

**REFERENCE GROUP ON REGULATING
MEETING 2**

**Ottawa Marriott, Wellington Salon
September 7, 2005**

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Executive Summary

In February 2005, the Government of Canada agreed to review the existing federal Regulatory Policy and develop a proposal to improve the governance system for developing, implementing, reviewing and evaluating regulation. The Reference Group is a key part of a comprehensive consultation strategy on the government's efforts to develop this proposal on regulatory governance.

The Reference Group on Regulating held its first meeting on July 13, 2005. This second meeting was held on September 7, 2005 at the Marriott Hotel in Ottawa.

The meeting was designed to shape the draft Government Directive on Regulating and to reconcile various perspectives on key issues. The Reference Group proceeded to a section-by-section review of the Directive.

Facilitator-led discussions focused on the direction set by “Commitment to Canadians”, the scope of the application of the Directive, responsibilities for Regulatory Analysis, central agency responsibilities and allocation of resources. Among other things, participants noted the importance of parliamentary input into the process of regulation-making. Other discussions focused on the concepts of “problem” and “public policy issue”, “public interest” and “public good”, substantive and process issues, whether the Directive should include a definition of regulation, and the need for clarity of concepts and language since the Directive is intended for both the Canadian public and government officials.

The 3rd and final meeting of the Reference Group on Regulating will be held in late November or early December.

Dominique Dennery, President, Dennery Resources, was facilitator. Lise Legault is the report writer.

Part 1 – Introduction

WELCOMING REMARKS

George Redling, Assistant Secretary to Cabinet, Regulatory Affairs and Orders-in-Council Secretariat, Privy Council Office, welcomed participants and thanked them for their comments on the first draft of the Government Directive on Regulating. He reminded participants of the role of the Reference Group which is to help get the draft Government Directive right in terms of broader public consultations, to bridge diverse perspectives to the extent possible and to provide advice to Ministers. Mr. Redling provided an update on activities since the July meeting of the Reference Group. He referred to the bilateral phone calls with some of the members of the Reference Group in preparation for this meeting.

Mr. Redling pointed out that the draft Directive would be discussed at an interdepartmental meeting on September 8, 2005 to obtain comments from approximately 160 officials from Ottawa and regional offices. He indicated that the Reference Group's advice would inform the public consultations that will be taking place in October and November in certain cities across Canada. He remarked that at the Reference Group's next meeting, comments received during this process would be shared with the Group. In conclusion, Mr. Redling pointed out that today's meeting is key and that it is the beginning of a broader consultation process to provide the best possible advice collectively to Ministers to enable them to make the best decisions.

Questions and answers are presented in Annex A.

PRESENTATION OF AGENDA

Dominique Dennery, facilitator, welcomed the group and walked participants through the meeting process for the day. She referred to the importance of receiving the Group's best advice and reminded participants that while the aim of the consultations is not to seek consensus and that dissenting opinions will be noted, alignment of views is encouraged.

Input received on the Government Directive on Regulating

Presenter: Samir Chhabra, Policy Analyst, Implementation Strategy for Smart Regulation, PCO

Samir's presentation focused on stakeholder feedback on the development of the Government Directive on Regulating. PCO received 29 submissions in total from public interest groups, business and industry associations, provincial and territorial government departments, and others. The majority of respondents indicated broad support for renewal based on the Smart Regulation principles and objectives. Samir reviewed the questions asked and the responses provided in the submissions concerning the strengths and limitations of the current regulatory policy, the principles and objectives, the policy requirements needed to strengthen regulatory governance, and on international cooperation. Samir indicated that overall, provincial and

territorial governments are very supportive of Smart Regulation and the recommendations of the External Advisory Committee on Smart Regulation (EACSR). In addition, he reviewed feedback received to date from other federal government departments. Samir also highlighted some of the key messages from the Reference Group. He referred to a couple of outstanding questions important to address today. He explained that the draft Direction includes a new section on social, environmental and health impact assessment. There was also overall support for the scanning of the international environment for best practices, but how or when do we adopt these best practices remains outstanding. We also heard that directive could go beyond risk management to incorporate a sustainable development approach.

Questions and answers are presented in Annex A.

Implementation Strategy for Smart Regulation

Presenter: Daniel Wolfish, Policy Analyst, Implementation Strategy for Smart Regulation, PCO

Daniel's presentation focused on outlining the purpose and content of the Government Directive, the critical path forward and the role of the Reference Group at today's meeting. Daniel explained the four key points of the Directive as follows: 1) to communicate to Canadians government's commitment to protect health and safety and provide supportive conditions for an innovative economy; 2) to ensure Canadians have information and opportunities to participate in regulating; 3) to communicate to government officials their regulatory roles and responsibilities, and 4) to ensure that Ministers have the information necessary to make sound decisions. He referred to the analytical frameworks, tools and processes and also compared the 1999 Regulatory Policy to the Government Directive on Regulating. Daniel also referred to the guiding principles, the lifecycle approach and to the accountabilities of departments and agencies. Daniel provided information on the next steps with respect to consultations with federal/provincial/territorial governments, other federal government departments, the public consultations, advice to Ministers and the implementation plan.

Daniel proposed some issues to be addressed today as follows: 1) Does the Directive reflect the right policy direction? 2) Do the accountabilities of departments and agencies help departments achieve the government's commitment to Canadians? 3) Is the intent clear? and, 4) What does the federal regulatory community need to implement the Government Directive successfully?

Questions and answers are presented in Annex A.

