist style approaches to compliance it can reduce the incentives for 'loop-hole' behaviour by requiring regulatees to comply with the spirit or purpose of a regulatory goal. More generally, the use of open-textured provisions in GBR (such as terms like 'reasonable' or 'fair') can capture a wide range of behaviours and avoid large enforcement or compliance gaps emerging.

Finally, GBR approaches are seen to promote substantive equality by allowing the actions of each regulatee to be assessed on their own merits and within their specific context, rather than suppressing differences between contexts. In this sense, it has been argued that a GBR

---

applying the GBR approach in public health would allow retailers to balance a variety of complementary salt-reducing strategies in the most efficient manner.

[46] See Ford (2010:289).

[47] See Black (2008:426) on this point.

[48] See Ford (2008:48) who postulates that regulators can provide incentives for 'good behaviour' by allowing regulatees to benefit from a reduced regulatory burden and more hands-off approach. High-risk actors should be subject to increased oversight: attract more compliance visits and more explicitly defined outcomes.

[49] Mumford: (2011:39) describes the general approach as a *'policy experiment to facilitate technological innovation.'*

[50] See National Audit Office (2014:17) who discuss this benefit for regulators. See also Ford (2008:36) who notes that the content can be filled in more dynamically and insightfully by those with the greatest understanding of the relevant situations. More generally, she notes that the content of the regulation continues *'to evolve, discarding older formulations as newer more comprehensive or effective ones evolve.'* See also Coglianese, Nash and Olmstead (2002:6).

approach is fairer than a RBR approach as it allows for like cases to be treated alike.[51] This attribute is consistent with a more general argument that case-by-case decisions are an important part of a legal system, and that those who are affected by rules should be able to participate in the creation of a rule that is applied to their case.[52]

Advantages of rules-based regulation

If a principal advantage of a GBR approach is its flexibility, and ability to adapt to changing circumstances, the principal advantage of a RBR approach is its relative *in*flexibility and consequent predictability. A RBR approach sets out tightly specified 'bright-line' rules which allow regulatees to understand exactly what actions are permissible or prohibited. This increases the certainty of regulatees as to what constitutes compliance; they know with a high degree of precision what their obligations are under the regulatory regime.

This greater level of predictability is seen to have a number of potential advantages. Firstly, it can provide regulatees with a degree of comfort in organising their activities and affairs. In particular, it can make regulatees more willing to make investments in assets or technologies that have already been assessed as being in accordance with the rules. Secondly, the increased predictability can make regulatees more willing to enter into specific activities or markets, as they can develop an *ex ante* understanding of how a regulatory regime will apply to them.

A RBR approach can potentially make enforcement easier as it involves less judgement on the part of the regulator. This is because substantive decisions as to the content of a regulation are typically made *ex ante* when developing the rules, and the question for the enforcer is simply a binary one: have they followed the rules or not.

More generally, RBR is seen as more cost efficient in some settings as it eliminates the need for the regulatory enforcer to make investigations and exercise judgment, in each and every application of the rule.[53] The reduction in costs stems, in part, from the fact that the regulator is not required to collect and analyse information, but also from the fact that it does not have to engage in political dealings or negotiations with the regulatee on a case-by-case basis.[54] In short, rules exploit any economies in enforcement costs by not requiring the regulator to undertake time-consuming and repetitive investigations of how goals might apply to specific facts for each and every regulated party.

A related advantage of the RBR approach is that, by reducing regulatory discretion, it can reduce the scope for regulatory bias or arbitrariness. RBR is also argued to improve formal equality by ensuring that all regulatees involved in a specific activity are treated exactly the same under the regulation. In short, the enforcer must apply the regulation consistently to all parties undertaking an activity and this is considered fairer.[55]

Finally, it is sometimes argued that the lines of accountability are clearer under the RBR approach. This is because the regulator remains ultimately accountable for ensuring that the

[51] See Sullivan (1992:66) generally on this point.
[52] Generally, see Sunstein (1995:957).
[53] See Kaplow (1992).
[54] See Sunstein (1995:972).
[55] See Sullivan (1992:62).

rules are congruent with the regulatory objective, and is not delegating this responsibility to private actors.

Disadvantages of rules-based regulation

If a principal benefit of a RBR approach is its relative *in*flexibility and prescriptiveness, this is also seen to be its principal weakness when applied in some contexts. Specifically, the lack of flexibility can increase costs and stifle innovation. For example, overall production costs may be higher under a RBR approach than they would be if regulatees were permitted to experiment with the methods and means of satisfying a regulatory goal.

A RBR approach is seen to be particularly problematic in contexts subject to significant change, as the rules can tend towards obsolescence and require constant adaptation or supplementation. The need to ensure that rules are not 'outrun' by changing circumstances can create challenges; if rules are too static they may misfire in changed circumstances and hinder innovation or technological development.[56] In addition, the need to develop rules to cover every possible action or contingency can result in an over-abundance of prescriptive rules or what has been described as 'rule overload'. This may result in regulatees being unable to remain abreast of all rules or devoting an inordinate level of resources to doing so.

A RBR approach may lead to a mechanistic, tick-box mindset among regulatees, where they lose sight of ensuring their actions are consistent with a larger regulatory objective. This effectively shifts all responsibility for achievement of a regulatory objective to a regulator, and can lead to a culture of dependency and lack of responsibility among regulatees.[57]

There can also be considerable challenges associated with drafting precise rules in some contexts. The nature of language means rules can contain a variety of gaps and ambiguities,[58] while the process of rule-making inevitably involves generalizations about the effects of actions in specific contexts. Accordingly, such rules will necessarily be under-inclusive (i.e.: they won't catch some actions that are inconsistent with the regulatory objective) and over-inclusive (i.e.: they will prohibit actions which do not impact on the regulatory objective).

The process of drafting precise *ex ante* rules can be particularly difficult in situations where risks are heterogeneous, and where the knowledge and information of the regulator is limited relative to that of private parties. In these circumstances again, there is a risk that proposed rules would be significantly under- or over-inclusive. Rule drafting can also be time-consuming. Sunstein (1995) notes that:

> *"…because of the informational demands imposed on those who make rules in the first instance, rules are now exceptionally difficult to promulgate…In the Environmental Protection Agency, for example, it takes over a year and a half to prepare a rule internally; half a year more to receive the legally-required public comments; and sixteen*

[56] See Sunstein (1995:994) on this point.
[57] See National Audit Office (2014:17). Similarly, Arjoon (2006:53) observes that it can create a culture of dependency which is inconsistent with good corporate governance principles, which emphasize a need for regulatees to consider what is ethical behaviour in specific circumstances and not just to comply with a set of rules as set out be a regulator.
[58] Sunstein (1995:984).

> *more months to analyze the comments and issue the rules. It is not at all surprising that the result is to shift agencies away from rulemaking and toward less costly options."*[59]

A well recognised practical limitation of the RBR approach is that it can create incentives for regulatees to 'game the rules' and to actively seek out loopholes which allow them to be strictly compliant, but to act in ways which undermine, or are inconsistent with, the spirit of a regulatory objective.[60] This behaviour can also lead to what has been described as a 'cat and mouse' legal drafting culture, as regulators seek to enact ever more rules to plug holes that have been exploited by so-called legal entrepreneurs, resulting in an ever-expanding thicket of rules.[61]

The RBR approach can also have implications for enforcement, with regulators focused on the binary question of whether a specific rule has or hasn't been complied with, regardless of effects. Some argue that RBR does not reduce the discretion of regulators, but rather drives it underground.[62] For example, regulators can sometimes make choices among a wide range of different rules when assessing compliance, or when choosing whether or not to apply a specific exception to a rule.[63]

Finally, some commentators argue that the RBR approach can have negative distributional consequences. Specifically, those who have access to substantial resources can obtain advice as to how best to navigate around the rules, while those with lesser resources will face a (relatively) more onerous burden of compliance.[64]

Disadvantages of goals-based regulation

The main disadvantages of GBR stem from the imprecision and potential vagueness of the approach, which can leave regulatees uncertain as to how to comply with a given regulatory requirement. Specifically, the use of subjective and potentially value-laden terms such as 'reasonable' or 'fair' in some GBR approaches can produce significant uncertainty for regulatees. To the extent to which regulatees cannot make predictions about what conduct is permissible, they will have limited ability to form reliable expectations which, in turn, can have a chilling effect on behaviour. In short, the GBR approach may foster a greater degree of conservatism among regulatees, and stifle what may be desirable behaviours.[65]

The generality and imprecision of goals established under a GBR approach can potentially be mitigated through the publication of non-binding guidance or indicative actions and behaviours that illustrate or exemplify compliance with a goal. However, there is a balance to be struck,

---

[59] Sunstein (1995:1015).
[60] See Institute of Chartered Accountants of Scotland (2006a:8) who note that it can lead to mindsets such as *'Show me the rule that says I cannot do to this".*
[61] See Braithwaite (2002) who observes that *'the thicket of rules we end up with becomes a set of sign posts that show the legal entrepreneur precisely what they have to steer around to defeat the purposes of the law.'*
[62] See Ford (2010:298). Sunstein (1995:995) cites examples of the Environmental Protection Agency in the US choosing not to enforce certain statutes.
[63] Sunstein (1995) observes that a degree of case-by-case judgement will inevitably break out at the moment of application.
[64] Cunningham (2007:1423) notes that this can be apparent in the context of supplier-consumer relationship where suppliers, who are resourceful and informed, can take advantage of consumers. Similarly, Braithwaite (2002) argues that the RBR approach can engender *'a structurally inegalitarian form of uncertainty. The law thus engendered becomes so complex that little people who cannot afford sophisticated legal advice cannot understand it.'*
[65] See Cunnigham (2007:1423) on this point.

and if a regulator overuses this mechanism, and regulatees are confronted with a proliferation of guidance, this will create similar issues to those that arise under a prescriptively detailed RBR approach.[66]

The open-textured nature of the GBR approach can also be costly relative to the RBR approach as regulatees may need to seek out expert advice as to what actions are in accordance with regulatory goals.[67] As discussed in section 7, this can foster the development of a 'compliance industry'. In addition, the formulation of goals requiring judgement, such as a requirement to reduce risk 'as far as reasonably practicable' can lead regulatees to engage in risk reduction activities at costs that are significantly disproportionate to potential benefits.[68] That is, it can lead to overcompliance.

The costs of enforcement can potentially be higher under a GBR approach relative to the RBR approach as the regulator has to investigate the specific context of the regulatee in order to determine compliance with the broad regulatory goal. This can mean that additional funds have to be spent on building up the capability of the regulatory agency to ensure that inspectors and enforcers are suitably trained and equipped to make such judgements.

A practical difficulty associated with the GBR approach involves the ability to identify, and accurately measure achievement with, the desired goals or outcomes. This is important as compliance involves an assessment of whether or not a regulatee has achieved these goals or outcomes. While in some cases it may be relatively straightforward to identify measurable regulatory goals, in others it can require the use of proxies.[69] In these circumstances the choice of proxy for a regulatory goal becomes important, as it will determine the degree of congruence with the overall objective of the regulation. It follows that who controls the interpretation of a goal or outcome can also be an important factor in the effectiveness of the approach. In some contexts, industry or third-parties may seek to fill an interpretative void by pre-emptively giving content to a goal or an objective by interpreting it in particular ways, which serve their own purposes and are inconsistent with the wider regulatory objective.[70]

The issue of accountability is sometimes described as the 'Achilles heel' of the GBR approach.[71] GBR places substantial emphasis on the judgement and expertise of regulatees, and this can create a need for appropriate accountability mechanisms to be developed. A particular concern where regulatees are involved in determining the content of a regulation, is that this can lead to a subtle form of regulatory capture, with regulators increasingly reliant on the judgement of industry, trade associations or third-party experts hired by industry, to define or interpret what the content of a regulation should be.[72] Where professionalism among such parties is lacking, or such actors are not legally responsible for their judgements and advice, this can create further problems of accountability within a regulatory system.

---

[66] See Black (2008:23) on proliferation of guidance in financial services regulation.
[67] Deighton-Smith (2008) argues that the indiscriminate use of GBR can result in firms being exposed to a massive compliance burden, given their unfamiliarity with the process required as well as leading to the situation where they had no certainty that their resulting plan would be compliant.
[68] See Deighton-Smith (2008:98).
[69] See Sugarman (2009:87) who notes that identifying performance goals that can be accurately measured at reasonable cost can often create a dilemma for those designing a scheme, and that it often means that outcomes are only rough proxies for the genuine social objective.
[70] See Braithwaite (2002:81) who cites Black (2001) in observing that the control of the interpretation of principles is an important one. Amoral calculators can preemptively set standards which define rules.
[71] See May (2003).
[72] See May (2003).

A number of distributional arguments are sometimes made against the GBR approach. First, all firms do not have similar regulatory capacity, and smaller firms may face disproportionate costs in having to assess how to comply with their regulatory requirements.[73] Second, if a regulator adopts a tailored approach to regulation under a GBR approach – whereby firms that are innovative in relation to compliance are rewarded by less intrusive regulation – this could work to the advantage of larger firms who are able to exploit any economies of scale in regulation. Third, if regulatees are given an overall regulatory constraint to meet (a goal) but are allowed to meet that constraint in any way they wish, such flexibility might lead regulatees to undertake activities in ways which, while satisfying the constraint, have wider undesirable distributional consequences for society. For example, a regulated firm with an overall cap on its emissions might focus on greater relative reductions in pollution in higher-income areas, with the result of higher relative pollution levels being experienced in poorer areas.[74]

Another high-level potential weakness of the GBR approach relates to the discretion afforded to regulators to interpret whether or not the actions and judgments of a regulatee are consistent with a regulatory goal, which may, in the absence of sufficient checks and balances, afford opportunities for arbitrary or biased decisions.[75] In particular, there is a risk that action will be examined retrospectively by a regulator with some degree of hindsight bias (i.e.: applying judgements based on information available now rather than information available at the time of action). To the extent to which a perception develops that the regulator is using its discretion to treat parties in an unequal or inequitable way, this can potentially undermine the legitimacy of the GBR approach. Some commentators have argued that, where goals are set at too general a level, and encompass a wide range of action and behaviour, this can potentially undermine the rule of law, and specifically, the notion that all action is permissible unless expressly prohibited.[76] This effect has been described by some as a form of 'regulatory creep'.

