



**Federal Communications Commission
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Decision-making procedures and ethics rules: the practical enablers of integrity and impartiality in telecommunications regulation

Executive Summary

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Integrity, honesty, ethical principles above private gain. Objectivity, impartiality, a manner that will bear the closest public scrutiny. These are high ideals to which to aspire, and a challenge to maintain.

In telecommunications regulation, as in other walks of public life, the real and perceived integrity of officials and their decisions is crucial to their ability to govern effectively. Not only must regulators be fair and impartial, but also they must be perceived as such by the public and the industry in order to be effective. At the heart of any regulatory regime, the personal integrity of each individual official is indispensable. No artificial construct, procedures or reporting rules can replace the centrality of the individual's reputation and character. However, having dutiful and ethical officials are often not enough. Telecom infrastructure requires investment from around the world, often from investors who can not possibly be personally familiar with individual regulators. For such investors, the systemic frameworks under which officials operate must inspire confidence. This project explores the systemic frameworks used by some of the world's communications regulatory agencies well known for their independence and transparency. Limits of time and resources prevented us from exploring the workings of all regulators with sterling reputations, but at least these few examples will begin to offer insight into this arena.

This project consists of several parts. The project overview provides a cross-country analysis of the decision-making procedures and ethical guidelines by four leading telecommunications regulators: the Canadian Radio-television and Telecommunications Commission (CRTC), Hong Kong's Office of the Telecommunications Authority (OFTA), the United Kingdom's Office of Telecommunications (OfTel), the United States Federal Communications Commission (FCC).

In a second paper, the list of documents, are summaries of eight example decisions made by these four regulators. Also included is a list of publicly available papers related to each example. Electronic copies of all these documents are provided on the compact disc that comes with this project. The purpose of providing the original documents is to give readers an authentic sense of how each regulator addresses the public in presenting a policy question, consulting the interested parties, proposing a solution, and, ultimately, issuing the decision. Also available on the compact disc are ethical guidelines from

agencies for regimes. Again, these documents serve as a beginning reference for those interested in how such frameworks concretely can be realized.

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Decision-making procedures and ethics rules: the practical enablers of integrity and impartiality and telecommunications regulation

Overview

Part 1: Rules that Govern Gifts, Conflict of Interest, Post Employment, Political Participation

An agency's transparency and impartiality in decision making could be jeopardized if its employees are influenced by gifts from outside sources, financial and personal conflict of interest, post-employment prospects. All four economies studied, Canada, Hong Kong, United Kingdom, and the United States, have guidelines concerning employee's proper handling of these situations to ensure that the regulator's decision making process is truly independent.

Depending on the situation, generally, there are four approaches to ensure the highest ethical standard: (1) avoidance, (2) disclosure, and (3) divestment or resignation, or (4) recusal. Employees are encouraged to take precautions to avoid and mitigate situations where a potential conflict or appearance of impropriety might arise. For example, if an employee is unsure about the appropriateness of a gift, he should either decline or if that is not possible, accept the gift and report it immediately to his supervisor. Employees, especially senior officials, are typically required to provide written reports disclosing financial and personal interests, and in cases of possible outside appointment, a written application to obtain permission within one or two years after leaving office. If a conflict is identified, however, the employee is required to divest the interest or recuse herself from the particular matter.

There are circumstances where an employee must avoid, disclose or file a report concerning gifts, financial interest or future employment. In ambiguous situations, there are usually criteria to identify conflicts and improprieties. The most common ones include the nature of the employee's position and the department's function; the extent of the employee's knowledge in confidential information against a potential outside employer's competitors; the employee's relationship with the person giving the gift or the potential outside employer. In addition, common sense is also encouraged. If a reasonable person under similar circumstances would perceive a conflict of interest, then the employee should take actions to avoid, report or mitigate the situation.

Of the four countries in this survey, Canada is the only one that has a single centralized guideline for civil servants. Hong Kong, US and the UK each has a guideline that functions as a general ethical framework. They also encourage departments and agencies to develop supplemental guidelines based on this framework to take into account their specific functions and circumstances. These departments and agencies are also responsible for carrying out and enforcing the rules.