Part 2 – Reviewing the Government Directive on Regulating

OUR COMMITMENT TO CANADIANS

This facilitator-led discussion focussed on the section entitled “Our Commitment to Canadians”

With respect to the opening paragraph, participants noted

- ✓ whether the title of the section should be “Our Commitment **to** Canadians” or “Our Commitment **for** Canadians”
- ✓ the need for clarity at the outset concerning the connection between regulation (secondary legislation) and enabling legislation rather than on page 7 of the Directive
- ✓ the need to include a reference to supporting a democratic process
- ✓ the need to add a reference to the improvement of standard of living and to quality of life
- ✓ that rather than use the enumeration “citizens, business, labour, etc. the words “Canadian public” be used throughout the Directive
- ✓ in line 40, the preference to use the word “non-governmental organizations” instead of the term public interest”
- ✓ that a reference should be made to sustainable development
- ✓ that sustainable developed has become too contested a term to be helpful; the emphasis should be on governing legislation; providing the “greatest overall benefit” as compared to “net benefit” does not provide more clarity; there are problems with introducing substantive policy goals in the Directive as opposed to process goals

Serving the public interest

Participants discussed whether the phrase “public interest” should be replaced with “public good”. Participants noted

- ✓ that the use of “public interest groups” sometimes has a negative connotation; we are serving the public good as opposed to serving the public interest
- ✓ the tradition of using “public interest” although this is contentious since one cannot define in substantive terms what is in the public interest
- ✓ the protection of various public goods is a more positive role for regulation
- ✓ public good is very important and should replace “public interest”
- ✓ que le principe de « servir l’intérêt public » est large et pourrait être remplacé par « protéger le droit des individus »
- ✓ the need for regulation to be relevant and to serve the interests of institutions as well as the clients it is trying to serve, and to serve the public good as a whole; the need to explain to Canadians that regulation will benefit them and is not only means of control

Instilling trust and confidence

Participants noted

- ✓ That the first two principles are goal oriented, and that the others are means where the Directive is prescriptive; the issue is how to install trust and confidence; the Directive reflects what has been heard around the table and provided in the submissions PCO has received

Supporting a fair, competitive and innovative market economy

There was a divergence of views on whether this principle should remain or be removed. Participants noted that

- ✓ this principle does not belong in this section since it is an objective and not a guiding principle; if it remains a reference should be added to a “sustainable” economy
- ✓ this principle only captures one type of regulation
- ✓ this principle is important and should remain
- ✓ restraining economic activity is not a purpose of regulation, but may be an effect of regulation

Making decisions based on evidence

There was a divergence of views on whether decisions should be based on “evidence” or “rationale” and on whether this principle should remain or be removed. Participants noted:

- ✓ that this principle should be removed since there have been instances where government has held up evidence-based decision making as a “golden” standard
- ✓ that, whether “evidence” or “rationale” is used, the principle should remain since there is a need for evidence that regulation will assist in improving the problem; this provides a rationale to engineer public behaviour (i.e., seat-belt legislation, blood alcohol level)
- ✓ support for a principle on rationale or evidence, since government does not regulate for the sake of regulating; there is a need to know how we are moving from a current situation to a new one
- ✓ that decision-making based on evidence should remain, but that it should reference the precautionary principle to support sustainable development overall
- ✓ there is a continuum and the word “evidence” by itself leads to misunderstanding; “evidence” needs to be explained or elaborated upon in terms of what is appropriate for informed decision-making

Building more responsiveness

Participants noted

- ✓ In the French version of the Directive, line 68, the preference to replace the words “des examens gouvernementaux et publics” with “des indicateurs de comparaison avec d’autres législations”

Demonstrating accountability to Canadians

Participants noted

- ✓ the need to identify a branch or an individual as being accountable
- ✓ the need to better define this principle
- ✓ that there is another important point besides cost benefit analysis and getting the “biggest bang for the buck”, and that is one of sufficiency of regulation and whether or not current regulation is sufficient to meet the intent of the regulation; a greater amount of regulation may be needed

Promoting effective cooperation and efficient processes

Participants noted

- ✓ the need to delete this principle or clarify “efficient processes”
- ✓ the need to explain how this principle will benefit the public good

Other matters raised by participants:

- ✓ that the first principle should be that regulations are effective to achieve their enacted purposes
- ✓ the need to include the concept of timeliness as a guiding principle
- ✓ the need to include a principle on the use of plain language and simplicity
- ✓ that an appeal mechanism is fundamental to the process
- ✓ the need to note in the Directive that regulation is not the only tool and that there are other means
- ✓ the need to consider whether the principles apply to government regulating itself

Participants also discussed substantive policy goals and process goals as they relate to the Directive and whether the section “Commitment to Canadians” should remain in the document.

Participants noted

- ✓ the difficulties with the principles and confusion of means and ends
- ✓ the concern in the report of the Auditor General that the 1999 policy has too strong an emphasis on economic goals and that the regulatory policy contains potentially conflicting requirements, and the problem with introducing substantive policy goals in the Directive as opposed to process goals
- ✓ that Canadians will have diverging views and that giving primacy to legislation rather than trying to articulate substantive policy goals may lead to a clearer document
- ✓ that there is no agreement on the principles that Cabinet approved for the consultations, and that there are difficulties with this and the lack of consensus with proceeding in this way