There can also be issues associated with choosing an appropriate level of sanction for not complying with a particular goal under the GBR approach. If sanctions for non-compliance are set at too high a level, this can be perceived as unfair, particularly where the goal is vague and open to multiple interpretations.[77] Conversely, if sanctions for non-compliance are set too low, regulatees may pay insufficient regard to compliance with the goals and simply treat any sanctions as a cost of doing business. On this point it should be noted that although a GBR approach has sometimes been applied in combination with what is variously termed a 'light-touch' or 'business friendly' regulatory approach, these concepts and approaches should not be conflated. GBR is not necessarily associated with a light-touch approach to enforcement and compliance, and indeed, to be credible, requires appropriate sanctions for non-compliance.

---

[73] Coglianese, Nash and Olmstead (2002:7) note that GBR can impose excessive costs on smaller firms because they have to search out ways of complying, and that some firms may simply prefer to be told exactly what to do.
[74] See Sugarman (2009:98) who notes that this can be countered by introducing more granular performance targets. This is a more general issue associated with giving firms flexibility within an overall regulatory constraint, and similar issues have arisen in price cap regulation where firms are given the freedom to set prices for individual services within an overall constraint. In some cases, this has led to the imposition of individual 'sub-price caps' on specific services. See Decker (2014:118).
[75] Sunstein (1995:957) discusses the more general risks of abusive exercise of discretion under case-by-case decision-making.
[76] See Cooper (2014).
[77] Black (2008:449) notes that if enforcement is too tough and at punitive end of spectrum then firms will seek the comfort of detailed rules. It can also create hostility towards regulatory regime and undermine trust.

Summary

Drawing on the above discussion, table 2 summaries the key advantages and disadvantages of the pure GBR and RBR approaches. These advantages and disadvantages are, of course, based on an abstract assessment of each approach, and as noted, may be moderated or even reversed when applied in specific contexts. The next section focuses on some of the contextual factors that can influence the effectiveness of each approach.

Table 2: Relative advantages and disadvantages of 'pure' types

Factor	Goals-based regulation	Rules-based regulation
Flexibility	Seen as more flexible	Less flexible
Predictability and certainty	More imprecise, and potentially less certain	More precise and therefore potentially more certain
Promotion of innovation	Seen to encourage experimentation and alternative approaches to compliance	Limited incentives to innovate in compliance
Equality	Seen to promote *substantive* equality	Seen to promote *formal* equality
Impact on approach and mindset of regulatee	Requires regulatees to be forward-looking and think through consequences of actions	Can result in a tick-box mentality developing
Uniform or differential treatment of regulatees	Can allow for differential treatment of regulatees based on compliance history or other characteristics	Formally treats all regulatees the same
Ability to adapt to changes in environment/ market	More open-textured and therefore can be more adaptive to changes in the environment	Less adaptive to changes, rules can tend towards obsolescence, and require more rules to be introduced
Scope for exercise of regulatory discretion	Potentially significant scope for the exercise of regulatory discretion	Typically constrains the discretion of the regulator
Accountability	Devolves some responsibility to firms, and can create an accountability gap	Regulator is ultimately accountable for failures
Incentives for compliance	Can lead to over- or under-compliance depending on level of precision of regulation, and the risk profile of regulatee	Can create incentives to 'game the rules' and engage in creative compliance

5. Relevant contextual factors

Studies that have examined the merits of GBR and RBR approaches have rarely expressed a strong preference or unequivocal support for one regulatory approach over another. The more common position is that the balance of advantages to disadvantages of each approach depends on the context in which it is applied. In this section, we therefore seek to explore some of the contextual factors that have been identified as potentially impacting on the appropriateness, and potential effectiveness, of each approach. Given the limited amount of empirical work in this area, most of the contextual factors discussed below have been drawn from theoretical analysis and reasoning rather than direct observation.

While such contextual considerations can influence the choice of approach in different contexts, as discussed in sections 6 and 7, in practice, regulators will rarely apply either a pure GBR or RBR approach. In this respect, the discussion in this section should be seen as one where the choice is between the relative emphasis given to a GBR or RBR approach.

The timing of intervention and costs of each approach

One influential stream of research has emphasized the importance of costs in selecting a strategy.[78] This work has defined costs widely to include: the compliance costs for regulatees, enforcement costs for regulators, and promulgation costs for legislators/regulators. This analytical framework, which is particularly prevalent in Law and Economics research, focuses on measuring social welfare under the different regulatory approaches. Social welfare is calculated as the difference between the social benefits from a particular strategy (which is the benefits of the commission of acts less the harm due to them) and the costs of enforcement.[79]

A key component of this analysis is the choice as to *when* a regulation should be given content; either before regulatees act (which is associated with a RBR approach), or after regulatees have acted (which is associated with a GBR approach).[80] An important assumption is that the appropriate 'content' given to a regulation is the same regardless of when an intervention occurs. That is, both the rule promulgator, in the case of RBR, and an interpreter/enforcer for GBR, are assumed to determine the appropriate content for the regulation, the only difference being the costs incurred by the regulator and regulatees.[81] Commentators have emphasized that there can be substantial differences in enforcement costs depending on the timing of intervention.[82] An implication of this point is that a RBR and GBR approach have different cost structures, and this can impact on their desirability in different circumstances.[83]

---

[78] One strand of this work has focused on 'optimal' costs of enforcement, which need not necessarily result in full compliance. Rather the focus is on allocating resources up to the point where marginal benefit of regulatory compliance/enforcement is equal to its marginal cost (assuming that beyond this point the marginal benefit of extra compliance/enforcement activity is less than its marginal cost).
[79] See Shavell (1993:261). Put another way, this approach assesses which regulatory approach will, under given conditions, achieve the greatest net social gain, or minimises both the regulatees compliance costs and the regulators costs, while satisfying a given regulatory objective. See Coglianese and Lazer (2003:704).
[80] See Kaplow (1992:560).
[81] See Kaplow (1992:570).
[82] See Shavell (1993).
[83] See Korobkin (2000:31) who makes this point.

For regulators, a RBR approach tends to involve most of the costs being incurred up-front at the time of drafting and promulgating a rule, as the regulator provides content to the rules at that time. Conversely, the GBR approach tends to involve greater costs for regulators at the time when the rule is being interpreted or enforced, as it is at that point that the regulation is given substantive content. For regulatees, a RBR approach is typically assumed to involve lower costs than a GBR approach, because of the relative precision of regulatory prescription under a RBR approach.[84] However, as discussed below, this can depend on the extent to which there is a shared understanding of a goal under the GBR approach.

Within this framework, an important determinative factor is the frequency with which enforcement actions are likely to occur. If there are likely to be many enforcement actions with similar characteristics (i.e.: recurring fact situations) it may be more efficient for the regulator to provide content to the regulation at the 'wholesale stage'.[85] In short, in these conditions, it is best to take advantage of the economies of scale associated with determining the content of the regulation *ex ante*.

Applying this reasoning, a GBR strategy is likely to result in lower costs in circumstances where behaviour occurs less frequently and is more heterogeneous in nature. This is because most of the scenarios that would need to be investigated *ex ante* to give content to a series of precise rules are unlikely to occur, and determining the appropriate content of the regulation for all such contingencies would be expensive. In this context, it would be less costly to introduce a general goal, and then wait until particular circumstances arise to give content to the regulation in those specific circumstances. In part, this is because information is easier to acquire *ex post* after the regulatee has acted.

Simplicity or complexity of the context

The relative simplicity or complexity of a context can also influence the choice between RBR and GBR. It is argued that RBR is most likely to be appropriate in relatively simple settings where the regulatees are largely homogenous,[86] and where actions subject to regulatory oversight have relatively defined characteristics, are well understood and frequently occurring.[87] Drawing on the points made above, in these circumstances, it is likely to be more cost effective to adopt a 'wholesale approach' and for the regulator to give content to rules *ex ante*.[88]

Conversely, it is argued that a GBR approach may be more appropriate in more complex settings, characterized by a range of heterogeneous regulatees engaged in a variety of actions which can result in a wide range of outcomes.[89] Specifically, where the activities subject to regulation are heterogeneous in nature, and occur relatively infrequently, a GBR approach is likely to be less costly, as rules do not need to be developed to cover every possible

[84] For example, regulatees may seek out legal advice under the GBR approach to get some comfort. However, costs may not be lower if it prevents regulatees from introducing lower costs methods of compliance.
[85] See Kaplow (1992) who notes that if conduct will be frequent, the additional costs of designing rules – which are borne once – are likely to be exceeded by the savings realised each time the rule is applied.
[86] Coglianese and Lazer (2003: 705) consider the degree of homogeneity of the regulated entities as having two dimensions: both across location and over time. A homogeneous sector is one where: (1) at a given point in time most private actors have similar operations; and (2) the technology used by these actors is stable over time.
[87] See Braithwaite (2002).
[88] See Kaplow (1992).
[89] Braithwaite (2002) argues that when the stakes are high and setting is complex than GBR is most appropriate. Similarly, Coglianese and Lazer (2003) argue that a GBR approach is more appropriate when it is possible to gauge regulatory outcomes and where there is a diversity of regulatory entities.

contingency.[90] The approach also avoids the potential risk that the regulator will develop rules which are under- or over-inclusive; a risk which increases the more diverse the behaviour that has to be captured in a rule. The use of GBR-type approaches in areas such as financial services has sometimes been premised on this complexity argument. Specifically, it has been argued that, because of the complexity and fast-moving nature of financial services, regulators could not hope to keep up with the pace of innovation.[91] As discussed below, the speed or pace of change in a regulated context is a factor that can contribute to complexity, and therefore support a GBR approach. This is because a RBR approach, in such a context, would require constant adaptation of rules, whereas the content of goals can be updated through contemporary interpretation.

While these points appear straightforward in principle, a practical difficulty is working out when a situation might be characterized as 'simple' or 'slow moving'. Indeed, many, if not most, regulatory contexts are characterized by a range of participants (of different sizes) who engage in different sorts of activities, and by some degree of dynamic change.

Nature of the risks regulated and potential for regulatory error

The nature and variety of risks, or more specifically, the potential harm associated with those risks, is another factor relevant in the choice between a GBR and RBR approach. Some commentators argue that a disadvantage of the RBR approach is that many potential risks cannot be captured in precise, uniform rules.[92] By contrast, the open-textured nature of GBR, allows for the capture of a wide range of possible risky behaviours without formulating prescriptive *ex ante* rules.

A connection is sometimes made between the type of risks being regulated, and the appropriate balance between GBR and RBR approaches. It is argued that certain low-probability, but high-risk, events – that could lead to catastrophic harm – should be subject to a RBR approach, with any compliance shortcomings addressed *ex ante* (e.g.: before an accident occurs) rather than *ex post.* This argument has been developed such that the stage at which regulatory intervention should occur is related both to the nature of the risks being regulated and the effectiveness of sanctions in controlling behaviour.[93] For example, it has been argued that in some areas of safety regulation (such as controlling the risks of fire, food and drugs, or the transport of dangerous materials) the harm associated with non-compliance would be widespread, but the threat of imposition of *ex post* sanctions on the regulatee might by insufficient to provide sufficient deterrence.[94] In these circumstances, prescriptive rules prohibiting certain actions may be the only option.[95]

Another way of framing the choice between GBR and RBR approaches is in terms of the potential effects associated with the different types of errors arising from each approach. This is sometimes cast as a choice between two types of errors: Type I errors (false positives) and

---

[90] See Kaplow (1992:595) who notes: *"When behavior to be regulated is infrequent or when each instance is unique in important ways, substantial ex ante analysis for each conceivable contingency would be a poor investment, whereas ex post determinations under standards are made with the knowledge that the scenario has at least arisen."*
[91] See Ford (2010:277).
[92] See Bamberger (2006).
[93] See Shavell (1993).
[94] See Shavell (1993:279) who notes this is because the harm caused by, for example, the contamination of food could be widespread easily surpassing the assets of the owner.
[95] Shavell (1993:280) notes that *"The appeal of prevention over act-based sanctions is the former, by definition, stops unwanted behavior, whereas act-based sanctions rely on deterrence."*

Type II errors (false negatives). Type I errors, or false positives, arise where the regulatory strategy prohibits certain actions which, in fact, promote the overall regulatory objective, or are at least benign with respect to that objective. Type II errors, or false negatives, arise when the regulatory framework fails to prohibit actions which are detrimental to the overall regulatory objective.

Applying this framework, RBR-type approaches can minimise the potential for Type II errors (false negatives) insofar as they specify *ex ante* which types of actions are potentially detrimental to the regulatory objective. While such an approach is seen to provide a high degree of legal predictability and accountability, a risk is that it may not fully capture all actions that are detrimental to the regulatory objective leading to under-compliance. On the other hand, a more flexible approach, which allows for the measurement of outcomes, is seen to minimise the potential for Type I errors in allowing for contextual nuance: the same actions in different contexts can advance or detract from the regulatory objective. However, predictability can be compromised under such an approach if the approach to assessing outcomes are themselves uncertain or unworkable. In principle, the optimal enforcement policy (in economic terms) is one that balances the relative risk of these errors in a manner that maximizes expected social welfare.

Information conditions

The quality of information available to the regulator is another factor that can be important in choosing between regulatory strategies. Specifically, we may see a relaxation of regulatory requirements – and a shift away from the RBR approach – in circumstances where the regulator does not have the knowledge or information available to formulate good rules. This view seems to be widely held, and the National Audit Office, for example, has argued that GBR will be most effective in contexts where the regulator does not have full access to information about industry processes.[96]

Some commentators have cast the choice between a RBR or GBR approach as one directly related to the challenges faced by policy makers and regulators in acquiring and disseminating information.[97] That is, whether a regulation should be given content *ex ante* (a RBR approach) or *ex post* (a GBR approach) involves a choice about whether information should be gathered and processed before or after regulatees act. In this context, if reliable information about whether specific actions promote a regulatory objective is only available after those actions have occurred, it may be preferable to adopt a GBR-type approach which looks at the outcomes or effects of specific actions rather than promulgating rules to prohibit or permit certain actions based on imperfect information.

While the quality of information is a relevant consideration in choosing between regulatory approaches,[98] imperfect information is almost ubiquitous across the regulated sectors, albeit to different degrees, and regulatees will almost always have better knowledge and information about the consequences of their actions than regulators. Given this, the question of the appropriate balance between approaches will depend on the degree to which the quality of information differs *ex ante* and *ex post* (i.e.: whether it is possible to use available information to develop rules which cover a reasonable proportion of expected risks and behaviours), and

[96] See National Audit Office (2014:17).
[97] See Kaplow (1992:585).
[98] As Shavell (1993:281) observes *'The limits of regulation appear to reflect the quality of information of regulators'.*

the costs associated with acquiring better and more reliable information (i.e.: it may always be possible to acquire better information after an act has occurred, but at inordinate cost).