A. Gifts

The acceptance of gifts that give rise to impropriety or appearance of impropriety is prohibited in all countries. The purpose is to prevent outside sources from influencing the independent judgment of a government official to the benefit of the gift giver. There are, however, exceptions. For example, employees can accept gifts in cases where the gift is low in monetary value, where it is the local customary hospitality, or where the employee has obtained express permission of the supervisor. If the employee has no choice but to accept the gift, most countries require that the employee disclose the receipt of gifts. In the US, gifts over a certain dollar value are generally not acceptable, except under certain conditions. Please also note that in addition to government ethics guidelines, many countries also have criminal codes on bribery.

Canada. Gifts or other benefits which may influence employees in their judgment and performance of official duties must be declined. Employees may, however, accept gifts of incidental value, customary hospitality and that do not give rise to appearance of conflict of interest or compromise the integrity of the government. In circumstance where it is impossible to decline the gift, the employee must report to the supervisor immediately.¹

Hong Kong. Employees can accept gifts from sources and on occasions approved by regulations. For example, they may accept gifts from a close relative or on occasions such as their wedding anniversary, where it is the customary tradition to give gifts. In other instances, they must obtain special permission. The authority may either permit the acceptance with condition or refuse permission.²

United Kingdom. Civil servants must not accept gifts which may give rise to the appearance of conflict of interest and which may compromise their personal judgment and integrity. Under certain circumstances, the employee is required to report offers of gifts, hospitality, awards, decorations and other benefits before accepting them.³

United States. Employees may not accept gifts from prohibited sources including: persons seeking official action by the employee's agency, persons regulated by the employee's agency and persons that have interests that may be substantially affected by the employee's official actions. Gifts are allowed where the value of the gift is US\$20 or less, or in some instances where gifts are truly given because of a close personal relationship. If the employee accepts a prohibited gift, he may return the gift or pay its market value.⁴

B. Conflict of Interest

¹ Canada. Conflict of Interest and Post Employment, Appendix A, Part II.

² Hong Kong. Civil Service Branch Circular No. 17/92.

³ United Kingdom. Civil Service Management Code, 4.1.3.

⁴ United States. Standards of Ethical Conduct.

Conflict of interest is defined broadly to include pecuniary, personal affiliations, and family. They commonly include the employee's participation in proceedings that involve close associates or family members, and the employee's stockholdings in companies that have dealings with the agency or companies that the employee has gained confidential information through official capacities.

The disclosure of financial and personal interests in categories that could give rise to conflict and the divestment of these interests if there is or appears to be a conflict are mandatory in all five economies with the exception of Hong Kong. Although OFTA requires mandatory disclosure of direct telecommunications investments, the divestment of these investments, however, is voluntary. These provisions aim to prevent personal or financial interests from influencing the independent judgment of a government official.

Canada. Other than those permitted, employees are not to have private interests in companies whose interests are affected by government decisions. The employees must make confidential report to designated officials of all assets prescribed by the code. They include any assets or liabilities that could give rise to real or potential conflict of interests due to the particular nature of the employee's duties and responsibilities. Finally, employees should not assist others in their dealings with the government that could result in preferential treatment.⁵

Hong Kong. All OFTA employees are required to declare upon appointment and biennially personal information including domestic and foreign investments and occupation and investment of spouse. Investments in telecommunications companies are strongly discouraged although not prohibited. Direct investments in telecommunications companies must be disclosed, indirect investments are permitted. The employee should report to superior when a potential conflict is identified. An employee must not use confidential or unpublished information obtained in official capacity to profit financially either personally or for friends and family.⁶

United Kingdom. Civil servants are prohibited from misusing information obtained through official duties to further private interests. When a conflict of interest arises, civil servants must declare their interest to senior management.⁷

United States. Employees are prohibited from having financial interest in entities regulated by the FCC. Depending on the employee's position, employees are required to file the Public Financial Disclosure Report or the Confidential Statement of Employment and Financial Interests. Employees are prohibited from acting in any matter in which they have a financial stake.⁸

If the employee is involved in a matter that would have an effect on the financial interest of a member of the employee's household, or if the employee is affiliated with a party in

⁵ Canada. Conflict of Interest and Post Employment, Appendix A, Part II.