- ✓ that it is not easy to distinguish between substance and process, but that the Directive does not address the issues identified by the Auditor General
- ✓ that the drafters tried to bend over backwards to say that there is not a presumption in favour of a narrow economic definition of regulation, but that regulation is also about promoting enabling and positive things to happen in the social sense
- ✓ that the document is about providing advice on how to implement regulation; policy leadership remains the responsibility of Cabinet
- ✓ there could be a long debate about which principles are in or out, but the principle dealing with “supporting a fair, competitive and innovative market economy” should remain; regulation emerges in the balancing of this principle with the public good principle
- ✓ the section should refer to the government’s role in regulating, the purposes of regulation to control economic activity and to protect public good (restrain, protect and promote)
- ✓ that the “Commitment to Canadians” is a good articulation of what was not sufficiently fleshed out in the 1999 policy; there really is a means and end component; the first 2 paragraphs and the first 2 principles are goal-oriented; the rest are means about how we go about reaching the goals; have we said enough about the means which are a reflection of current values; the section reflects the issues raised around the table we would be remiss; the section reflects what we have heard around the table and what PCO has heard through the submissions
- ✓ the section should remain in the document; we would be remiss if we did not set out the government’s commitment to Canadians
- ✓ the need to emphasize accountability to Canadians
- ✓ the section should remain in the document and cannot be watered down; it is a directive to officials, and it is preferable to err on the side of more principles than less
- ✓ the section needs to maintain the details; the balance the section is trying to establish is important

ACCOUNTABILITIES OF DEPARTMENTS AND AGENCIES

Sections I and II - Scope of Application and Regulatory Analysis

This facilitator-led discussion focused on the Scope of Application of the Government Directive and Regulatory Analysis section of the Directive.

1. SCOPE OF APPLICATION

Participants noted:

- ✓ that the political and legislative context to the making of regulation should be made explicit
- ✓ in line 81, the reference to “policy, legislative and regulatory proposals” should be clarified to make it clear that the Directive is addressing the development of secondary instruments
- ✓ the need to broaden the scope to include 4 types of social regulation as follows: 1) reactive regulation where there is a problem and where risk assessment and cost benefit analysis are relevant; 2) preventive regulations which are not risk-based and where risk-management is irrelevant; these regulations have a rationale but are not evidence-based; 3) sustainable development regulations; these have a rationale but are not evidence-based; 4) regulations establishing public rights; these will also have a rationale but are not evidence-based
- ✓ that the intent of preventive and pro-active regulation embodies the spirit of sustainability and public rights, so there is a need to caution that the 4 types of social regulation are not mutually exclusive
- ✓ need to focus on public policy “objectives” which could be preventative, etc.
- ✓ the difficulty in introducing a more specific definition of regulation;
- ✓ in line 83 should read “commitment” and not “commitments”
- ✓ in line 93, and throughout the document, the need to be clear with respect to “Canadians” “other interested parties”, and “affected parties”
- ✓ in line 93, the need to be consistent or to clarify words, such as “consultations”, “dialogue” and “engagement”; there is also a need to reflect a continuum of involvement
- ✓ in line 99, the need to delete the word “maintenance” with respect to “sustainable maintenance”
- ✓ in line 101, that evaluation and review are the same, and that reporting should be added to the list
- ✓ the need to identify responsibility and the consequences of evaluating and reporting

2. REGULATORY ANALYSIS

A) Conducting Consultations or a Dialogue with Canadians

Participants noted the need to include a reference to consultation with Parliament and to give broad direction to departments in this regard possibly through the requirement of a communications strategy. PCO asked for additional guidance on this issue, whether the intention was to engage Parliament on every regulatory initiative or whether there might be a more generic way of engaging Parliament. It was suggested that one option might be to make all regulations available to parliamentarians as soon as they are ready to go into pre-publication. One participant suggested that another option would be to have Parliament review regulations based on their common characteristics, for example, international agreements implemented solely by regulation. Another participant pointed out the difficulty in establishing selection criteria, while

another, while another asked whether there might be a role for PCO as a central clearing house in this area.

Participants also noted:

- ✓ the need to be consistent or to be clear as to the meaning of the words “consultation” and “dialogue”
- ✓ in line 121, the need to refer to the parent legislation established in response to the problem
- ✓ in lines 115 and 119, the need to clarify the meaning of “engaging” and “balanced engagement”
- ✓ that the process needs to be more clearly defined as to who is involved and at what stage, and that the communications strategy is a link to transparency, and the consultation and engagement processes
- ✓ in line 105, that the word “Canadians” is very broad and could be narrowed to consultations with “affected Canadians”
- ✓ that the EACSR report pointed out that, where appropriate, public participation must be resourced in order to provide appropriate advice to government
- ✓ that consultation should be considered as part of identification, selecting and assessing regulatory responses
- ✓ in line 92, the need to replace “are expected” with “are responsible”
- ✓ Line 137 could be split into two bullets
- ✓ Line 140 should read “for a minimum of thirty days...”
- ✓ Line 144 seems to imply that international obligations are equivalent to legislation

B) Identifying and Assessing the Problem

Participants discussed whether or not to replace the word “problem with “public policy issue” which is already used in line 159. In this regard, participants noted:

- ✓ that the phrase “public policy issue” should replace “problem” and that the Directive should refer to the different categories of regulations for which risk assessment and cost benefit analysis are relevant and irrelevant
- ✓ that for some uses “public policy issues” should replace “problem”; but that there is the reactive type of regulation for which it is legitimate to use the word problem
- ✓ that the use of “public policy issue” is also appropriate if there is a problem; the response is different, but the 4 categories are all “public policy issues”; every regulation falls into the category of a “public policy issue”
- ✓ the need for a preamble to explain that for certain types of regulation, the question of social or environmental problem will arise and a consequence is that this is linked to the notion of risk; the document should make it clear that it is dealing only with the type of regulation where there is a problem and where risk is relevant