Degree of Innovation

As discussed in section 4 above, a perceived advantage of the GBR approach is that it can allow for innovation, both in terms of compliance, but also in terms of production processes. This is because the approach generally sets out a goal (for example, to limit the exposure of workers to hazardous materials), but is not prescriptive about how the regulatee achieves the goal, thus allowing regulatees scope for experimentation.

GBR is also argued to be responsive to the rapid and significant changes in a market which accompany innovation, by allowing the regulatee to change its own behaviour (such as by varying how it complies with the goals or outcomes), without requiring new rules to be promulgated.[99] By comparison, the use of a RBR approach in sectors characterized by high levels of innovation may eliminate the incentives for regulatees to seek out new technologies or processes that could achieve a regulatory objective more efficiently.

The general presumption that GBR is most appropriate in innovative sectors is however, subject to some qualifications and caveats. For example, it has been argued that where the GBR approach is applied in a uniform or homogenous way – such that all regulatees have to reach the same performance standards – this can limit the incentive for regulatees to differentiate themselves from one another (i.e. the uniform performance standard will effectively become the de facto standard for the industry). An alternative approach is for the regulator to apply non-uniform performance standards to regulatees, such that those who out-perform the standard, by seeking out new and alternative ways of complying, are rewarded for such activities.[100]

It has also been argued that the 'innovation' that emerges from a GBR strategy should not always be assumed to be beneficial. This point has been made, in particular, in the context of the New Zealand 'leaky buildings' case (discussed in section 7 below), where, it is argued, the latitude to innovate under the GBR approach to building regulation resulted in the emergence, and widespread adoption, of low-cost building solutions on which there was limited information about performance and durability.[101]

A related argument is that, even where innovation occurs under the GBR approach, the benefits may only accrue to specific groups. This type of argument has sometimes been made in the context of innovation in financial services as a result of the application of the GBR approach, where innovation is argued to have favoured bankers and not necessarily led to wider improvements in social welfare. Accordingly, some commentators have urged a more circumspect view of the relationship between GBR and innovation, with a greater focus on the types of innovation, and on whom it confers benefits, recognising that self-interested actors often innovate in ways which only serve their own interests.[102]

[99] See National Audit Office (2014:17).
[100] See Coglianese and Lazer (2003) on this point.
[101] See May (2003).
[102] See Ford (2010:294).

The attitude and capabilities of regulatees

The attitude of the community being regulated with respect to compliance, and regulation more generally, is another factor that can be relevant in choosing between a GBR and RBR approach. Recall that a disadvantage of the RBR approach is that it can encourage creative (or aggressive) compliance, whereby regulated firms seek out ways of navigating around rules or comply with the letter, rather than the spirit, of a regulation. It follows that in contexts where there is likely to be a high incidence of creative compliance – such as, for example, where there are significant financial returns at stake – a GBR approach may be preferred as it will give a regulator a greater ability to capture actions which are inconsistent with regulatory objectives. However, as noted by some, in contexts where such 'amoral calculators'[103] abound, and where significant sums are at stake, it is equally likely that the GBR approach will be subject to challenge on the basis of interpretation and application.[104] Consequently, in these circumstances, it is argued that neither a RBR nor GBR approach will succeed on its own, and that to address this tendency a combined strategy will need to be adopted (a 'belts and braces' approach).[105]

More generally, the effectiveness of GBR can be determined by the extent of trust between a regulator and the community it regulates. This is because regulators and regulatees effectively enter into a compact: the regulator will communicate its expectations about the goals clearly, and be predictable in its approach to assessing compliance with those goals, and the regulatee will take advantage of the flexibility afforded it to comply with the overall regulatory goals set by the regulator. In this sense, there has been argued to be a trust paradox: there has to be a high level of trust between all the participants for GBR to operate at all. GBR can help this relationship develop, but it needs to exist before GBR can even begin to work.[106]

A separate issue relates to the capabilities of the regulated community. Some commentators have argued that GBR can be more difficult to apply, and therefore less effective, in contexts where there are a large number of small and medium sized enterprises (SMEs). This is because SMEs may not have the capacity, or resources, to consider closely how to be compliant under the GBR approach (i.e.: they do not have the time or capability to 'think through' the alternative ways of compliance).[107] This challenge in applying the GBR approach features in a number of the case studies discussed in section 7.

Questions have also been raised about the ability of those being regulated to apply broad goals or outcomes to different fact situations. This has been described as an interpretative exercise where regulatees must reason by analogy through mapping the relationship between broad goals or outcomes to their own factual context.[108] Where the knowledge and expertise

[103] See Black (2001:24).
[104] See Braithwaite (2002).
[105] As Ford (2008:60) observes more generally, resistance toward effective compliance and other forms of corporate cultural dysfunction are not easily dislodged.
[106] Black (2008:456). Black (2010:24) argues that both sides are required to trust each other to fulfill their side of the bargain, and where such trust is lacking there is limited scope to apply principles based regulation in a substantive way.
[107] Ford (2008:38) notes that this capability problem could be addressed by third parties such as trade associations or industry councils, which build capacity as to what it means to be compliant.
[108] See Nelson (2003) on this point who refers to research in psychology which suggests that that this mapping depends on decision makers seeing through surface features of a problem to identify key relations that determine the structure of the analogy.

within regulatees to perform this task is lacking, a more prescriptive RBR approach may be appropriate.[109]

Another factor that may be relevant in balancing the GBR and RBR approaches is the impact of the standard behavioural assumptions applied when considering the appropriateness of the two strategies. Building on work in behavioural psychology and economics, some commentators have challenged the standard assumption that individuals respond in ways that are rational and consistent. If we allow for the fact that deviations from rational behaviour are systematic and widespread (as suggested by this research) this too can have implications for the choice between a RBR and GBR strategy.[110]

One finding of behavioural economics is that individuals might suffer from what is known as a self-serving or optimism bias: that is, they interpret information in ways that is to their benefit. This suggests that, when faced with the need to make judgements under the GBR approach, regulatees may be over-confident about their level of compliance and correspondingly undertake more risky compliance behaviour. Applying this to the choice of regulatory strategy, we may see more non-compliant behaviour under the GBR approach than the RBR approach. On the other hand, to the extent to which there are concerns that the regulated community is largely risk averse, and the GBR approach might lead to them to act even more conservatively, such an over-confidence bias might act as a counter to such a tendency.

Another type of bias that has been identified in behavioural research is so-called hindsight bias, where a factual situation is assessed in a different way *ex post* to how it would be assessed *ex ante*. If regulators exhibit such hindsight bias, any *ex post* assessment of a particular action under the GBR approach will be tainted by the results of that action. Put differently, actions that might be assessed as reasonable *ex ante*, could be judged by a regulator as unreasonable *ex post*, once the consequences of the actions are observed.

Finally, if it is assumed that regulatees display bounded rationality (i.e.: they economise on cognitive effort by applying heuristics or rules of thumb to make decisions) this might imply that they will not take the time to make a full assessment of the consequences of their actions and judgements under the GBR approach, and, this can lead to both more or less compliance than is optimal.[111]

Communication, shared understandings and predictability

Another important contextual factor is the extent to which each approach can provide certainty (or more accurately predictability) to regulatees about what actions are compliant with a regulation. GBR approaches are sometimes seen as less predictable because they are potentially open to multiple interpretations,[112] while RBR approaches are often viewed as more

[109] See May (2010:16). Of course, this argument depends on an assumption that a regulator will have a higher level of expertise and knowledge when crafting rules.
[110] The discussion in this section draws heavily on Korobkin (2000:44). He concludes that behavioural analysis can provides a richer and more nuanced analysis but does not provide a clear direction on the trade-offs between factors.
[111] See Korobkin (2000).
[112] Black (2008:446) notes that interpretative communities can fracture and the regulatory regime may contain several interpretative communities, each holding a different interpretation.

predictable by providing specific and precise instructions which leave little scope for misinterpretation.[113]

However, numerous commentators argue that the predictability of the RBR approach can be overstated.[114] In part this is because regulators often have some degree of flexibility in selecting which rules to deploy in a given factual situation, and in interpreting whether or not a specific action is consistent with a rule.[115] In addition, it has been argued that certainty doesn't automatically follow from the clarity and precision of the words used in rules, but rather from the shared understandings and assumptions of the regulated community as to how those words will be interpreted and applied in practice.[116] On this basis, it should not automatically be assumed that the GBR approach is less predictable: it depends on interpretative practices, and whether or not it is possible to develop a shared understanding of the goals and concepts among the regulated community, regulators and others who interpret and apply the regulation.[117]

The ability to develop a shared understanding of the concepts underpinning either a GBR or RBR approach is, in turn, affected by the channels and mechanisms of communication between a regulator and regulatees. In this respect, the RBR approach typically specifies routine mechanisms of communication and therefore, in principle, minimises the potential for misunderstandings to arise. However, some actions and activities may not be easily communicated through these routinised means of communication.[118] Communication can also break down under the RBR approach in various circumstances, such as where too many rules are issued by a regulator such that practitioners become overwhelmed. Similarly, where a RBR approach features a rule for which there are numerous exceptions or qualifications this can also hinder clear communication of expectations and reduce the relative predictability of the approach.[119] Indeed, it has been argued that the GBR-type approach can be more predictable than a dense weave of rules, which can sometimes communicate competing and conflicting messages.[120]

---

[113] For example, the Accountants technical group of Scotland (2006b:4) notes with a rule: *'there can be no doubt about when and how it is to be applied. Rules provide specific instructions - like a computer program.'*

[114] Schauer (2003:307) observes: *'No rule can be infinitely specific. Neither our world nor our language provide an airtight seal against unimagined or even unimaginable contingencies.' Similarly, Sunstein (1995:984) notes that 'with rules, because of the nature of language legal rules will leave a variety of gaps and ambiguities: there will be no ordinary meaning in many cases. No law is issued with the full knowledge of the situations to which it will be applied.'*

[115] May (2003) notes as background to the adoption of the GBR approach in the New Zealand leaky buildings example discussed in section 7 is one where the complexity of prescriptive building codes had exacerbated code enforcement such that inspectors had to choose which provisions they wanted to enforce. This inevitably led to inconsistency in enforcement practices which decreased predictability.

[116] See Braithwaithe (2002) who argues that: *'Certainty does not flow so much from objective features of the clarity and precision of the words in rules – as lawyers sometimes assume, but from shared assumptions in a regulatory community about the interpreted shape of a rule', and then illustrates this point by noting that 'A hotel chain does not secure quality décor through décor rules, but through stories and concrete examples of abominable and impeccable taste that nurtures the sensibilities central to this kind of private regulation.'*

[117] Sunstein (1995:965) observes everything depends on interpretative practices. Braithwaite (2002) and Black, Hopper and Band (2007:194) note that whether principles are certain depends of whether there is a shared understanding as to the meaning and application between the regulator and the regulated and any court or tribunal which needs to make a determination.

[118] See Schlag (1985:387).

[119] As Korobkin (2000:24) observes most rules have qualification or exceptions, which is to say that certain triggering facts may invoke the rule but additional second level triggering facts may negate the rule. The mere presence of these exceptions makes the rule complex, and less certain.

[120] See Cunningham (2007:1423).

Given its nature, a GBR approach typically relies on less routinized means of communication and on the ability of regulators and regulatees (and others) to develop and communicate to one another their understandings of different concepts and expectations.[121] As noted, where such communication is effective, the scope for misinterpretation will be minimised, and the predictability of the GBR approach improved. However, where communication is not effective, regulatees can misjudge the boundaries of permissibility, and this can lead to behaviour which is inimical to a regulatory objective. One way such communication can break down is where the regulator is 'undisciplined' in the guidance it provides under a GBR approach, both in terms of volume and in the frequency of changes to such guidance.[122]

Ability of regulator to adapt to alternative approach

The effectiveness of the GBR approach depends, in part, on how the regulator adapts its behaviour to the approach, and in particular, how they deal with the flexibility afforded them under this approach. Some commentators have suggested that the GBR approach is so different from that of RBR that it involves a re-imagining of the task of the regulator. Specifically, the regulator must be willing to be pragmatic, to devolve some responsibility, and to adopt an approach which appreciates and values the contribution and expertise of regulatees.[123] In addition, a regulator must be willing to accept a range of judgement-based outcomes as potentially consistent with a regulatory goal. As already discussed, this will involve the regulator having a degree of trust in the judgement of those it regulates. If regulators are not open to a range of possible judgements, many of the benefits of the GBR approach in terms of innovation will not be realised, and the regulator's interpretation of compliance will become the norm.[124]

A related contextual issue is the ability of the regulator to change its behaviour and enforcement approach. Some commentators have noted that a shift from a RBR to GBR approach requires different types of regulatory skills and capacities, and, in particular, the regulator will need to have the necessary knowledge, information and expertise to assess the judgments made by regulatees. It is sometimes claimed that a contributing factor to the 2007-08 financial crisis was the poor access to information, and in-expertise, of some regulators, which led to a lack of meaningful engagement and oversight of financial firms.[125]

---

[121] See Schlag (1985).
[122] Black (2008:446) refers to the example of regulation of the Financial Services Authority in the UK where the scope of the GBR-like approach was elaborated through a series of speeches, policy documents and miscellaneous communication documents. In her view, this 'verbal outpouring' made it difficult for regulated firms to understand what was required of them and whether they had missed something, and this created an atmosphere of uncertainty and trepidation, as regulatees examined each speech by officials to see whether there is a change in approach.
[123] See Ford (2008:27) generally on this. She notes that it can involve re-imaging the regulator as more pragmatic, and willing to devolve responsibility to industry and perhaps humbler about how well informed and well equipped it is relative to industry itself.
[124] Black (2008:446) refers to this as the compliance paradox: although PBR provides flexibility, in practice, firms practices might be homogenous because the regulator only accepts certain practices as being 'compliant' or because firms treat guidelines as if they were rules.
[125] See generally Ford (2010).