⁶ Hong Kong. OFTA Standing Circular No. 1/99, Civil Service Branch Circular No. 19/92 for general guidance to prevent conflict of interest.

⁷ United Kingdom. Civil Service Management Code, 4.1.3(a),(c).

such a matter, then the employee must consider whether a reasonable person would question the employee's impartiality in the matter if he participated in the matter. If there is an appearance problem, then the employee should not participate in the matter unless authorized by the department or agency.⁹

C. Post Employment

As with provisions concerning gifts and conflict of interest, post employment guidelines aim to maintain the independence of a government official's decision making process. They prevent any suspicion that the officer might be influenced by the hope or expectation of future employment with outside firms and the risk that a particular firm might gain an improper advantage over its competitors by employing someone who had access to information on the competitor through official capacities.

All countries require the report of outside appointment if there is a potential conflict, most commonly, if it is a company that the employee had significant contacts with while in office, or if the company was a party to the matter that the employee's department was in charge of resolving. Canada, UK and US require former employees to either avoid or obtain permission prior to taking a new appointment one to two years after termination of employment. For high level officials, UK and US have a cooling off period of three months and one year, respectively, where the official is prohibited from undertaking certain activities related to her or his former official capacity.

Canada. A former employee is prohibited from participating in a proceeding if while in official capacity, the employee acted for and advised the department involved in the resolution of the matter, and if it would result in the conferring of a commercial or private benefit for the new employer. Within one year of leaving office, the employee is prohibited from accepting appointment with companies that the employee had significant dealings in the year preceding the termination of employment. In addition, the employee cannot represent an entity in front of a department that they had substantial dealings with or provide policy consultations on topics that they worked on prior to termination. This one year limitation may be reduced by designated authorities.¹⁰

Hong Kong. Employees are urged to keep in mind that conflict of interest may arise between his duties as a civil servant and potential employment after she leaves.¹¹

United Kingdom. Post employment is by governed by Business Appointment Rules. This Rule is applicable under specific circumstances including: if the employee is at a senior level, if the employee has had official dealings of a continued or repeated nature with their prospective employer, and if the employee has had access to commercially sensitive information of competitors of their prospective employees.

⁸ United States. FCC. "Ethics Program Topics."

⁹ United States. Standards of Ethical Conduct.

¹⁰ Canada. Conflict of Interest and Post Employment, Appendix A, Part III.

¹¹ Hong Kong. Civil Branch Circular No. 19/92.

In the first two years after service, the employee must file an application and obtain approval from the Advisory Committee on Business Appointments prior to taking a new appointment. It is an independent Committee appointed by the Prime Minister, and it determines the relationship between the civil service and the new private appointment.

There is a minimum of three months waiting period for Permanent Secretaries and their equivalent between leaving civil service and taking up an outside appointment. This waiting period could be waived if the new appointment is entirely unconnected with the applicant's official knowledge and there are no questions of impropriety.

If a civil servant is offered employment from an outside employer and is considering the offer, the person must report the approach to a senior official. For employees dealing with procurement or contract work, they must report the approach regardless whether they are considering the offer.¹²

United States. An employee may not participate in any particular Government matter that will affect the financial interests of a person or entity with whom she is seeking employment. The employee is permanently barred from representing anyone at the FCC on a matter if the person's involvement in such a matter was personal and substantial. If the matter was under the employee's official responsibility during the last year of government service, then the employee is barred for two years after leaving government service from representing anyone back to the government on the same matter.