- ✓ that if the Directive is to be balanced and flexible, there is a need to mention the different types of regulations; the Directive has focused on the reactive type of regulation that responds to a problem and then it sets out a procedure to deal with questions of risk assessment and cost benefit analysis
- ✓ if the Directive tried to deal comprehensively with the 4 types of regulations and procedures, it would be a different type of document; the least that can be expected from a public consultation is that the document refer to the 4 types of regulations and mention that rationale in each case will be different; the Directive could then deal with the reactive type of regulation; this should be addressed in the scope and reinforced in section B. This would meet the minimum requirement
- ✓ that the document is colored by the perception that we must not produce regulation that interferes with a climate of investment and free trade; in that context, regulation is seen as negative; “public policy issue” is the right phrase, since it does not prejudice whether regulation is good or bad
- ✓ not all things are “problems”; they are “public policy issues” until they are assessed as problems. If the issue is a problem or potential problem there are 2 paths: those that require regulation and those that require something other than a regulation, and this Directive deals with those that require regulation
- ✓ that substituting “public policy issue” for problem is appropriate; different types of regulation pose different analytical challenges in terms of calculating risk and the nature of the risk; the Directive will guide actions of departments and agencies working in various policy areas, and there is a need to strike a balance between conciseness and setting broad parameters and not being unduly prescriptive.
- ✓ the section should not identify the notion of problem with notion of risk
- ✓ line 156 should be written so that there is one clear concept of risk
- ✓ line 170 “Submit assessments of the problem for external review...should be clarified
- ✓ the need to reference the context for a particularly regulatory activity back to the legislation that has identified the problem
- ✓ in line 168, it is more than “public perception” or quantifying risk; there are qualities of risk in that people will find some risks more unacceptable if they are involuntary as opposed to voluntary or if consequences are catastrophic as opposed to not;
- ✓ that “public perception” does not belong here
- ✓ in line 169, “where appropriate” should be removed

- ✓ that even in terms of public rights, there are public right that we do enshrine in law and protect through regulation; risk analysis can be applied to these regulations, and regulation can be anticipatory and preventative, and this entails the notion of uncertainty.
- ✓ that there is some risk involved in all cases
- ✓ that the primacy of risk assumption is not acceptable
- ✓ that there is no consensus on the quantification of risk as being the foundation of a regulatory system

C) **Selecting and Assessing Regulatory Responses**

With respect to *Selecting the appropriate mix of government instruments*, participants noted

- ✓ that there should be reference to the Canadian standards system or the utilization of Canadian standards on page 5 under mix of instruments to counter line 247
- ✓ that government does not have many instruments to work with other than the choices of regulation or “scouts honour”; it is not clear what direction this section provides to departments
- ✓ the tool kit is expanding not contracting, and there have been innovative approaches by different levels of government, including voluntary programs, mechanisms where governments have financed activities and provided incentives to participate, programs where industries has made a voluntary commitment to do something, or where contractual arrangements are made with sectors; this does not constitute regulation, but it is implied or explicit that there will be regulation if compliance is not be met
- ✓ the need to think about all options and to consider focusing regulation on the 80% of actors where issue has the most impact
- ✓ that this is a government-wide approach, and where a department does not have the authority to develop, for example, a tax instrument, it would be up to that department to advocate and educate the other department responsible for the development of such a regulation
- ✓ the need to highlight accountability assessment in the mix of instrument since there is a tendency to finance non-governmental groups that are not accountable to anyone
- ✓ the possibility of regulatory gaps because of jurisdictional confusion or interdepartmental rivalries, and the need to modernize the notion of accountability to take into account that increasingly governments are partnering with other levels of government, non-governmental organizations and new entities that are beyond the traditional frameworks of departments

- ✓ in line 192, presumably the major criteria is whether the regulation will accomplish the intent of the legislation; whether it is most effectively achieving the objective, one may wish to look at whether there are other means of achieving the objective that are not as intrusive for other areas, but if we are looking at selecting the appropriate mix this is not the principal criteria to consider
- ✓ In line 201, the need to take into account circumstances where it is necessary to achieve universality of standards; the fact that a product may meet certain performance levels is not necessarily indicative that standards should be relaxed
- ✓ in line 205, the word “positive” should be deleted

With respect to ***Assessing opportunities for coordination and cooperation***, participants noted

- ✓ the need to strengthen coordination vis-à-vis a whole of government approach
- ✓ the Directive refers to both interdepartmental and intergovernmental coordination; line 215 suggests that there is a fear that regulation will expand and that there will be unintended negative impacts
- ✓ the need to consider how to address cooperation with Aboriginal peoples who have self-government capacity

With respect to ***Cooperating internationally***, participants noted

- ✓ in Line 251, delete “only when merited by specific circumstances”
- ✓ in line 244, “under international agreements” should be replaced with “under international law including agreements”
- ✓ that Line 254 is captured by line 251
- ✓ in line 205 or 247, the need to consider the opportunity to link with international reviews on assessments of technologies and products rather than creating a new Canadian system and to learn from assessments and reviews from around the world; uncertainty about whether or not jurisdictions (i.e. G-8, European Union) to be relied upon should be specified
- ✓ the need to take into account the difference between “cooperating regionally” and “cooperating internationally”
- ✓ in line 247, the need to add sharing of assessments and acceptance of empirical information
- ✓ in line 199, the need to clarify the limited scope of this clause which should be restricted to technical devices and cases where there are quite clear barriers to trade, where there have been solutions proposed that address those barriers. If applied generally as a way of

saying departments must always put into place performance standards rather than specifications standards in the area of social policy, occupational health and environmental protection, this will be construed as an exercise in deregulation

D) Analyzing Impact of Proposed Options

Assessing Social and Environmental Impacts

Participants noted:

- ✓ in line 274, the need to add a reference to maximizing the positive environmental and social impact of regulatory activity
- ✓ in line 279, the need to be consistent and to add a reference to health since it is mentioned on pages 10 and 12
- ✓ whether there is a need to be explicit that regulation should not adversely impact on other groups of people;
- ✓ the need for more directed guidance to departments and agencies about how to do assessment of social and environment benefits and costs; it is easier to quantify costs economically than it is to quantify benefits and costs to the environment and health; the Roundtable on the environment and economy has been tasked with helping government in this regard, and there might be some reference that could be made to it
- ✓ in lines 279, the phrase “on an equal basis” should be clarified
- ✓ in line 279, the reference to economic considerations should not appear since the Directive contains a whole range of economic safeguards and this section deals with social and environmental impacts
- ✓ whether it is necessary to have separate headings for assessing social and environmental impacts, and economic impacts, if we are taking a sustainable development approach