Ability to craft rules to capture the actions or activities of interest

A practical contextual consideration already alluded to in the preceding discussion is whether it is possible to formulate and develop a set of precise (*ex ante*) rules to cover the actions or activities of interest to a regulator. An implication of this point is that in some contexts the use of a GBR approach is inevitable.[126]

The difficulty in formulating precise *ex ante* rules in relation to an activity can stem from a number of factors. First, it may be that the possible actions which would need to be addressed are too diverse and numerous to identify, and cannot be specified in advance.[127] In this respect a parallel is sometimes drawn with negligence and the law of tort, which potentially covers millions of acts, most of which have little in common, and many of which are unlikely to arise.[128] Secondly, and relatedly, the cost of developing precise rules for millions of possibilities might be excessive, particularly as few of these possibilities may ever arise. Thirdly, in some circumstances, there may be limitations of language. It may not be possible to come up with a precise and succinct meaning of the key concepts and actions that rules would need to address. In such a case, drafting a rule may be difficult, and could lead to creative compliance.[129]

This last point ties into a more general conclusion of work on contracts and transaction costs in Law and Economics. This work draws a distinction between complete and incomplete contracts. Like the RBR approach, a complete contract in this framework is one that specifies performance *ex ante* for all the various contingencies that can occur. Assuming that it is possible to identify all such contingencies, it is clear that such an approach can give rise to substantial transaction costs. Incomplete contracts, on the other hand, are more analogous to the GBR approach, and allow for agreement on some, but not, all contractual terms, with some elements and concepts in the contract given content *ex post* as new information becomes available. The relevant conclusion of this work is that, in many contexts, some degree of incompleteness in a contract may be necessary by virtue of the fact that it is simply too difficult to capture all the possible contingencies in a contract *ex ante*, and that requiring constant changes to a complete contract to reflect changed circumstances can impose undue transaction costs.

---

[126] See Kaplow (1992:599).

[127] See Kaplow (1992:599) who notes: *"we may be unable to specify in advance proper disposal techniques for all hazardous substances because we cannot foresee all potential hazards - whereas some hazards, and how best to address them, may become apparent when they arise."*

[128] See Schlag (1985:415) who notes: *'It seems difficult to imagine replacing the reasonable prudent person standard in tort law with a rule to define a standard of care. The immediate objection to such a proposal is that a rule could not possibly be an adequate substitute for the reasonable standard given the multitude of varied situations in which that standard applies.'*

[129] See Sunstein (1995:965) who notes that in such cases an incompletely specified provision may be the best we can do.

Identifying and evaluating goals and outcomes

If a major practical challenge of the RBR approach is developing a set of relatively precise *ex ante* rules, the major practical challenge of the GBR approach is monitoring and assessing whether the goals (or outcomes or performance standards) are being achieved. In settings where it is not possible to monitor or assess the extent to which regulatees are acting in ways consistent with the desired goals, or where it is prohibitively expensive, this can weaken the case for applying GBR.[130] Even where it is possible to set out high-level goals or outcomes, the more difficult task may lie in identifying desired levels of performance: at precisely what point will the goal be considered to be satisfied?

Here a distinction can be made between settings where performance or outcomes can be directly observed and measured, and settings where it is not possible to directly evaluate performance or outcomes because the systems are too complex, or the outcomes to be prevented are unobservable (and outcomes have to be measured based on predictions).[131] For example, the assessment of the resilience of a nuclear power plant to a meltdown cannot be directly observed, nor can the safety of a building with respect to earthquakes or fire. In this respect it has been noted that, when goals or outcomes are assessed based on simulation models, this can have distinct limitations, increase uncertainty, and lead to what has been described as 'legitimate self-delusion'.[132]

Incentives to comply and the risk profile of regulatees

Another important practical consideration in the choice of approaches is the incentives for, and extent of, compliance associated with each. The RBR approach establishes 'bright lines' which inform regulatees of the nature of prohibited conduct. While this can deter regulatees from stepping outside of the line of permissible conduct it can encourage them to engage in activities up to the boundary of permissible conduct, or to navigate around the borders of the rules through creative or aggressive compliance. This does not imply, however, that only the RBR approach provides scope for creative (aggressive) compliance, and the potential also exists for such creativity under a GBR approach. Some empirical studies have indicated that, under a RBR approach, it is the evidence of whether or not a specific factual situation is covered by a rule that is interpreted creatively, while under the GBR approach it is the goals that are interpreted creatively.[133]

Building on this last point, there are mixed views on the incentives for compliance under the GBR approach. Some commentators observe that, although the GBR approach allows regulatees to use the better information available to them to find solutions to regulatory problems, they do not necessarily have better incentives to do so.[134]

---

[130] Coglianese and Lazer (2003:702) argue that in these circumstances, alternative approaches like MBR may be a more effective approach. More generally, they argue that GBR-type approaches will only be appropriate where the regulator can cheaply measure output and evaluate its social impact.
[131] May (2003:386) notes that this can be done through a probabilistic risk assessment. See also Coglianese, Nash and Olmstead (2002:4).
[132] See Coglianese, Nash and Olmstead (2002:11).
[133] See Nelson (2003).
[134] As Coglianese and Mendelson (2009:11) note: 'After all, if these incentives were sufficient, no regulation would be necessary in the first place.'

It is sometimes argued that that the GBR approach should improve compliance because it empowers regulatees to make their own decisions and choices as to how to comply, and that this can result in such decisions being seen as more reasonable and legitimate than rules imposed by an external regulator.[135] It has also been argued that the less precise the regulatory prescription, the more concerned regulatees will be that they will be found not to be in compliance with the goal, and the possible costs associated with that.[136] This, it is argued, creates stronger incentives for regulatees to be less aggressive/creative in their compliance decisions, particularly where the severity of the sanctions and penalties for aggressive/creative compliance are significant.[137]

However, the imprecision of the GBR approach may, in some circumstances, result in under- or over-compliance with a regulation (i.e.: regulatees complying more or less than is socially optimal, resulting in resource losses). This is because the GBR approach can turn compliance managers into risk managers.[138] It follows that the degree of compliance depends on the relative risk-profile of the regulatees.[139] Regulatees that have an appetite for risk (i.e.: risk-seekers) may take advantage of the flexibility to seek to 'take a chance' with their compliance judgements, having regard to the costs of enforcement action and possible reputational risk.[140] In circumstances where sanctions for compliance are low or there is limited reputational risk, this can result in under-compliance.[141] On the other hand, risk-averse regulatees may become overly conservative in their judgements and actions under the GBR approach. This may potentially chill actions that may be beneficial to a regulatory objective and represent a form of over-compliance.

[135] See Coglianese and Lazer (2003:695).
[136] See Nelson (2003) who refers to some evidence of less structured aggressive accounting reporting with imprecise standards.
[137] See Nelson (2003); Agoglia, Doupnik and Tsakumis (2011); Black, Hopper and Band (2007:195) also make this point: "Where principles are used regulated firms are more concerned about error costs ("getting it wrong") than where rules are more precise. They are less likely to creatively comply."
[138] See Black (2008:454) who notes that this can create an ethical paradox. On one hand, GBR encourages a more ethical culture by engendering a responsible and ethical culture focused on achieving certain outcomes. However, because compliance becomes a matter of judgement or risk, non-compliance becomes an option
[139] See Korobkin (2000) on behaviour and risk profiles. Kaplow (1992:605) notes that risk profile is relevant to choice between approaches for two reasons: (1) individual behaviour reflects risk preferences; (2) when individuals are risk averse, their bearing of risk imposes a social cost.
[140] See Black (2008:454).
[141] Di Lorenzo (2012) finds empirical support for this in relation to US financial services and loans and access to credit where regulated firms formed the view under the GBR approach that evasion was a reasonable business decision.

Summary

This section has identified and examined various contextual factors which, in principle, could impact on the suitability, and potential effectiveness, of each approach. Table 3 below sets out these contextual factors, and relevant considerations.

Table 3: Contextual factors and considerations

Contextual Factor	Considerations
Timing and costs of intervention	There can be substantial differences in costs depending on the stage of intervention. The frequency with which particular behaviour occurs, and its relative heterogeneity, are relevant considerations.
Simplicity or complexity of setting	RBR seen to be more appropriate in relatively simple setting with homogenous actors. Conversely, GBR may be more appropriate in more complex settings with more heterogeneous regulatees and where a wide variety of activities are subject to regulation.
Nature of risks and potential harm	There are often challenges associated with capturing a wide range of potentially risky behaviour and outcomes in prescriptive, uniform rules under the RBR approach. However, some degree of prescriptive rules may be the only option to avoid some low-probability but high-risk events.
Information conditions	The choice between GBR and RBR can be cast as one that considers when a regulation should be given content, and the information available to the regulator at different points in time. GBR is seen as most appropriate in circumstances where the regulator does not have good access to information. However, as most regulators face imperfect information conditions the question is obviously one of degree.
Degree of innovation	There is a general perception that GBR is more appropriate in innovative sectors as it is potentially more adaptive to changes in the market. However, this is subject to the qualification that if a GBR approach is applied uniformly this can limit the incentives for innovation. Questions have also arisen about whether the innovation which emerges is socially beneficial, and who benefits from such innovations.
Attitude and capabilities of regulatees	RBR can potentially give rise to creative compliance, and a GBR approach may therefore be able to capture a wider range of actions inconsistent with a regulatory objective. However, the advantages of the GBR approach are seen as being affected by the degree of trust between a regulator and the community it regulates. A separate issue is the capabilities of regulatees and whether they have the capacity and resources to be able to take advantage of the flexibility of the GBR approach.
Communication, shared understandings and predictability	GBR approaches are generally seen as less predictable than RBR approaches as they can be open to multiple interpretations. However, the predictability of RBR can be overstated, and, in some contexts, where there is a shared understanding of the goals among a regulatory community, the GBR approach can provide a high degree of predictability. In addition, if a RBR approach involves too many, or conflicting, rules this can reduce predictability.
Ability of the regulator to adapt	To apply the GBR approach a regulator must be willing to devolve some responsibility, and to accept and assess judgement-based outcomes. This can require a different set of skills and capabilities than are required for enforcement under an RBR approach.

Contextual Factor	Considerations
Ability to draft rules to capture the actions or activities of interest	In some settings a GBR-type approach may be inevitable by virtue of the fact that it is not possible to formulate and develop a precise set of prescriptive rules to cover all the actions of interest to the regulator.
Ability to identify and evaluate goals and outcomes	A major challenge of applying the GBR approach in some settings is identifying and then assessing goals, outcomes and performance standards. Where it is not possible to identify or assess, through accurate measurement, such goals or outcomes, the case for applying a GBR approach is weakened.
Incentives to comply	A major limitation of the RBR approach is that, in some settings, it can create incentives for firms to be creatively compliant. The incentives to comply under a GBR approach are less clear: on the one hand, the lack of prescription can reduce the gaps in the law which can allow creative compliance, however there may still be scope for creative interpretation of goals, and the approach may also produce incentives for over or under compliance, depending on the risk profile of regulatees.

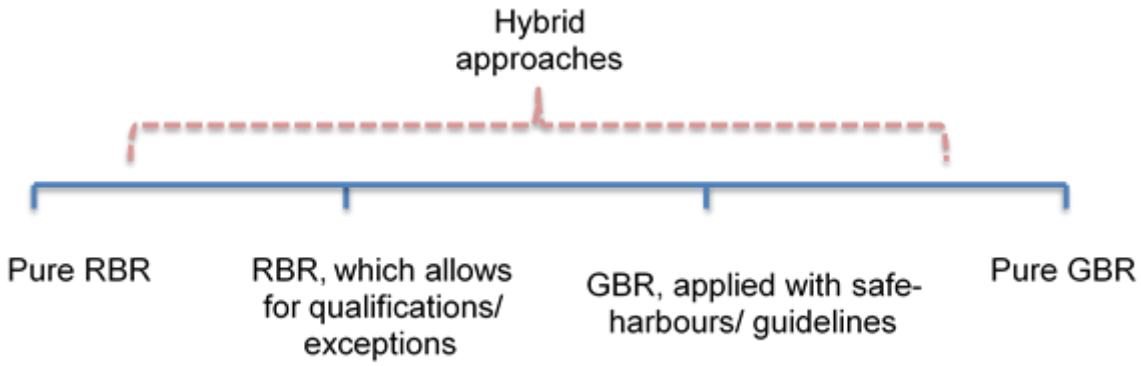
6. Hybrids

In this section and the next, we move to a consideration of the experience of actual implementations of the approaches. In this section, we discuss the emergence, in practice, of hybrid arrangements, which combine elements of both approaches. We look at the factors behind the emergence of these hybrids, as well as their potential benefits and risks. In section 7 we examine the detail of specific applications of one or other of the regulatory strategies, almost of all of which are examples of a hybrid approach.

The emergence of hybrid approaches

Previous sections of this paper have focused on the theoretical advantages and disadvantages of 'pure' RBR and GBR approaches, and how these might be impacted by particular contextual considerations. However, as many commentators have observed, in practice, it is rarely the case that a 'pure' version of either GBR or RBR is implemented.[142] For this reason, it is best to characterise implementations as being situated along a continuum according to the relative degree of specificity or precision of rules (or alternatively the relative degree of discretion they afford regulatees). At one end lies a pure RBR approach which sets out specific and precise rules (with no exceptions or qualifications), while at the other end of the spectrum lies a pure GBR approach which sets out relatively general, high-level goals (with no accompanying guidance or safe-harbours). This is shown in the figure 1 below.

Figure 1: Spectrum of RBR and GBR



At a general level, four types of hybrid approach are evident in practice. These combinations are set out in table 4 below, and involve policy choices about whether goals are binding or non-binding, or whether rules are binding or non-binding.

[142] See Schauer (2003), Sullivan (1992:57); and Coglianese, Nash and Olmstead (2002:8).

Table 4: Hybrid approaches

	Binding elements	Non-binding elements
Hybrid GBR approach	Goals	Guidance, safe-harbours, prior decisions, best practice requirements.
Hybrid RBR approach	Rules	Regulatory goals statement, exceptions, qualifications to rules.

It is also possible to observe variants within the general typology set out in table 4 above. For example, where a hybrid GBR approach is applied which has binding goals and non-binding guidance, regulatees may be required to justify why it is that they deviate from any non-binding guidance and/or bear the onus of demonstrating that their compliance approach is consistent with a regulatory goal. As discussed in section 7 below, this approach is adopted by the Health and Safety Executive (HSE) in the UK, such that if a regulated party does not follow an Approved Code of Practice it is required to justify how its actions are consistent with the relevant regulatory objective.