Certain high level officials are subject to a one year cooling off period. For a period of one year after leaving a senior position, these officials may not represent on behalf of any person, other than the US, before his former agency with the intent to influence the agency on any matter in which the person seeks official action.¹³

D. Conclusion

All five countries' civil service ethics guidelines are based on the core principle that civil servants' actions must maintain public confidence in the integrity of government service. On the whole, they focus on two areas. The first is an emphasis on the personal integrity of the individual officers. For example, Hong Kong's guidelines say, "All staff of OFTA are required to uphold the honesty and impartiality of the civil service and to observe an exemplary standard of personal integrity in making private investments."¹⁴ Canada's guidelines instruct that, "Employees shall perform their official duties and arrange their private affairs in such a manner that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced. Employees have an obligation to act in a manner that will bear the closest public scrutiny, an obligation that is not fully discharged by simply acting within the law."¹⁵

¹² United Kingdom. Civil Service Management Code, 4.3.7 – 4.3.9.

¹³ United States. Standards of Ethical Conduct.

¹⁴ Hong Kong. OFTA standing Circular, 1/99, para. 2.

¹⁵ Canada. Conflict of Interest and Post Employment, Appendix A, Part I.

The second area of concern is not only *real* conflicts of interest, but also the dangers of *perceived* conflicts of interest. The United States Standards of Ethical Conduct highlight, “Employees must strive to avoid any action that would create the appearance that they are violating ethical standards.”¹⁶ The United Kingdom’s Civil Service Management Code underscores that, “The central framework derives from the need for civil servants to be, and to be seen to be, honest and impartial in the exercise of the exercise of their duties. They must not allow their judgment or integrity to be compromised in fact or by reasonable implication.”¹⁷

Part II: Independent Regulators - Survey of Rulemaking Processes

Transparency in the rulemaking process is the key characteristic of an effective independent regulator. This study compares the rulemaking processes of four communications regulatory authorities: CRTC, OFTA, OFTEL and the FCC.

All four regulators’ rulemaking processes are based on a three-stage consultation framework.¹⁸ In the first stage, after an issue is identified, the authority releases a formal consultation paper soliciting comments from the public. It is followed by a comment and reply comment period where outside players and the public at large submit their views on the issue. Finally, a decision is reached based on available information and public policy. The consultation paper, comments and reply comments, and the final decision are available to the public on the regulator’s website or through official publications unless there is confidential information. This three-stage consultation process serves as the minimum procedural safeguard to ensure that the public is notified of a pending rulemaking, allowed to participate in the process and informed of the final decision and its reasoning.

Depending on the nature of the proceeding, both informal and formal procedures have been incorporated into the three stage consultation framework. Of the four regulators, OFTA follows the core consultation framework most strictly. When it deems necessary, however, it does include additional steps. Similarly, OFTEL modifies procedures on a case by case basis. Although there is a Code of Practice on Written Consultation, OFTEL has acknowledged that informal steps have been taken to accommodate some complex proceedings. The CRTC and the FCC, on the other hand, have included additional formal procedures in the formulation of the initial consultation paper and in the consultation stage. In fact, the Canadian National Telecommunications Powers and Procedures Act, which sets forth procedural guidelines for rulemaking process, states that the CRTC may, when appropriate, “vary or supplement any of the provisions of these Rules.”

¹⁶ United States. Standards of Ethical Conduct.

¹⁷ United Kingdom. Civil Service Management Code, Section 4.1.3.

¹⁸ Please note that the CRTC has a separate rulemaking process for Broadcasting issues. Unlike its rulemaking process for Telecom issues, if the Broadcasting issue is a matter of great public importance, public hearings are held in place of the three stage consultation process.

A. Initiation and Formulation of Consultation Paper

Rulemaking proceedings are typically initiated either by the regulator itself in response to changing industry conditions, or by an industry player requesting a formal consultation. If a petition for rulemaking is filed, the regulator formulates a consultation paper during the period between the filing of the petition and the release of the formal consultation.

The purpose of a consultation paper is to clearly define all relevant issues that need to be addressed, to provide background information on these issues and to set out the regulator's preliminary views on the issues. For example, if there are related issues that are not included in the petition for rulemaking, they can be combined into a single consultation process, instead of having multiple proceedings. A good consultation paper sets the scope of the proceeding and ensures a timely and cost effective rulemaking for both the public and the private sector.