Assessing Legal Implications and International Obligations

Participants noted

- ✓ in lines 307 and 308, the need for more general language
- ✓ in line 295, that if legislative objectives are paramount, ensuring that they are authorized by the Act is not sufficient; there is a need to add a reference to ensuring that they are implementing the objectives; this should also be added on page 11
- ✓ in line 301, the need to add “in as a transparent manner as possible”; the reason why we implement international obligations is different than domestic concerns, and departments should make an effort to identify why the regulation has been implemented

- ✓ in line 307, replace “specifically” with “with regard to trade obligations”
- ✓ in line 307, there are many international obligations, and the primacy of one over the other has not been settled

Assessing economic impacts

Participants noted

- ✓ in line 324, a reference should be added to maximizing the benefits of regulation
- ✓ in line 324, reword in such a way that departments should consider if similar results could be produced with a lower regulatory burden
- ✓ in line 329, build in a reference to a regulatory regime encouraging an innovative or sustainable economy as opposed to the things it is not doing
- ✓ In line 330, change “absolutely necessary” to “demonstrably necessary”
- ✓ In line 334, the concept of competitiveness should be broadened (i.e. job creation)

Analyzing the benefits and costs of Regulation

- ✓ In line 337, a reference should be added to ensure an analysis be done at the appropriate point demonstrating that regulations have achieved their objectives and that there is an obligation to compare actual cost of implementation with the projected costs

E) Planning for Implementation and Compliance

Participants noted

- ✓ under line 359, the need to be more clear in that the first part is dealing with the drafting of regulation and that the rest of this section is referring to compliance and enforcement
- ✓ in line 363, the need to add that regulation be designed to be uniformly interpreted and not only designed to be easily understood
- ✓ in line 362, whether it is necessary to refer to the preparation of regulations in both official languages, since this is an obligation under the Official Languages Act; if the reference remains, substitute “are expected” with “are responsible”
- ✓ in line 364, add a reference to the people who must administer and comply with regulations

- ✓ the need to verify line 368 to 371 with the Department of Justice;
- ✓ in line 373, the need to refer to both enforcement and compliance;
- ✓ in line 381, the need to refer to timeliness for regulatory activity
- ✓ in line 386, reference to the enforcement of regulation should be made
- ✓ in line 391, the need to add reference to timelines and milestones

F. Measuring, Evaluating and Reviewing Regulation

Participants expressed a divergence of views on whether or not lines 428 to 439 should remain in the document.

Participants noted:

- ✓ that the purpose of line 428 is not clear and should be phrased in a neutral fashion or might be deleted. If it remains, reference should be made that the foremost importance of regulation is to carry out the purpose of legislation. The first assessment is whether or not it is continuing to carry out the legislative intent. One cannot usurp the parliamentary role in crafting the intent of the legislation. All one can do is evaluate if the regulation carries out the intent and if it does this in a way that is most beneficial to the public interest
- ✓ that line 438 is inappropriate and should be rephrased to remove the tension between social and economic considerations
- ✓ that line 438 should remain because of the principle of “supporting a fair, competitive and innovative market economy”; there are activities under regulation where we do want businesses and consumers to have access to competitively priced goods and services;
- ✓ that the principle of “ supporting a fair competitive and innovative market economy” should be deleted; if it remains, it should be evaluated
- ✓ the need to take stock of the continuing relevance of current regulatory activity in a public policy field in terms of upholding goals of public policy in an Act of Parliament either through the roles of TB and PCO or through a lifecycle process with a sunset provision; could departments decide on their own on the timetable; for some regulatory programs it may take longer to demonstrate success than for others; it is a balance between centralization and decentralization
- ✓ evaluation has different meanings; the methodological requirements for systematic in depth evaluations should be described, who are the primary and secondary audiences for evaluations; there is a need to ensure the utilization of evaluations, and that there is accountability and consequences

- ✓ the need for accountability; performance measurements are not accountability tools; timing should be referenced in the section; 428 should remain in the document
- ✓ support for the inclusion of line 428 in the Directive since it ties directly back to page 1; there is a need for a benchmark to audit existing regulations
- ✓ there is a need for resources in terms of reporting

Section III RESPONSIBILITIES FOR PLANNING AND REPORTING TO CANADIANS

Participants noted

- ✓ that the results of evaluations should be publicly available
- ✓ in line 444, “affected parties” should replace “interested parties”
- ✓ that “Parliament” should be added to “Reporting to Canadians”

Sections IV through VIII

This facilitator-led discussion focussed on central agency responsibilities, allocation of resources, and consistency with other federal government policies and legislation

With respect Section IV and the role of the **Privy Council Office**, participants noted

- ✓ the need for policy leadership on regulatory reform and the development of a professional community, and the notion of a shared administrative culture around Smart Regulation
- ✓ that PCO has a key role in promoting policy leadership across government
- ✓ the need to enhance regulatory culture in terms of smart practices and the role of PCO as a centre of expertise

With respect to Section 5 and the role of the **Department of Justice**, participants noted

- ✓ that the Department of Justice should be given a forum to provide an opinion but not to overshadow the decision-making process, the key word being “advice”
- ✓ whether it would be possible for the Directive to specify that when there is a clear consensus on policy and language as a product of consultation, the Department of Justice will adopt the language that has been developed in stakeholder consultations

With respect to Section 5 and the role of the **Treasury Board Secretariat**, participants asked a number of questions of clarification as follows:

Question: Does accountability for capacity lie with TBS? Does TBS make decisions about resourcing and ensuring that there is capacity in government so that the regulatory process flows as intended?