There is also the possibility of allowing regulatees to choose between a GBR approach or a RBR approach such that a hybrid regulatory strategy is applied. This can be important in the context of concerns that SME enterprises may not reap the benefits from the GBR approach, and that such an approach creates excessive costs for such enterprises, as well as on the basis that SMEs would welcome the greater certainty associated with the RBR approach.[143] This approach was applied by the UK Financial Services Authority in the past, whereby firms were given the option of complying with a safe-harbour RBR approach or applying more innovative practices consistent with the regulatory principles which led to the same compliance outcome. If firms opted to be innovative under the GBR-like approach they were required to satisfy the regulator that this would achieve the same regulatory goal.[144] However, an argued risk associated with giving regulatees an option is the potential for gaming insofar as it might allow regulatees to seek out loopholes in the rules, and argue, if challenged, that they wish to apply the goals based approach.[145]

Convergence of approaches

Some commentators have focused on the forces that might underlie the development of hybrid approaches. For some, convergence of the GBR and RBR strategies is inevitable in practice, with the GBR and RBR approaches necessarily moving towards one another.[146] Others suggest that the extent of convergence is so significant in practice that it is not meaningful to

[143] See Ford (2008:51).
[144] See Ford (2008:51).
[145] See Ford (2008:53) who notes that noncompliant actors could *"rely strategically on existing detailed rules whenever they had a colorable basis for arguing that they were in compliance with a rule, regardless of whether their actions were within the spirit of the underlying principle. The firm could selectively look for loopholes in the rules, falling back on principles only if and when the regulator decided to challenge the conduct in question."* Only innovation which would be sought in advance are those which are clearly not allowed under the rules. GBR would be reduced to the service of last recourses and ex post justifications.
[146] See Ford (2008:11) who argues that each regime will necessarily include both rule-based and principles-based elements, and that when applied in particular contexts by human regulators, there may be even more bleed-over than drafters intend.

seek to distinguish between the two approaches, and that debates about the pros and cons of pure versions of GBR and RBR approaches involve an 'arrested dialectic'.[147]

A number of factors are seen to lead to this convergence. In particular, it is argued that the behavioural responses of those who implement or enforce regulations, as well those subject to regulations, can 'soften the edges' associated with each approach. For example, even where a RBR approach is applied, which consists of precise rules, the enforcer of a rule might apply exceptions, or draw on other rules in a rule-book when considering specific action. That is, the addition of qualifications or exceptions can make a RBR strategy more GBR-like in application.

Convergence may also be seen where enforcers seek to narrow their discretion under a GBR approach by introducing 'safe harbours', by publishing guidelines or best practice requirements, or by relying on previous decisions when taking action. The use of these mechanisms may give the application a more rule-like complexion. While it may appear counter-intuitive that an enforcer would wish to constrain its own decision making discretion in this way, some commentators argue that enforcers of broad and vague goals have tried to convert them into rules to a surprising degree.[148]

It is not only enforcers who may facilitate this process of convergence. Regulatees can also facilitate the process in their own adaptive behaviour. For example, if most regulatees under a GBR approach collectively interpret the meaning of a goal in a similar way, this interpretation can come to have similar effects on behaviour as if it was a rule.[149]

Benefits of a hybrid approach

The application of a hybrid approach can, in principle, combine the positive attributes of each approach within a single regulatory strategy. For example, the combination of a binding GBR approach alongside non-binding guidelines or safe-harbours, can serve to allow regulatees the flexibility to be innovative in compliance, while at the same time reducing uncertainty and making the approach more coherent to regulatees. Put differently, those who wish to use the opportunity to be innovative can do so, while those regulatees who consider it too costly or uncertain to develop new and innovative approaches, can simply follow the (non-binding) rules as set out in the guidelines. Similarly, the combination of a binding RBR approach with non-binding principles can allow regulatees to better appreciate and understand the general regulatory goals that are being pursued in a specific area.

In short, a prudently designed blend of approaches may, in some contexts, bring significant benefits by allowing for the limitations of each approach to be compensated by the benefits of the other approach.

---

[147] See Schlag (1985: 383).

[148] See Braithwaite (2002) who refers to the empirical tendency for principles to go the way of rules. Schauer (2005:811) draws on work in behavioural psychology to argue that for many people the optimal range of choice is narrower than is often supposed, and that ordinary people resist excess choice as much as they resist excessively constrained choice. This is also consistent with work in behavioural economics on the use of heuristics and rules of thumb in decision making.

[149] As Ford (2008:9) observes: *"Principles, in the fullness of context, may congeal around a particular meaning."*

Risks of a hybrid approach

A less sanguine view of hybrid approaches is that, rather than combining the positive attributes of each approach, the regulatory strategy absorbs and compounds the negative attributes of each. In short, the resultant combination of approaches risks being neither efficient nor optimal.[150]

Even if it is possible to design a regulatory strategy that avoids the limitations of each approach, the combination of approaches may not fully reap the benefits of either approach. For example, the use of a GBR approach with extensive non-binding guidance might result in a situation where regulatees feel so constrained by the guidance that they do not take advantage of the flexibility afforded them under the approach. Similarly, if a RBR approach is applied, but is subject to a number of exceptions or qualifications to match a range of different contexts and circumstances, this can reduce the predictability of the approach and remove one of its principal advantages.

Finding the right combination

The critical question that arises in practice is therefore exactly how to combine elements of the GBR and RBR approaches as part of a regulatory strategy so as to yield the potential benefits of each approach, while avoiding the potential limitations. As emphasised in this paper, the question of the appropriate balance cannot be determined in the abstract but depends on a range of contextual factors. Moreover, the direction of impact of some of these factors may only become evident over time,[151] such that the balance may also need to be refined over time.

[150] See Schauer (2003).
[151] For example, the extent to which a regulated community embraces responsibility; the degree of trust between the regulated and regulators; changes in the nature of risks or the relative risk-aversion of regulatees etc.

7. Insights from the application of the approaches

This section considers some of the available evidence on the effectiveness of the two approaches as they have been applied in practice. It is not intended to be a comprehensive survey of the application of the approaches, but, rather, to focus on certain key insights from real-world applications.[152] The discussion is divided into two parts. Part A presents three case studies from the UK involving three different spheres of regulation: (1) workplace health and safety; (2) food safety and (3) legal services regulation. These cases studies have been developed based on published material as well as discussions with regulators in the relevant areas. Part B discusses examples of the application of the two approaches from a wider range of regulated areas and jurisdictions. This section has been based on secondary sources that have described the application of the approaches.

As already indicated, there is limited empirical work that has sought to systematically examine the application of the two approaches in different contexts.[153] The majority of the examples used in this brief survey focus on the experience of the application of applying a GBR type approach, or where a GBR approach has replaced a RBR approach. This reflects the fact that such regulatory 'experiments' have tended to attract the most attention. When considering the experience of the application of the GBR approach, it is important to recall that any assessment of merits must be a relative one. That is, the outcomes of the application of each approach must be compared relative to those that might have been achieved under the relevant counterfactual (i.e. had a more RBR approach being applied).

Part A: UK case studies

Health and Safety

One of the longest running applications of a GBR approach in the UK is that of Health and Safety regulation. The origins of this approach can be traced back to the influential Robens report of 1972.[154] This report concluded that health and safety should primarily be the responsibility of those who create risks and those who work with them, and that health and safety at work could not be ensured by an ever-expanding body of legal regulations enforced by an ever-increasing army of inspectors.[155]

---

[152] Other studies have presented examples of the application of the two approaches in other regulatory contexts and jurisdictions. Coglianese, Nash and Olmstead (2002) refer to various examples of the application of performance based regulation in the United States, while Coglianese and Lazer (2003) discuss the application of management based regulation in the areas of food safety, industrial safety and environmental protection in the United States. Various Australian case studies of the application of a mix of performance and process based regulation are referred to in Deighton-Smith (2008), including in the environmental area, rail safety, food safety, health and safety, vehicle design and building regulation.

[153] See Coglianese and Lazer (2003).

[154] At the time the report was drafted there was nine main groups of statutes and around 500 subordinate statutory instruments. Robens argued that the first and perhaps most fundamental defect with the arrangements he reviewed was that there was 'too much law' which far from advancing the cause of health and safety has reached a point where it was counterproductive. See Robens (1972:28).

[155] See Robens (1972).

Subsequent legislation[156] captured this philosophy, and is seen to have led to the development of a predominantly GBR-type approach to the regulation of workplace safety whereby the regulator typically expresses only general duties, principles and goals, with regulatees (or duty holders) given choice as to how to comply.[157]

The GBR approach in health and safety regulation is applied in a number of ways including by way of various broadly specified obligations, which are sometimes qualified by terms such as 'so far as is reasonably practicable' or 'as low as reasonably practicable' or 'as low as reasonably achievable'.[158] Such qualifications recognise that the preventive and protective measures required of regulatees should be commensurate with risks, and that, as control measures are introduced, the residual risks may fall so low that additional measures to reduce them further are grossly disproportionate to the risk reduction achieved.[159]

The GBR approach is seen as particularly appropriate for health and safety regulation because of the nature of activities being regulated. In particular, health and safety regulation is directed at dynamic situations, where the level of risk and potential harm is, in many ways, dependent on the behaviours and responses of human actors. This implies that is not possible to develop static rules to predict all of the possible responses to different risk scenarios.

The Health and Safety Executive (HSE) recognises that, for a non-prescriptive GBR-type approach to work, regulatees must have a clear understanding of what they must do to comply with their legal obligations. To address this issue the HSE issues different types of guidance as to how goals should be interpreted, and what types of compliance actions would be considered consistent with the regulatory goals. This guidance is seen as an important part of the GBR approach in health and safety regulation for at least two reasons. First, under the regulatory framework, regulatees must undertake a risk assessment by identifying 'hazards' arising from their undertakings and act to reduce the risk from such hazards to a legally accepted standard, such as 'as far as reasonably practicable'. These risk assessments can create uncertainty for some regulatees, particularly in contexts where the science underpinning an assessment of a particular risk is complex, ambiguous or incomplete, or the necessary data is unavailable. Second, guidance is seen as important to assist smaller firms who may not have the expertise to make the assessments required to comply with their regulatory obligations.

Another important aspect of the HSE approach is issuing guidance with special status – known as Approved Codes of Practice (ACOPs). ACOPS are intended to clarify particular aspects of the general duties and regulations, and spell out their implications.[160] Their 'special guidance status' means that, if a regulated party is prosecuted for a breach of the law, and is found not to have followed a relevant provision of an ACOP, a court can find them at fault unless they are

---

[156] The Health and Safety at Work Act 1974.
[157] See HSE (2001:8).
[158] Löfstedt (2011:52) notes that: *"So far as is reasonably practicable' (SFAIRP) is the key principle at the heart of Great Britain's health and safety legislation. The concept (that employers should ensure so far as is reasonably practicable, the health, safety and welfare at work of their employees) has a clear purpose. It gives employers flexibility to manage risks in a proportionate way and recognises that hazards cannot be eliminated altogether."*
[159] The HSE (2001:2) describes it in the following way: *"Deciding what is reasonably practicable to control risks involves the exercise of judgement. Where dutyholders must control risks so far as is reasonably practicable, enforcing authorities considering protective measures taken by dutyholders must take account of the degree of risk on the one hand, and on the other the sacrifice, whether in money, time or trouble, involved in the measures necessary to avert the risk. Unless it can be shown that there is gross disproportion between these factors and that the risk is insignificant in relation to the cost, the dutyholder must take measures and incur costs to reduce the risk."* This is linked to the concept of 'tolerability' which has been defined as the willingness to live with a risk so as to secure certain benefits.
[160] In 2011 there were 53 ACOPs.

able to show they have complied with the law in some other way. In short, while ACOPs are not mandatory in the manner of a prescriptive regulation, they have more force than ordinary (non-binding) guidance. Because of this characteristic, the regulator limits the use of ACOPS to specific circumstances.[161] The HSE has stated that ACOPs form an important part of the regulatory strategy by preventing over-response by industry, over-enthusiasm by enforcers, and over-selling by intermediaries. Alongside ACOPs, the HSE publishes guidance material which describes good practice. This guidance is non-binding but, according to the HSE, following the guidance would normally be considered enough to comply with the law.[162]

While the general approach of the HSE can be described as predominantly goals-based, in some specific contexts the HSE recognises the need to apply alternative strategies such as a more prescriptive RBR-type approach. Examples include where: a step-change of behaviour is required in areas of bad practice; where there is a need to reduce the spread of performance among regulatees (and bring bad performers up to acceptable level); where there are manifest hazards, high risks or a high level of societal concern about an issue; or where it is important to secure standardization or a 'level playing field' (i.e. that fair competition requires regulatees to *do* the same thing not just achieve the same result).[163] The HSE also recognises that GBR may be insufficient in circumstances where an area is covered by an EC Directive, where adequate control of a risk of a specific hazard requires that specific standards be met, or where uncertainty needs to be reduced to a minimum (allowing for minimum discretion of the regulator). Moreover, in some areas the HSE applies what might be classified as a more process-based, or MBR, approach to manage and control risks.

Generally speaking, assessments of the HSE's regulatory strategy have been positive. The 2011 Löfstedt review of Health and Safety legislation, for example, concluded that the general sweep of requirements set out in health and safety regulations were 'broadly fit for purpose', and there was no case for radically altering the current legislation which places responsibility on those who create the risks. However, the Löfstedt review identified various issues, and potential areas for improvement in the regulatory approach which the HSE have subsequently addressed.[164] Among these:

- That, while the 'reasonably practicable' qualification to certain regulatory obligations was overwhelmingly supported on the grounds that it allowed for risks to be managed in a proportionate manner, there was general confusion in practice as to what would satisfy the requirement, and smaller firms in particular (who are less likely to have an in-house health and safety expert) found it difficult to interpret. This created a risk that smaller firms would take health and safety actions which were excessive or insufficient.[165]

- There is the potential for smaller firms to fall under the influence of third-party advisers who may promote unnecessary paperwork and may lead regulatees to overcomply with regulations. Specifically, Löfstedt found that: *"There are complaints of an overly-complex and bureaucratic system which drives SMEs to seek out the services of consultants, who,*

[161] Four conditions must be met: (1) there is clear evidence of a significant or widespread problem; (2) the overall approach being taken to an area of risk is by amplifying general duties in the HSW Act or preparing goal-setting regulations; (3) there is a strong presumption in favour of a particular method or methods that can be amplified in an ACOP in support of the general duties or goal setting regulations to give authoritative practical guidance; (4) the alternative is likely to be more prescriptive regulation.
[162] HSE (2009:3).
[163] HSE (2001:60).
[164] See Department of Work and Pensions (2015).
[165] Löfstedt review (2011: 52).

in turn, can provide advice that is not required by law and provides little or no benefit to workplace health and safety, adding further burdens to business".[166]

- That, while the legal requirement to carry out a risk assessment was an important part of the risk management process, it was leading some businesses to produce, or pay for, lengthy documents covering every conceivable risk, which was sometimes at the expense of controlling more significant risks. In this respect, estimates were provided which suggested that small firms spend almost six times more per employee than large organisations on risk assessments.[167]

As noted, the GBR approach has a long pedigree in the area of health and safety regulation in the UK. Discussions with the HSE suggest that various features and aspects of the wider context and institutional framework have contributed to the acceptance and evolution of this approach. In particular:

- It is widely acknowledged that it would not be possible to write rules to cover the wide range of circumstances and activities in which health and safety issues arise. Because of the nature of risks, and this wide scope of application, GBR is arguably the only potentially effective approach in the area.