OFTEL and OFTA use this period to conduct informal consultations for selected proceedings involving complex issues. OFTEL, in its formulation of the Ombudsman Consultation Paper, hosted and chaired a working group consisting of telecommunications providers and consumer groups to consider the feasibility of setting up the scheme. The working group met in the span of about one year. Its output served as the basis for the formal consultation paper.

Similarly, in the Interconnection and Related Competition Issues proceeding, upon receiving the consultation request from PCCW-HKT, OFTA wrote to all ten local fixed network operators to inform them of the intent to initiate the review and to invite them to raise additional issues related to interconnection so that they could be resolved efficiently in a single proceeding. After reviewing three responses, OFTA issued a formal consultation paper outlining specific issues and OFTA's preliminary views on these issues.

Unlike OFTEL and OFTA, the FCC has incorporated this informal discussion period as part of its formal rulemaking process. After a Petition for Rulemaking is filed and a Public Notice is released, the public may comment on the reasons why the petition should or should not be granted. If the petition is granted, a formal rulemaking is initiated with the Notice of Proposed Rulemaking. The process of formulating the consultation paper, however, could restart even after the submission of comments and reply comments. A Further Notice of Proposed Rulemaking can be issued in lieu of an Order after the comment and reply comment stage. If an Order is released, the FCC could still issue a Further Notice of Proposed Rulemaking seeking comments on issues that were not discussed in the completed proceeding.

B. Comments and Reply Comments

Comments and Reply Comments provide a forum for public participation in the rulemaking process. This is the point where the regulator collects facts and opinions on

the issue in question. The goal is to gather all relevant information so that the regulator can make the most informed decision.

After a consultation paper is released, interested parties can file comments by a specific deadline. Other than OFTA, the other three regulators also have a formal reply comment stage. The information gathering process, however, is not limited to comments and reply comments. During this period, for consultations involving complex issues, the regulator may also hold workshops and hearings (OFTEL and CRTC), request interrogatories (CRTC) and accept ex parte filings (FCC) to obtain the broadest range of viewpoints, to collect all relevant facts, and to ensure the accuracy of the information. These documents supplement the comments and the reply comments and are incorporated as part of the record for the final decision.

OFTEL held a public work shop to encourage open discussions of proposals set forth in the consultation paper as part of the consultation process for the Ombudsman Proceeding. Ex parte filings are frequently made in FCC proceedings to report meetings between parties and the FCC and to supplement the FCC with additional information.

C. Final Decision, Appeals and Implementation

After the conclusion of the consultation period, the authority makes a final decision based on information collected during the comment and reply comment period and public policy factors. The regulator's statement presents and justifies its conclusions on the issues identified in the consultation paper. It summarizes and responds to the comments, reply comments and other issues raised in the consultation process.

If the parties do not agree with the decision, they can either appeal through the courts or appeal through the regulator by means of a petition for reconsideration. Canada is the only country with an appeals process through the federal cabinet. However, the cabinet usually pays deference to the CRTC.

After the release of the final decision, if it is not challenged, or affirmed if it was challenged, the regulator may hold discussions with the industry and consumer groups to devise the best strategy to implement the new rules. For example, the CRTC Interconnection Steering Committee, composed of CRTC staff members, industry and consumer groups, is responsible for creating plans for the implementation of decisions and technical rules. Its final decision is subject for CRTC approval. OFTEL also held a working group after the conclusion of the Ombudsman Consultation to determine the strategy for the implementation of the Ombudsman scheme.

Conclusion

The four regulators' rulemaking procedures are based on the same basic three stage process. There are, however, flexibility in the process to accommodate the special circumstances of each case, in particularly, consultations involving complex issues. CRTC and FCC have expanded the three stage process and have included additional

formal procedures. OFTEL and OFTA, on the other hand, modify the three stage process on a case by case basis. The core elements of the three stage consultation process, however, are never dispensed. They serve as the minimum procedural safeguard to ensure the transparency of the rulemaking process.