Answer (PCO): TBS has primary responsibility for program assessments and decisions; it is the government's internal financial management department. The Secretary to the TB will provide advice to TB Ministers for their consideration and approval as to how monies are spent within departments and programs.

Question: When a compliance and enforcement plan that accompanies a new regulation comes forward, what role does TBS play in ensuring that the plan is resourced?

Answer (PCO): The department would have to make an assessment as to whether it could cover the plan within its existing A-base; if it could not, it would have to submit a Treasury Board Submission for consideration by TB Ministers.

Question: If a Submission fails and a department does not receive the financial support it requires, does the department proceed with the regulation or does the regulation fail?

Answer (PCO): The department would have to make a decision as to how it prioritizes its resources, and whether or not this regulation will be financed internally, and how the department will reallocate.

Section V1 Appropriate Allocation of Analytical Resources

Question: In lines 552 to 570, has the framework for assessing, selecting and implementing instruments for government action (on page 5) been left out as an oversight?

Answer (PCO): The framework identified on page 5 should be identified in section 8. The question is do we list all the frameworks here or do we just have one sentence in case other frameworks are developed.

Part 3 – Consolidating Views of the Day

In closing the session, Dominique asked participants to share one or two key points they wished to highlight. In addition to points already shared through e-mail, participants noted

- ✓ the need to include references to standards, and to ease of interpretation and clarity
- ✓ the need to ensure that the Directive clarifies that it is intended to affect subordinate legislation that emanates from statute and to include a definition of regulation

- ✓ that the development of regulation should not be intended to support a fair, competitive and innovative market economy unless you are dealing with particular legislation whose goal it is to do those things
- ✓ the importance of encouraging innovation in Canada for developing sectors, and support for principles as outlined
- ✓ the need to stress that regulation is a positive instrument of public policy, that there are several types of regulation, and that each has a different rationale and purpose, and that there are different modes of administration and evaluation
- ✓ Regulations should be relevant to the people affected by them; the need for the regulations should be understood and there is a need for a mechanism for those affected to have input
- ✓ that one purpose of regulation is to protect Canadians against negative consequences of economic activity
- ✓ an appreciation for the section on Commitment to Canadians as an overarching component;
- ✓ the much improved draft over the 1999 directive; the need to ensure that as exercise comes to close on paper, there is a robust change management plan that will be very important in terms of training; capacity is also key; regulation is positive and has enabling role but if capacity is not there to affect regulation in timely way, it affects the ability to realize the section of “ Commitment to Canadians”
- ✓ that the sections on commitment and principles are key, and that the document will be important in terms of communicating a message and that this links to the culture change that will be required
- ✓ that the group is closer to its primary purpose of developing a sound and practical policy regarding implementation of regulation and measuring and assessing its impact; we cannot go back to the pros and cons of regulation; the wider debates about regulation will be ongoing; the Directive is mainly an administrative policy document

Part 4 – Conclusions and Next Steps

George Redling commented on the near 100% participation of the Reference Group at both its meetings. He thanked participants for their thoughtful and helpful comments. He pointed out that there seemed to be a consensus amongst the participants to keep a section entitled “Commitment to Canadians”, though there were mixed views on the inclusion and content of several of the principles, particularly the principle dealing with the economy. Mr. Redling said that further thought would be necessary on the role of parliamentarians in regulatory governance and that a

project on parliamentary engagement is underway. He referred to the discussion around “problem” and “public policy issue”, and indicated that while he understood the limitations that the word “problem” may involve, further discussion may be required. Mr. Redling explained that we must be mindful about possible unintended consequences with implementation.

Mr. Redling confirmed that the Directive is intended to be a change agent document intended for the Canadian public and for government officials. He referred to the need to make the Directive as clear as possible in order to avoid ambiguity and confusion. Mr. Redling thanked the members of the Reference Group for their comments, and pointed out that he would keep the Group informed of activities taking place between now and the next meeting.

It was pointed out that the next meeting of the Reference Group would be held following the public consultation process. These consultations will take place at the end of October over a period of two weeks. The Directive will then be redrafted, so it is expected that the next meeting of the Reference Group will be held in late November or early December. PCO asked members to submit available dates for the last week of November and first week of December. PCO will consult the Group on management of the agenda for the next meeting and how much time to allocate to each of the components. PCO also requested suggestions on who should be participating in the public workshops so that they can be invited.

APPENDICES

Appendix A

Summary of Questions and Answers

SUMMARY OF QUESTIONS/ ANSWERS/COMMENTS FOLLOWING OPENING REMARKS BY GEORGE REDLING

Question: Do you have details on dates and locations of public workshops? It would be useful to receive information as soon as possible

Answer (PCO): We have planned to begin public consultations in late October. We will be sharing our plans with the Reference Group through e-mail and will be happy to receive feedback in order to invite the appropriate groups.

SUMMARY OF QUESTIONS/ANSWERS/COMMENTS FOLLOWING THE PRESENTATION ON INPUT RECEIVED ON THE GOVERNMENT DIRECTIVE ON REGULATING

Question: Does the government of Quebec support the adoption of common standards in their submission?

Answer (PCO): There is a generally supportive tone for Smart Regulation through the 7 provincial submissions, and the facilitation of trade was raised in many submissions. The submission from Quebec did not specifically refer to common standards.

Question: Was there a submission from Quebec and was the focus of this submission on internal trade barriers?