- Generally speaking, regulatees have embraced the responsibility given to them under this approach. They have recongised that GBR does not equate with self-regulation, and many businesses can perceive the wider commercial and reputational benefits associated with compliance with health and safety regulation.

- As in other areas where the GBR approach is applied, most complaints regarding the approach have come from smaller businesses, who don't like the uncertainty associated with the approach. In particular, some small firms, who have little access to expertise, have, at times, sought a reversion to a more prescriptive approach.[168] However, this issue is seen to potentially diminish over time as a collective body of experience is developed and disseminated across an industry.

- As in other areas, the general nature of the GBR provisions has given rise to what might be described as a 'compliance industry' of third-party health and safety consultants who seek to sell compliance services to regulatees. The number of such consultants is not known, however, it was suggested that the number of such consultants can increase after a particularly high-profile incident occurs.

- A concern associated with the development of this compliance industry is that it may lead to over-compliance, particularly by smaller or less well-resourced firms who may defer to the judgement of the external 'experts'. The HSE has sought to address this issue by providing more tailored guidance, and in making clearer to regulatees what they do and do not have to do under the relevant regulatory goals.

- Another issue that has arisen in the past, and was identified in the Löfstedt review, is how qualifying standards applied under the GBR approach (such as 'so far as is reasonably practicable') interact with the application of regulations by courts in specific cases. In particular there have, at times, been concerns that the courts have applied a strict liability

[166] Löfstedt review (2011: 16).
[167] Löfstedt review (2011: 35).
[168] See also HSE (2001:17).

standard on employers in circumstances where the regulatory standard was a qualified one of reasonable practicability.[169]

- One factor that is perceived to have been important in determining the effectiveness of the GBR approach in health and safety regulation is the working relationship that has developed between regulators and industry, trade associations, supply chains and other stakeholders. In some areas, the industry has produced guidelines as to what they consider to be best practice for their area. These different bodies have been seen as important in assisting to get the message across to regulatees about what good compliance looks like in a non-adversarial way.

- The HSE state they have observed more innovation in compliance over time, and that these innovations have moved apace with wider technological developments. Indeed, this is seen as one of the advantages of the GBR approach in this area, as it has allowed the notion of 'best practice' to keep abreast of technological developments.

- Another important contributing factor to the effectiveness of the approach in health and safety regulation is seen to be increased public awareness of health and safety risks, as well as pressures provided by other parties such as unions and interest groups. Such awareness and pressures has been seen to create incentives for firms not to use the flexibility inherent in the GBR approach to cut corners. Put differently, the fear of reputational damage associated with poor health and safety practices has been seen to weaken the incentives for regulatees to under-comply with the GBR approach.

In sum, although it has been challenged from time to time (particularly after major incidents), the GBR-type approach, as applied in the area of health and safety regulation in the UK, seems to be well established and regarded. It is possible to speculate that one reason for the long application, and perceived effectiveness, of the approach in this area is that it was underpinned from the start by a philosophy which placed responsibility for health and safety firmly on regulatees. This may have facilitated a more mature relationship between regulators and regulatees developing over time.

Regulation of solicitors in England and Wales

An interesting case study of where a regulatory strategy has shifted from a predominantly RBR to more GBR-type approach is that of regulation of solicitors in England and Wales. This change in regulatory approach followed a radical restructuring of the regulatory architecture in 2007, which included the separation of regulatory and advocacy functions of professional bodies, and the establishment of a number of new 'frontline' regulators at the professional level.

A new regulatory framework was established in 2011, facilitated through a revision to the Handbook of the Solicitors Regulation Authority (the SRA). The new SRA Handbook comprises 10 mandatory Principles which underpin all regulatory requirements, and regulatees are expected to act in accordance with these Principles in everything they do. According to the SRA, whenever a regulatory issue arises the first port of call should always be the Principles.[170]

[169] See Löfstedt review (2011).
[170] See SRA (2011:3).

The mandatory Principles require that solicitors and the firms the SRA regulate:

- uphold the rule of law and the proper administration of justice;
- act with integrity;
- not allow your independence to be compromised;
- act in the best interests of each client;
- provide a proper standard of service to your clients;
- behave in a way that maintains the trust the public places in you and in the provision of legal services;
- comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner;
- run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles;
- run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity; and
- protect client money and assets.

The new Handbook also comprises a new Code of Conduct which is built around an approach of 'outcomes focused regulation' (OFR). This Code of Conduct is revised from the prior Code by replacing prescriptive rules supported by guidance with a set of mandatory 'outcomes' and non-mandatory 'indicative behaviours' (IBs).

Outcomes show how each of the Principles must be achieved by regulatees in their specific context. In the absence of prescriptive rules, regulatees are expected to determine, and implement, the right systems and controls to achieve these outcomes having regard to the nature of their practice, the type of clients they serve and type of work undertaken. Thus, while firms were formerly subject to detailed rules on what information they must give to clients, the relevant information obligation is now largely[171] based on the needs of the relevant client and type of work involved. This may require a solicitor to exercise a degree of judgment about the specific needs of an individual client (e.g. a client that may be vulnerable). Similarly, while formerly detailed rules governed conflicts of interest in specific areas of work, firms must now have systems and controls in place to identify and deal with conflicts in all areas of work.

The non-mandatory 'indicative behaviours' (IBs) outlined in the Code provide examples of the kind of behaviour that may establish whether the outcomes have been achieved and the principles complied with. The solicitors representative body (the Law Society) has issued guidance on good practice under these arrangements.[172] The guidance discusses, in particular, the status of IBs and the risks of not following these, as well as outlining the benefits of recording the basis of any decisions made not to follow an IB. They also raise the possibility of an interaction between regulatory arrangements and civil consequences (i.e.: whether not following an IB may increase the risk of a negligence claim). The Law Society also offer a consulting service which is pitched, in part, at providing expert support to help solicitors navigate through regulatory changes, and to provide a 'compliance health check'.

[171] The provision of information regarding complaints procedures remain compulsory.
[172] See Law Society (2011).

The shift from a largely RBR approach to a more GBR-type approach has been accompanied by a corresponding change in supervision and enforcement. Firms are required to notify the regulator of any regulatory failures, and an important aspect of firms monitoring their own compliance, and identifying and preventing compliance failures, is the requirement on firms to appoint compliance officers for both legal practice and finance and administration. The enforcement approach is described by the SRA as more targeted, and risk based – with resources focused on areas with the greatest risk to the public and clients. In this respect, the SRA has been at pains to distinguish OFR from 'light touch regulation', signaling the new arrangements do not mean a more lax enforcement approach or reduced regulatory obligations.

The shift in regulatory approach also encompasses what might be described as various process-based or MBR-type elements. As noted, solicitor firms are required to appoint compliance offices for legal practice (COLPs) and compliance officers for finance and administration officers (COFAs) with appropriate skills. COLPs are responsible for ensuring that all reasonable steps are taken to ensure firms comply with their authorization and statutory obligations and to record and report any material failures. COFAs have similar obligations in relation to compliance with the SRA account rules.

Although the approach has been applied for a relatively short period of time, the initial perceptions are that:

- The shift in regulatory approach is part of a transition, which, importantly is seen to require a change in the culture of both the regulator and the regulated community. A particular focus is on trying to encourage regulatees to incorporate the objectives into their thinking, such that issues like integrity and their client best interests are front of mind.

- More generally, there is considered to be some scope for moving further towards a GBR approach, by rationalizing the number of outcomes, and reducing the length of the Handbook (the 2014 version still comprises over 400 pages).

- As in the health and safety example discussed above, there is some concern that the flexibility of the GBR approach might lead to over-compliance by some regulatees – particularly smaller enterprises. A particular concern is that, to the extent to which such over-compliance is widespread, this might push up compliance costs which will then be passed on to consumers.

- The tendency to over-comply is seen to reflect a potential asymmetry in how smaller firms approach risk because the downsides of not complying with regulation are significant, and firms would therefore rather over-comply, particularly in a context where the compliance costs can be passed on to consumers in final prices.

- As in other areas, the shift towards a more GBR-type approach has led to the development of compliance consultants, who offer their services to assist regulatees. The SRA is aware of the significant rise in the number of these consultancies and is seeking to alleviate the need for their use, by developing various case studies and webinars to help regulatees (particularly SMEs) to understand how to be compliant under the GBR approach.

- The shift to the GBR approach is seen as important by the SRA because it potentially allows for significant innovation in how legal services are provided. The backdrop is one of significant change in the legal services market, particularly the growth of on-line legal services and alternative business models. In circumstances where solicitors are

providing new services through a variety of different mechanisms, traditional RBR is seen as potentially inappropriate because it may not adequately cover the diversity of business models that emerge, and may, in fact, frustrate product and service innovations.

- According to the SRA, it is already possible to observe innovations in how some firms are approaching compliance under the GBR approach. In particular, new approaches are being applied by new firms entering the legal services space (who tend not to be traditional law firms) and by smaller entrants.
- Some lawyers are seen to have interpreted the non-binding IBs as rules, and therefore to not take advantage of the flexibility associated with the GBR approach to innovate. In part, this is attributed to the culture of some solicitors, whose education and training emphasise compliance with rules.

Food Standards

The Food Standards Act 1999 empowers the Food Standard Agency (FSA) to protect public health from risks which may arise in connection with the consumption of food (including risks caused by the way in which it is produced or supplied) and otherwise to protect the interests of consumers in relation to food.

The general regulatory strategy of the FSA is one which has been described as hybrid in nature; combining elements of a GBR approach and a RBR approach. The type of approach differs according to activities being regulated and the extent to which they are governed by EU regulations.[173] In part, this reflects the fact that much UK regulation relating to food safety and food hygiene (some 90%) is determined at the pan-European level. Most of this food regulation is increasingly directly applicable to regulatees in the UK, meaning that the FSA has limited scope to decide how to implement them.[174] Generally speaking, the EU regulations tend to be fairly prescriptive in nature, or tend to apply a qualified goals approach.

A good example of this is the general hygiene provisions for primary production and associated operations under EC Regulation 852/2004 which relates to the hygiene of foodstuffs. It first sets out a goal in the following terms*: "**As far as possible** food business operators are to ensure that primary products are protected against contamination, having regard to any processing that primary products will subsequently undergo".* However this goal is then qualified by obligations for regulatees to comply with a wide range of other legislative provisions.[175]

While there are some areas where a GBR approach is adopted, the FSA's strategy incorporates elements which might best be characterized as process-based or MBR-like in nature. An example of this is where EU regulations require that the HACCP (Hazard Analysis and Critical Control Point) principles be applied. In brief, the HACCP principles require that food business operators consider how they handle food and introduce procedures to make

[173] There are five main pieces of EU legislation relating to food safety.
[174] See BRE and NAO (2008:15).
[175] Specifically, it notes: "Notwithstanding the general duty laid down in paragraph 2, food business operators are to comply with appropriate Community and national legislative provisions relating to the control of hazards in primary production and associated operations, including: (a) measures to control contamination arising from the air, soil, water, feed, fertilisers, veterinary medicinal products, plant protection products and biocides and the storage, handling and disposal of waste; and (b) measures relating to animal health and welfare and plant health that have implications for human health, including programmes for the monitoring and control of zoonoses and zoonotic agents." See Annex 1 <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2004:226:FULL&from=EN>

sure the food produced is safe to eat. Critically, regulated businesses are required to have an appropriate HACCP-based food safety management process in place. Put differently, the onus is on regulatees to show that the systems put in place to identify and control food safety and hygiene issues are consistent with the HACCP principles.

As part of inspections, business will be examined to see if they have an appropriate HACCP-based food safety management system in place. The HACCP principles do require regulatees to exercise judgement in some areas, and to assist regulatees in this respect, the FSA has developed a range of food safety management packs for different sectors of the food industry, which help food business operators manage their procedures.

A 2008 review of the FSA's implementation of the Hampton Principles[176] concluded that the FSA is constrained by EU legislation on food hygiene issues, but that it should continue to push for changes which allow the UK to adopt a more risk-based and principles-based approach.[177] The review also found that more could be done to link the work of local authorities, who undertake the enforcement activity for the FSA in most areas, to the FSA's strategic outcomes. This would help inspectors' interventions to more clearly focus on issues that posed the greatest risk to the achievement of the outcomes. More generally, the review noted that some stakeholders felt that the FSA's approach (in relation to local authorities) was 'unnecessarily prescriptive and directive'. However, it also noted that the FSA was undergoing a change with the aim of affording local authorities greater flexibility.[178]

More generally there seems to be a desire to tilt the balance of the regulatory approach towards a focus on outcomes for consumers, with a more open-minded approach adopted to the means by which such outcomes are achieved. A number of factors have been suggested for why such a shift may be beneficial.

- First, it is seen as consistent with changes in the industry and in particular higher levels of innovation, particularly in how food is processed. In this context of significant technological change a more prescriptive approach may impede technological developments by prescribing processes and practices *ex ante*.
- Secondly, a shift towards a more GBR-type approach is seen as consistent with the general philosophy of the FSA, which is based around the primary responsibility being placed on food operators to keep food safe. A potential disadvantage of the RBR approach in this regard is that food operators might tend to focus more on the rules than on outcomes and see the regulator as being ultimately responsible for keeping food safe.
- A third factor is that such a shift is consistent with wider pressures and developments in the food supply chain. In particular, such an approach is seen to complement initiatives of, and requirements imposed by, industry trade associations, large supermarkets and other operators in the food supply chain in relation to food safety. These pressures are said to potentially limit the incentive for regulatees to use the flexibility afforded under the GBR approach to cut corners.

[176] The Hampton Report published in 2005 is a cornerstone of the Better Regulation Agenda and sets out various Principles for good regulatory practice.
[177] See BRE and NAO (2008:16)
[178] Local authorities undertake the majority of enforcement activities. Codes of practice have been issued by the FSA to guide local authorities on issues such as the frequency and nature of inspections, and all authorities are required to comply with the Code of practice. The FSA monitors and audits performance of local authorities.

The approach to food regulation in some other countries is also tending towards a GBR-type approach. In Canada, for example, a 2013 consultation sought views on shifting towards a 'outcomes-based' approach to regulation, including performance measurement.[179] Like the FSA, the Canadian Food Inspection Agency (CFIA) applies a combination of prescriptive regulation; systems or management-based regulation, and outcome-based regulation. The proposed change in approach is seen as a response to a changing operating environment and of the need to reap benefits in terms of: increased due diligence, by requiring regulated parties to focus on achieving outcomes rather than fulfilling prescribed behaviours; providing regulatees with more flexibility to introduce new technologies, processes and procedures to enhance safety and reduce cost; and allowing the regulator to adjust to changing science, technology and economic conditions.

The Australia New Zealand Food Standards Code has also adopted the principle of moving from prescriptive regulation to outcomes-based standards, wherever possible. The Code sets down mandatory obligations on food businesses in Australia and New Zealand, and while outcomes are identified, it is within the purview of regulatees (manufacturers in this case) to decide how to comply. The rationale for this approach is to allow regulatees greater flexibility in their businesses and to help achieve the goal of minimum regulation.

Part B: International case studies

This Part presents mainly international examples of the experience of the application of GBR and RBR approaches in specific areas of regulation including road safety; building construction, fire safety, financial services, and securities regulation.

Driving safety

Laws relating to safe driving are often used as the paradigmatic example of the differences between a GBR and RBR approach. Specifically, should such laws be based on precise speed limit rules (such as a maximum of 70 miles per hour) or on more imprecise goals/standards (such as 'drivers should drive safely at all times')? In 1995, in the US State of Montana, the standard approach of applying a numerical daytime speed limit was replaced by a 'basic Rule' of 'reasonable and prudent' daytime driving. This GBR type approach was in place for three years until 1998, after which it was replaced by a numerical speed limit again.[180]

A study examining the effects of this change in strategy found that, in the short-term, the shift had limited effects on driving behaviour of Montana citizens in terms of speed or safety, which is seen as suggestive that informal norms governed much of the behaviour.[181] However, the study did observe a significant increase in fast and somewhat reckless driving by tourists to Montana whom, the author's speculate, may have been attracted to Montana because of its shift towards a GBR-type approach. Indeed, they speculate that the state became a 'speed magnet'. In terms of enforcement, the study concludes that the GBR-type approach created 'serious problems' and, in particular, that its 'vague nature' resulted in many different interpretations by drivers and law enforcement officials. This resulted in increased roadside confrontations between drivers and police officers, and a judicial backlog of cases involving

[179] See Canadian Food Inspection Agency (2013).
[180] The removal was in part because the Montana Supreme Court invalidated the law.
[181] See King and Sunstein (1999).

contested violations. Finally, the study finds some evidence that motorists became more accustomed to the approach over time as drivers adapted to the more flexible approach.

Building control regulations

Another international example of a shift from a RBR to a GBR approach involves building safety regulation in New Zealand in the early 1990s. This episode has received considerable attention, in part, because the shift involved what has been described as a uniquely pure application of the GBR approach.[182]

The background to this change in regulatory strategy is that, up until 1991, the control of building safety was contained in a complex set of prescriptive building codes.[183] The number and complexity of the codes made enforcement difficult and led to a situation where building inspectors would choose the provisions they wished to enforce, resulting in inconsistency in enforcement practices. It was also argued that the high level of prescription, and extent of redundancy, in the building codes' provisions increased the costs of construction, and limited the ability of developers to innovate and adopt new building practices. A 1986 review of the codes found that the system imposed high compliance costs and provided limited scope for developers and builders to apply cost-effective alternatives.[184]

The shift in regulatory approach involved the introduction of a new Act that set out broad objectives (relating to protecting people, health and safety and the environment) and a series of sub-objectives (regarding averting injuries, property damage etc.) The approach to compliance was somewhat unusual in that either local authorities or private certifiers could certify builders and developers.

The shift to the GBR approach has been argued to have contributed to what has become known as the 'leaky buildings crisis'. Specifically, from about the mid-1990s, problems started emerging with the weathertightness of buildings that had been constructed. These problems were associated with moisture undermining the structural durability of parts of the building (such as decking, joints, railings etc.) which can lead to cracks emerging, and potentially the partial or total collapse of the building. It is estimated that the problems of poor weathertightness affected some 42,000 homes, at an estimated cost of $11.3 billion.[185] May (2003 and 2007) concludes that this episode provides a 'cautionary tale' of the application of the GBR-type approach. In his assessment, the GBR-type approach resulted in a 'race to the bottom' in buildings standards as they applied to alternative designs. He attributes this result, in particular, to a lack of accountability and professionalism, noting that: private building certifiers were a weak link in the accountability structure; there was a lack of well-established professional norms; and there was, in some cases, an abuse of professional responsibilities. He also finds that local authorities often resisted being heavy-handed in enforcement in order to encourage developers into their area.

A 2002 government review found that the regulatory arrangements had resulted in a major shift in responsibility and accountability to the industry, who did not guarantee performance against the objectives. It also found that the performance objectives were incomplete, lacked sufficient

[182] See Mumford (2011).
[183] This summary is based on May (2003).
[184] However, May (2003:391) observes that the deficiencies of applying the RBR approach in building codes were not unique to New Zealand, and similar concerns were expressed from the 1970s in other jurisdictions which led to shifts away from prescriptive RBR approaches in many countries such as Japan, Australia, Netherlands, UK, US and Canada during the 1990s and 2000s.
[185] See Mumford (2011:39) who quotes a figure by PricewaterhouseCoopers.

detail, that there was an inadequate system of certification and that there were deficiencies in the inspections processes of local authorities and private certifiers.[186] Another review, undertaken a year later, concluded that the latitude afforded industry to experiment and innovate under the GBR approach resulted in the adoption of low-cost building solutions which were untested.

The New Zealand leaky buildings saga (as it often referred to) highlights the relevance of a number of the contextual considerations noted in section 5. First, it was a context where the flexibility afforded the industry under the GBR approach appears to have been used to cut corners and to under-comply relative to what was optimal. Second, it highlights issues of responsibility and accountability, where the broad nature of the regulatory provisions allowed industry and third party experts to provide content to the goals. Third, there appears to have been a problem of under-enforcement, in part, because local authorities wished to differentiate themselves as being developer-friendly. Fourth, while the shift in approach did encourage innovation, such innovation was not ultimately beneficial.

In considering the apparent failure of the GBR approach in this context, an important question is whether different outcomes would have been observed if the RBR approach had remained in place. This is of particular relevance as, during the period of the shift to a GBR strategy, there was a substantial contemporaneous increase in demand for condominium living, and a growing preference for 'Mediterranean style' homes with plaster and adobe finishes.[187] The views on whether the RBR approach would have resulted in better outcomes is mixed. Two government reports published in the early 2000s recognised the limitations of the GBR approach, but did not support the return to an overly prescriptive regime. May (2003), however, concludes that, while the problems would still have arisen, they would more likely have been identified and addressed prior to becoming a crisis if a more prescriptive regime was still in place.[188]

Fire safety

The GBR approach has been widely adopted in regulating for fire safety, particularly in relation to non-traditional structures.[189] In the US, the shift in approach can be traced back to the early 1990s, when a professional association of fire engineers started advocating for regulatory reform.

A challenge encountered in applying the GBR approach in this area has been the measurement of performance, and in particular, the fact that performance is measured against hypothetical fires. Although there are a number of computer and simulation models, which allow for the testing of ignition and spread of fires, a major challenge is accounting for the unpredictability of human behaviour and response to fire. This highlights the contextual factor discussed in section 5, concerning difficulties associated with measuring outcomes in hypothetical situations.

May (2007) observes that a consequence of the GBR approach being applied in relation to fire safety is that fire-protection engineers have become more prominent in certifying whether a particular structure is adequately resistant to fire. While this places third-party fire engineers in a similar role to that of the private safety certifiers in the New Zealand leaky buildings example,

[186] This discussion draws on the summary in May (2003:395).
[187] See May (2003:393).
[188] See May (2003:396).
[189] The discussion in this section draws on May (2007:20).

any problems in accountability have, in May's view, been tempered by a greater relative degree of professionalism of the fire-protection engineers.

Financial services

Securities regulation in the United States and Canada

Another example where a GBR-type approach has been applied in financial services is the regulation of securities markets in some parts of North America.

In the province of British Columbia in Canada the move towards a GBR approach began in 2004 with the issuing of a new Act based on a principles-based and outcomes-oriented regulatory approach.[190] This approach was in contrast to that adopted in other Canadian provinces, such as Ontario, which are seen as being more prescriptive and RBR-like in character. Although the Act was never fully implemented, the relevant regulatory authority (the BC Securities Commission) stated that it was moving ahead with changing its regulatory approach and how it administered regulation.[191] These changes introduced in British Columbia are claimed to have influenced a more general shift towards a GBR-type approach at the Federal level. For example, a January 2009 Government Expert Panel on Securities Regulation recommended that Canada adopt a more principles-based approach.[192] However, as this report was published in the midst of the financial crisis there was some uncertainty as to whether and how such an approach would be applied.[193]

Various aspects of US financial regulation have also been characterised as GBR-like in approach. US securities regulation, while sometimes perceived as relatively prescriptive and rule–oriented in nature, has, some claim, moved towards a more GBR approach[194] and been described by others as comprising a mix of rules and principles.[195]

The approach to the regulation of mortgage markets in the US has also, in the past, been characterised as GBR-like in nature. Between 1982 and 2009, bank lending practices are seen to have been constrained principally by the high-level regulatory principles that such practices were 'safe and sound' and consistent with 'prudent' underwriting standards. These principles were complemented with non-binding guidance contained in a Handbook. During this period there was a reliance on bank management to determine which practices were unsafe, on the basis that this would allow banks to respond more effectively to changes in market conditions. The approach has been subject to subsequent critical assessment. In particular, it has been argued that it resulted in the offering of unsafe and unfamiliar mortgage products, which increased the short-term profits for financial institutions and led to unsustainable levels of home ownership. In short, the innovation in mortgage products that the approach allowed are seen to have ultimately operated contrary to the long-term regulatory goal of allowing access to credit, as any short-term gains were eliminated with the collapse of the market and with the substantial losses incurred by homeowners.[196]

The regulatory approach has now shifted back towards a RBR-type approach. In 2008, at the start of the financial crisis, the Federal Reserve issued new regulations that were more RBR-

[190] See Ford (2008) and Ford (2010) for descriptions.
[191] See Ford (2008). Black (2008:429) comments that the approach to securities regulation in Canada is principles based but without the principles.
[192] Ford (2010: 259).
[193] See Ford (2010).
[194] See Ford (2008:2).
[195] See Park (2012:133).
[196] See Di Lorenzo (2012:49).

like in nature, including rules that prohibited the issue of mortgage loans where no regard was had to the ability to repay the loan. The Dodd-Frank Wall Street Act of 2010 also adopted a more RBR-like approach to regulation of mortgage products. It is more prescriptive in relation to lending requirements and in prohibiting certain practices. Among other things, the new approach imposes minimum underwriting standards; prohibits loans with no or limited documentation; limits prepayment penalties and prohibits compensation to brokers on the basis of the terms of the loans brokered.

Accounting standards

The relative merits of GBR and RBR has received considerable attention in relation to the regulation of accounting practices. In particular, following the high-profile accounting scandals of the early 2000s there was an extensive debate about whether the US General Accepted Accounting Principles (GAAP) were too rules-based, and that a shift should be affected towards a more principles-based approach, such as that contained in the International Financial Reporting Standards (IFRS).

Up until the early 2000s, the use of the RBR approach is claimed to have been driven by a desire for consistency and for comparability of financial reports. There was also said to be a demand for 'bright line' rules by accountants in the face of potential litigation, and from company executives who sought more definitive accounting information. However, a longstanding concern about the RBR approach to accounting standards, which is said to have been highlighted by the Enron and WorldCom accounting scandals, was that it allowed corporate executives and accountant practitioners to behave opportunistically and to 'play the system'. Specifically, there were concerns that it had allowed accountants and executives to engage in so-called aggressive reporting (or creative compliance), such that they became accustomed to complying with the letter of the law rather than the spirit.[197]

Investigations into the relative merits of shifting from a RBR to GBR approach were conducted across a number of countries in the wake of these accounting scandals. In the US, the Sarbanes-Oxley Act required the Securities and Exchange Commission (SEC) to assess the feasibility of shifting towards a more principles-based approach. To this end, the SEC set out a roadmap outlining a timetable for a potential shift away from the rule-based GAAP standards to the more principles-based IFRS standards. However, the enthusiasm for a more GBR-type approach has been reined back over time by concerns that such an approach will allow excessive judgement.[198]

In the UK, the Financial Accounting Standards Board (FASB) examined the issue, and received a number of submissions claiming that the RBR approach had allowed practitioners to engage in financial engineering and 'exploit the gaps in GAAP'.[199] In 2002, the FASB endorsed the shift away from a RBR approach on the basis that it would result in greater judgment, and accounting treatments that conform to the substance of the transaction. UK accountancy bodies have also examined the relative merits of the two approaches. The general position of the Institute of Chartered Accountants of England and Wales is that a principles-based system provides *a 'more robust and flexible regulatory environment than a prescriptive, rules-based system'*.[200] However, it also recognises that a balance has to be struck between the two approaches and that, in some circumstances, a simple rule may be the most efficient way of

[197] See McBarnet and Whelan (1999) generally on creative accounting practices.
[198] See Institute of Chartered Accountants of Scotland (2006a:i).
[199] See Agoglia, Doupnik and Tsakumis (2011:2).
[200] See Institute of Chartered Accountants in England and Wales (2006).

achieving a desired outcome.[201] The Scottish Institute of Charted Accountants has concluded that principles-based accounting standards can fully serve the needs of business and the public interest, and that a rules-based approach *'adds unnecessary complexity, encourages financial engineering and does not necessarily lead to a 'true and fair view' or 'fair presentation'*.[202]

Nursing homes

An interesting international comparative study of the application of the two regulatory approaches is presented in Braithwaite (2002) who compares nursing home regulation in the US and Australia. According to Braithwaite, the approach to nursing home regulation in Australia shifted in 1988 away from RBR towards an approach based on 'outcome' standards. Specifically, thirty-one outcome-oriented standards were negotiated between different parties (including government, unions, industry and consumer groups) in 1987, and were generally broad in nature. For example, one general standard required that the dignity of residents be respected by nursing home staff, while another required nursing homes to create a 'homelike environment'. By contrast, the approach to nursing home regulation in some US States is characterised by Braithwaite as involving an RBR approach. Indeed, he found that over a thousand different rules applied to nursing homes in most US states.