Answer (PCO): Yes, Quebec sent a submission. Provinces presented submissions that focused on the broad picture and indicated broad support. Provincial submissions did not address technical or specific issues. There is also a federal-provincial-territorial meeting scheduled for mid-October. We will be meeting with provincial officials during the public consultations across Canada in October and November. We expect that more specific comments will be forthcoming from the provinces at that time.

Question: Could you elaborate on the 10% who are opposed?

Answer (PCO): There were only three “opposed” submissions. One of the comments we heard was that there might not be enough understanding of what Smart Regulation is overall and that there is no academic literature on Smart Regulation. Some of the comments were more specific to particular legislation. For example, regulation should not replace the current Food and Drugs Act. This is not something that this Directive will do.

Comment: From your positive responses in the submissions, one had to do with empirical analysis in the development of regulations. However, we do not see empirical analysis about how the current regulatory policy works in practice, and we do not know how decisions are currently made. There is a desire on the part of government to change the Government Directive, but we have no empirical analysis on why this is happening. The OECD focus is much more based on process and much less on the social and economic objectives. I do not see that concern reflected here.

Answer (PCO): There has been some key analysis done to inform our thinking and to drive some of our analysis. There have been four major processes. First, in 2000, the Auditor General’s report on health and safety regulations focused on the role of regulatory policy. Second, in 2002, the OECD was invited to Canada to undertake a review of the regulatory system and provided an analysis of some of its strengths and weaknesses, and provided recommendations for further improvement. Third, the External Advisory Committee on Smart Regulation reported in 2004 and proposed 41 recommendations on regulatory governance, including the renewal and updating of the regulatory policy. Four, there has also been ongoing review internally and through stakeholder engagement. While analysis has not been statistical, it is an analytical analysis that has provided a strong basis for change.

Question: Is there a synthesis that PCO has prepared that we could see? It could provide further insight.

Answer (PCO): Included in the binder for the first meeting of the Reference Group was a chart that synthesized the inputs of the Auditor General, the OECD, and EACSR.

Question: Since Parliament is involved in making laws that lead to regulations, when will parliamentarians see the Government Directive?

Answer (PCO): We are working on a parliamentary engagement strategy. We have already appeared before the Standing Committee on Industry to explain the Smart Regulation approach. We will have to engage in more of that, but no specific timing has been established since we want to see how work progresses.

Question: Is it a standard practice that departments that have a large scope of regulatory responsibility report on an annual basis on their performance relative to the standard?

Answer (PCO): Departments are supposed to account for their performance through their annual Reports on Plans and Priorities and Departmental Performance Reports. The issue is whether and how this can be strengthened.

Comment: Over a number of years, studies have identified perceived deficiencies in the regulatory process, but we get entangled in the distinction between the substance of regulation and the procedures that guide regulation. There will be disagreement on substantive issues because we have different perspectives on the current and future role of government. It seems to me that the regulatory process should not be biased either towards pro-regulation or anti-regulation, but that it should be neutral. In the United States, with respect to contracting out, Congress has put in its law a rebuttable presumption in favour of contracting out – a preference to use the private sector whenever possible to produce goods and services. I do not think we have the same arrangement in Canada. The Directive should address procedure acknowledging that substance and procedure go together quite often.

Question: Has PCO done polling of Canadians? It would be useful to get existing information.

Answer (PCO): We have not done any public opinion research on the development of the GDR. Public workshops will be the main opportunity to obtain input as well as web-based consultations. Last fall, PCO commissioned public opinion research on Smart Regulation that revealed that Canadians had not heard of Smart Regulation, and that as long as things were working well and that the government does its job, Canadians will not be thinking much about regulation. We will share the reports of this public opinion research with the Reference Group.

Comment: The substance and process discussion is important. On the substantive issues, there is some analysis of the effectiveness of substantive instruments. The University of British Columbia has done a number of studies on the effectiveness of traditional regulation in terms of what motivates actors to comply. On the process side, we do not have rebuttable presumption for or against anything in the regulatory policy, but I see a heavy bias against regulation, and a number of obstacles and tests that are unanswerable in a right or wrong manner. I do not know which regulatory proposals have been rejected or turned into voluntary agreements which research has shown does not have the same effectiveness in achieving compliance.

Comment: On the general point about the approach of the Directive, there is a temptation by some PCO personnel to go beyond administrative and process issues. For example, I do not think that the Directive should address the prioritization of economic and social issues. It is the elected government and Parliament that determine priorities. The Directive should not bind government policies. The function of the Directive is to outline how departments are obliged to implement and carry out the intention of the legislation. I would like to see a distinction made between the substantive and the process issues, while at the same time, expanding the notion of policy objectives so that the Directive can accommodate approaches to regulations that go beyond the identification of problems and the risk based approach that we see in the document. This does not mean that the government is obliged to introduce specific types of regulations. However, the Directive must be sufficiently flexible to lay down the modes of regulatory implementation regardless of the type of regulation that the government decides to

introduce.

Comment: This is an important point. We are talking about the neutrality of the process. I do not know where the notion of giving direction on the prioritization of economic and social objectives has come from.

Question: When there are issues brought to the fore to enhance the Directive, what criteria are used to determine which ones are accepted and discounting?

Answer: Daniel will be addressing this in his presentation.

SUMMARY OF QUESTIONS/ANSWERS/COMMENTS FOLLOWING THE PRESENTATION ON THE GOVERNMENT DIRECTIVE ON REGULATING

Question: Can you define regulation and regulatory authority as they are used in the context of this Directive?