Braithwaite's overall assessment is that the GBR-type approach in Australia worked more effectively than the RBR-approach in the US. He posits a number of reasons for this. First, he identifies certain undesirable effects that the specific RBR approach had on behaviour, referring, in particular, to an example from Illinois which required that inspectors count the number of pictures on nursing home walls (presumably with the aim of investigating whether the environment was homelike or not). He finds the rule to have resulted in *'the common practice of nursing homes tearing one picture after another out of a few magazines and slapping them up with sticky tape above the resident's beds prior to inspections'*.[203] Braithwaite also describes how nursing home staff complied with the rule that the number of residents attending activities be recorded, identifying situations in which sleeping residents in wheelchairs would be wheeled into rooms where activities were occurring so they could be ticked off in the attendance book. He also argues that a profusion of rules in the US meant that inspectors simply were not aware of, or did not apply, the majority of them.[204] Finally, as specific protocols were typically attached to the rules, this was seen to provide some nursing home administrators with an ability to creatively comply with the rules. He cites one nursing home administrator as saying: *"Give us the rules, and we'll play the game".*[205]

Braithwaite concludes that, in nursing homes, a rule-following mentality is a 'disaster' for quality of care. This is because nursing home staff can focus unduly on complying with the rules and not the wider desired outcome or, alternatively, can rebel against the system and adopt their own approaches, resulting in inconsistent rule following behaviour.[206] More generally, he argues that some aspects of the task of regulating nursing homes – such as whether such facilities foster a homelike environment – are inherently subjective and therefore incapable of being fully captured in a set of specific rules. Instead, they require staff talking to

[201] See Institute of Chartered Accountants in England and Wales (2009).
[202] See Institute of Chartered Accountants of Scotland (2006b:3).
[203] Braithwaite (2002:61).
[204] Braithwaite (2002:63) refers to one inspector saying that they only use 10% of the rules repeatedly and that most are never used.
[205] Braithwaite (2002:64).
[206] Braithwaite (2002:67).

residents about what a homelike environment means to them, how much private space they require etc., and provision in accordance with these findings.

Summary

This section has examined various applications of the GBR and RBR approaches in the UK and elsewhere in the world. Table 5 below summaries some of the key insights to emerge from these applications.

Table 5: Summary of insights

Case study	Insight
Health and Safety in the UK	A long running example of the application of a predominantly GBR approach, which is seen as particularly applicable to health and safety given the nature of the risks and activities being regulated and the challenges of applying a RBR approach. Generally speaking, assessments of the HSE's regulatory strategy have been positive, and the HSE state that they have observed more innovation in compliance over time. However, there have at times been concerns about: over- or under-compliance by smaller firms and the development of a 'compliance industry' of health and safety consultants.
Solicitors in England and Wales	Regulatory approach shifted from predominantly RBR to more GBR in 2011, against a backdrop of significant change in the legal services market. Initial perceptions are that there has been some innovation in how some firms are approaching compliance under the GBR approach. However, there is considered to be further scope for movement towards a GBR approach, but this will require a change in the culture of both the regulator and the regulated community. There is some concern about over-compliance by some regulatees, particularly smaller enterprises. It has also led to the development of compliance consultants.
Food standards in the UK	A hybrid regulatory strategy is applied combining elements of a GBR and RBR approach, reflecting the fact that much of the relevant regulation is determined at the EU level. There seems to be a desire to shift the balance of the regulatory approach towards a focus on outcomes for consumers, accompanied by a more open-minded approach to the means by which such outcomes are achieved. This is consistent with the approach to food regulation in some other countries which also tend towards a GBR-type approach.
Driving safety in Montana	Following a shift toward a GBR approach, a shared understanding of informal norms is said to have developed among indigenous drivers. However, the shift in approach was (mis) interpreted by non-indigenous drivers as signaling a more lax enforcement approach. The GBR approach also led to multiple interpretations at first, which increased disputes and associated enforcement costs.
Building control regulations in New Zealand	The flexibility afforded builders under the GBR approach is said to have led to cutting corners and under-compliance. It also led to a growth in a compliance industry comprised of third-party experts, which raised serious issues of accountability. Problems of under-enforcement arose because local authorities sought to attract building developers to their areas. Questions exist about whether the innovations that emerged under the GBR approach were ultimately beneficial.

Case study	Insight
Fire safety in US	Performance is assessed against hypothetical fires under the GBR approach. A major challenge is accounting for unpredictability and human responses to fire. Third party expert engineers have become prominent in certification activities.
Mortgage regulation in US	During the period up until 2009, a GBR-type approach was applied to mortgage markets. This is seen by some to have led to innovations that allowed for short-term gains, but were ultimately unsafe and inconsistent with the regulatory objective of access to credit. Since this time, the regulatory approach has become more prescriptive in relation to lending practices, and rules prohibiting certain practices.
Accounting standards	Various accounting scandals of the early 2000s were attributed to creative compliance practices under the RBR approach reflected in accounting standards. In the UK, the approach adopted is more GBR-like which is seen to provide a more robust and flexible approach to regulation, and to remove the unnecessary complexity that can be associated with a RBR approach.
Nursing home regulation in Australia and the US	The GBR-type approach adopted in Australia has been assessed as more effective than the RBR-type approach adopted in some US states. The RBR approach is seen to have led to some 'absurd' behaviour, and to be inappropriate given the difficulty in capturing some of the subjective goals (like fostering a homelike environment) in a set of prescriptive rules.

References

Agoglia, C.P, T.S. Doupnik and G.T. Tsakumis, 2011. “Principles-Based versus Rules-Based Accounting Standards: The Influence of Standard Precision and Audit Committee Strength on Financial Reporting Decisions.” *The Accounting Review.* 86: 747-767.

Akinbami, F. 2013. “Is meta-regulation all it’s cracked up to be? The case of UK financial regulation.” *Journal of Banking Regulation*. 14:16-32.

Arjoon, S. 2006. “Striking a balance between rules and principles-based approaches for effective governance: A risks-based approach.” *Journal of Business Ethics*. 68:53-82.

Bamberger, K.A. 2006. “Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State.” *Duke Law Journal.* 56:377-468.

Black, J., M. Hopper and C. Band, 2007. “Making a success of Principles-based regulation.” *Law and Financial Markets Review*. May 2007.

Black, J. 2001. “Managing Discretion.” Paper delivered for Australian Law Reform Commission Conference on Penalties: Policy, Principles and Practice in Government Regulation. June 2001.

Black, J. 2008. “Forms and paradoxes of principles-based regulation.” *Capital Markets Law Journal*. 3:425-457.

Black, J. 2010. “The Rise, Fall and Fate of Principles Based Regulation.” LSE Working Papers. 17/2010.

Braithwaite, J. 2002. “Rules and Principles” A theory of legal certainty.” *Australian Journal of Legal Philosophy*. 27:47-82.

BRE and NAO, 2008. *Effective inspection and enforcement: implementing the Hampton Vision in the Food Standards Agency*. March 2008.

Canadian Food Inspection Agency, 2013. “*Foundations of an Outcome-Based Approach*.”

Coglianese C., J. Nash and T. Olmstead, 2002. “Performance-Based Regulation: Prospects and Limitations in Health, Safety and Environmental Performance.” Harvard University Regulatory Policy Program Report No. RPP-03.

Coglianese C, and D. Lazer 2003. “Management-Based Regulation: Prescribing Private Management to Achieve Public Goals.” *Law & Society Review*. 37:691-730

Coglianese, C and E Mendelson, 2009. “Meta-regulation and Self-Regulation.” Penn Law School Public Law and Legal Theory Working Paper No. 12-11.

Cooper, J. 2014. “The pros and cons of principles-based energy regulation.” *Utility Week*. 7 November 2014.

Council of Australian Governments 2004. ‘*Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard Setting Bodies*’. <http://www.pc.gov.au/research/completed/national-standard-setting/coag. pdf>

Cunningham, L.A. 2007. “A Prescription to Retire the Rhetoric of “Principles-Based Systems in Corporate Law, Securities Regulation and Accounting.” *Vanderbilt Law Review*. 60:1412-1492.

Decker, C. 2014. *Modern Economic Regulation: An Introduction to Theory and Practice*. (Cambridge University Press).

Deighton-Smith, R. 2008. "Process and performance-based regulation: challenges for regulatory governance and regulatory reform." *Minding the Gap: Appraising the promise and performance of regulatory reform in Australia*. ANU Press. 89.

Department of Work and Pensions 2015. *A final progress report on implementation of health and safety reforms* March 2015.

Di Lorenzo, V., 2012. “Principles-Based Regulation and Legislative Congruence.” *Legislation and Public Policy*. 15:45-108.

Dworkin, R.M. 1967. “The Model of Rules” *University of Chicago Law Review*. 35: 22–23.

Ford, C.L., 2008. “New Governance, Compliance, and Principles-Based Securities Regulation.” *American Business Law Journal*. 45:1-60.

Ford, C.L., 2010. “Principles-Based Securities Regulation in the Wake of the Global Financial Crisis.” *McGill Law Journal*. 55:259.306.

Georgosouli, A. 2011. “The FSA’s ‘Treating Customers Fairly’ (TCF) Initiative: What is so good about it and why it may not work”. *Journal of Law and Society*. 38:405-427

Gunningham, N. and D. Sinclair, 2009. “Organizational Trust and the Limits of Management-Based Regulation.” *Law & Society Review*. 43: 865-899.

House of Commons Regulatory Reform Committee, 2009. *Themes and trends in Regulatory Reform*. 14 July 2009.

HSE, 2001. *Reducing Risks, Protecting People: HSE’s decision-making process*. HSE Books.

HSE, 2009. *Enforcement Policy Statement.*

Independent Farming Regulation Task Force, 2011. *A report on better regulation in farming and food businesses*. May 2011.

Institute of Chartered Accountants in England and Wales, 2006. *Fundamentals – principles based accounting standards*.

Institute of Chartered Accountants in England and Wales, 2009. “In defence of Principles”. *Policy Briefing*. March 2009.

Institute of Chartered Accountants of Scotland, 2006a. “Principles or Rules Based Accounting Standards? A Question of Judgement: A review of the professional, academic and regulatory literature”.

Institute of Chartered Accountants of Scotland, 2006b. “Principles not Rules: A Question of Judgement.”

Kaplow, L. 1992. “Rules versus Standards: An Economic Analysis.” *Duke Law Journal.* 42:557-624.

Kemeny, J.G. 1979. *Report of the President’s Commission on the Accident at Three Mile Island.* GPO 1979.

King, R.E. and C.R. Sunstein, 1999. “Doing without speed limits”. *Boston University Law Review.* 79:155-190.

Korobkin, R.B., 2000. ‘Behavioral Analysis and Legal Form” Rules vs. Standards Revisited.” *Oregon Law Review*. 79: 23-60.

Law Society of England and Wales (2011) ‘Outcomes focused regulation: Overview’ Practice Note. 20 September 2011.

Löfstedt, R.E. 2011. *Reclaiming health and safety for all: An independent review of health and safety legislation*. CM8219.

May, P.J. 2003. “Performance Based Regulation and Regulatory Regimes: The Saga of the Leaky Buildings.” *Law & Policy*. 381-401.

May, P.J. 2007. “Regulatory regimes and accountability.” *Regulation & Governance*. 1:8-26.

May, P.J. 2010. “Performance Based Regulation.” Jerusalem Papers in Regulation & Governance. Working Paper No.2. April 2010.

Mc Barnet, D. and C. Whelan, 1999. *Creative accounting and the cross-eyed javelin thrower* (Wiley)

Mumford, P. 2011. “Best practice regulation: Setting targets and detecting vulnerabilities.” *Policy Quarterly*. 7:36-42.

National Audit Office, 2014. “Using alternatives to regulation to achieve policy objectives.” June 2014.

Nelson, M.W. 2003. “Behavioral Evidence on the Effects of Principles- and Rules-Based Standards.” *Accounting Horizons*. 17:91-104.

OECD, 2012. “Recommendation of the Council on Regulatory Policy and Governance”. OECD Regulatory Policy Committee.

Park, J.J. 2012. “Rules, Principles, and the Competition to Enforce the Securities Laws.” *California Law Review*. 100:117-181.

Robens, 1972. *Safety and Health at Work: Report of the Committee* Cmnd 5034. HMSO London 1972.

Sants, H. 2009a. “Delivering Intensive Supervision and Credible Deterrence” Speech delivered to the Reuters Newsmakers Event. 12 March 2009.

Sants, H. 2009b. “Intensive Supervision: delivering the best outcomes.” Speech by Hector Sants, Chief Executive, FSA. 9 November 2009.

Schauer, F. 2003. “The Convergence of Rules and Standards.” *New Zealand Law Review*. 303-328.

Schauer, F. 2005. “The Tyranny of Choice and the Rulification of Standards.” *Journal of Contemporary Legal Issues*. 14:803-814.

Schlag, P. 1985. “Rules and Standards.” *UCLA Law Review*. 33:379-430.

Shavell, S. 1993. “The Optimal Structure of Law Enforcement.” *Journal of Law and Economics*. 36: 255-287.

Solicitors Regulation Authority (SRA) 2011, *Outcomes-focused regulation at a glance.* October 2011.

Sugarman, S.D., 2009. “Salt, high blood pressure, and performance-based regulation.” *Regulation & Governance*. 3:84-102.

Sullivan, K.M. 1992. “The Supreme Court 1991 Term: The Justices of Rules and Standards”. *Harvard Law Review*. 106:24-122.

Sunstein, C.R., 1991. “Administrative Substance.” *Duke Law Journal*. 607-644.

Sunstein, C.R., 1995. “Problems with Rules.” *California Law Review*. 83:956-

This publication is available from: www.gov.uk/beis

Contacts us if you have any enquiries about this publication, including requests for alternative formats, at: enquiries@beis.gov.uk