Answer (PCO): The existing Regulatory Policy uses the term regulatory authority to refer to departments and agencies. In this document we have substituted the term Regulatory Authority with departments and agencies, since regulatory authority may be a bit narrow. There are departments that are responsible for the administration of regulations, but there are also departments that have an interest in regulations that they themselves may not be the primary developer or implementer of. We talk about departments and agencies to broaden the scope to ensure analysis and coordination is across government to provide a more whole of government approach to the way we are moving forward. In terms of the definition of regulation, this Directive is focused primarily on secondary legislation. We are working with other parts of PCO and the Department of Justice to ensure coherence and alignment with the Cabinet Directive on Law-Making.

Question: Regulatory authority is used in line 42 of the Directive. It is important to clarify this at the outset of the Directive to know that we are dealing with secondary legislation and that the objectives have already been set by primary legislation. The Directive is subservient to parliamentary authority. Where is this reflected in the Directive?

Answer (PCO): It is included in two places. On page 7, line 287 which deals with the role of departments and agencies to ensure the regulations are authorized by an enabling Act, and on page 11, line 497 where the Department of Justice is expected to examine all proposed regulations to ensure that they are legally authorized to be made.

Question: Where does the strengthening of PCO's challenge function sit with other

departments?

Answer (PCO): Departments are very supportive of a strengthened challenge function. I think the issue is what does this mean. Overall, there is recognition for the need to enhance PCO's function with stakeholders and departments. Some people feel the role should be that of gatekeeper; more recently, PCO has been playing a facilitator role and assisting in the process. The issue is how much of a role should PCO play in rejecting, challenging, enhancing and coordinating.

Comment: PCO uses the phrase "making decisions based on evidence". For some regulations, this is fair. For other types of regulations, it is irrelevant or restrictive. For example, the reason for regulation may be that it is in the pursuit of government policy objectives. It may not be to address a problem. An example is the disclosure of information, where you are concerned with public rights. There may not be evidence that we have a problem. I would prefer to see the word "rationale" used for decision-making rather than evidence. I would not like to see the word "justification". If you say regulations have to be justified, it conforms to the generally negative tone of the draft.

Comment: In the same context, the word "problem" also needs to be changed.

Question: To which extent does the Directive provide for the future role of Parliament? If enabling legislation does not address that issue, does the Directive allow a department or agency to seek parliamentary input? Canadians do not know unless law specifically provides for it. It is something to think about in terms of process.

Answer (PCO) There is nothing to prevent any department or parliamentary Standing Committee to do provide Parliamentary input now. Even without the enabling legislation requiring this, Parliamentary input already occurs. It is at Parliament's discretion.

Question: If this is a Directive on process to establish regulations, perhaps the Directive should specify when departments should consider forwarding regulatory proposals to parliamentary consideration rather than leaving this to the discretion of departments.

Answer (PCO): Discretion also rests with parliamentarians. Most of you are aware that publication in the Canada Gazette is not the only public examination of regulations. Over the past 10 years, the making of regulation has evolved much more towards a stakeholder input process. Some departments do this better than others and have a sophisticated stakeholder system in place, for example Transport Canada.

Comment: Canadian citizens are stakeholder groups and their representatives are Members of Parliament. The Directive should provide guidance to departments as to when to move regulations into the parliamentary forum. Associations represent various constituencies, and Members of Parliament represent Canadians.

Comment: With respect to the role of PCO, we have set up a gatekeeper role vs. facilitator role. It has to combine both functions. It is important that PCO be seen as a centre of expertise. PCO will need some repository of knowledge and skills on issues

like risk management analysis and applying the difficult test of proportionality. This is a very challenging assignment to give to departments. With respect to Parliament, this raises the broader question of using a stages model, although there is an artificiality about a linear process that goes on. Parliament has shown almost no interest in this. There is a Standing Committee that does not follow up on many of the regulatory proposals. In principle, Parliament should be involved, but this will be difficult.

Comment: We need expertise in-house (at PCO) to help build capacity. Canada is losing its expertise in the regulatory area. PCO needs to have a horizontal view, since departments often work in silos.

Answer (PCO): PCO already plays both roles of gatekeeper and facilitator. The role of facilitator can be of great importance in a transition period to a new type of directive. We are building a mix of capacity within our regulatory affairs unit to have a source of expertise within PCO and to provide expertise to departments. Expertise to departments means having a fairly extensive training strategy for departments as well and providing them with the right frameworks. We are currently developing a training strategy with the Canada School of Public Service.

APPENDICES

Appendix A

List of participants

Members

- Hugh Benevides: Associate, Canadian Environmental Law Association
- David Bennett: Director, Canadian Labour Congress
- Peter Benders: Director of Public Policy and Economic Development, BIOTECanada
- David Coon: Policy Director, Conservation Council of New Brunswick
- Strater Crowfoot: Chair, Indian Taxation Advisory Board
- John Dillon: Vice President, Regulatory Affairs and Legal Counsel, Canadian Council of Chief Executives
- Michael Janigan: Executive Director, Public Information Advocacy Centre
- Pat Keindel: President (Standards), Canadian Standards Association
- Dr. Kathy Kovacs Burns: Co-Chair, Best Medicines Coalition (by teleconference)
- Yves Le Bouthillier: President, Law Commission of Canada
- Michael Murphy: Senior Vice President, Policy, Canadian Chamber of Commerce
- Gilles Taillon: President, Conseil du Patronat du Québec
- Paul Thomas: Duff Roblin Professor, University of Manitoba
- Garth Whyte: Executive Vice President, Canadian Federation of Independent Businesses
- Elinor Wilson: Chief Executive Officer, Canadian Public Health Association
- Gemma Zecchini : Senior Vice President, Public Policy, Food and Consumer Products Manufacturers of Canada

PCO

Samir Chhabra, Policy Analyst, Implementation Strategy for Smart Regulation

George Redling, Assistant Secretary to Cabinet, Regulatory Affairs and Orders-in-Council Secretariat

Daniel Wolfish, Policy Analyst, Implementation Strategy for Smart Regulation