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CITIZEN PARTICIPATION IN REGULATION

A Supplement to the Interactivity Foundation Discussion Guidebook

The Future of Regulation



www.interactivityfoundation.org



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the **Interactivity**
Foundation

THE PURPOSE OF THIS SUPPLEMENT

Many areas of regulation seem remote to citizens. Sometimes that is because of the complexity of some regulatory subject matter. Other times it is the scale of regulation that keeps citizens at arms length. In some cases citizens are simply confused about what a regulation is, seeing it as part of a perplexing jumble of laws and court decisions. They often do not understand it as a distinct part of government operations that combines administrative, legislative, and judicial functions.

The range of things that may be accomplished by regulation is quite large. Such things include the development of standards, issuance of licenses and permits, setting of rates, monitoring for compliance, planning, investigation of complaints, issuance of citations for violations, and conducting hearings to determine penalties and corrective measures, etc. The public is largely aware of things like utility rates, zoning, and food safety. However they are usually less aware of the regulatory side of public health, emergency management, economic development, financial transactions, and other areas that might not touch individuals directly.





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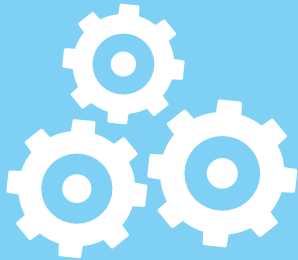
The project manager wishes to thank consultant facilitators Blake Gentry and Jennifer Moore-Kerr for their help in conducting test discussions of this supplement. Wisconsin discussion project manager James Schneider and contract facilitator Karen Stollenwerk provided important feedback concerning general public discussion of regulation. Interactivity Vice President Jeff Prudhomme and Gail Sumi of the Wisconsin League of Municipalities also contributed to the framing of overall regulatory concerns.

Policy Possibilities for Citizen Participation in Regulation

- A.** Make the System Work-- Rein-vigorate Current Participatory Ap-proaches
- B.** Empower Public Interest Advocates— Create Citizen-Guided Insti-tutions
- C.** Promote Direct Citizen Regula-tion—Enlarge the Public's Role
- D.** Transition to Representative Democratic Regulation—Extend Rep-resentative Democracy Principles Into Regulation
- E.** Rely on Citizen Juries Where Possible—Encourage Community Members to Decide Matters of Re-sponsibility and Liability

MAKE THE SYSTEM WORK —

02



REINVIGORATE CURRENT PARTICIPATORY APPROACHES

POLICY A

Regulation was not initially designed as a system of insiders and technocrats. Modern regulation was, in large part, a response to the abuses of patronage and political corruption in the administration of public agencies. Regulation has features that provide a framework for transparency and citizen input. Over time some of these features have grown “rusty” and poorly understood. Some would argue that regulatory agencies were often “captured” by the very interests they were meant to regulate. It may also be the case that weakened civil society institutions and increasing complexity contribute to a lessening of public involvement and alertness.



This policy approach takes the view that the legal and political systems that serve as the foundations for regulation can and must be made to work on behalf of the public interest. The legislative branch establishes frameworks for regulation, the executive branch carries out regulatory administration and enforcement, and the judicial branch may be resorted to when there are questions about the meaning of the regulatory frameworks or issues of due process in the application of regulations.



Most systems of regulation have built-in systems of public notice of regulatory meetings, publications explaining regulatory operations and procedure, and opportunities for the public to comment in writing or to appear at meetings or hearings. Regulatory agencies are typically subject to the general laws on open records and open meetings. This does not mean that regulatory processes are easy for citizens to navigate. Indeed, much of the public (and many of those subject to regulation) feels that regulation is a maze that they become easily lost in.



As with many areas of democratic governance, regulatory systems seem to function as intended when the public at-large, civic organizations, and the media are paying attention and are prepared to act. This has been accomplished in some cases by ongoing public interest organizations that monitor regulatory matters of constant interest or by ad hoc community organizing around specific regulatory issues. Petitioning, demonstrations, and even civil disobedience have also made regulators aware of public sentiment and shaped the direction of regulatory action.

POLICY

A

MAKE THE SYSTEM WORK — REINVIGORATE CURRENT PARTICIPATORY APPROACHES

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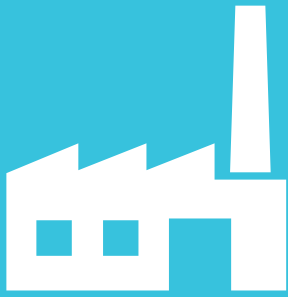
This policy approach takes the position that citizen responsibilities include awareness of and engagement with regulatory systems and a willingness to demand that they live up to our values of fairness. Citizen discussion of ways to improve the basics of citizen participation in current regulatory systems produced the following points:

- Provide additional opportunities for members of the general public to serve on and interact with regulatory boards and committees.
- Expand Whistleblower protections in regulatory settings for regulatory agency staff and regulated industry employees.
- Enlarge opportunities for citizens to recover legal expenses and damages resulting from improper regulatory action.
- Expand capacity for citizens and civic organizations to intervene and act as Private Attorneys-General when agencies fail to enforce regulation.
- Require that legislative bodies with audit and review responsibilities conduct top-to-bottom periodic oversight and reporting on regulatory operations.



ESTABLISH AND EMPOWER PUBLIC INTEREST ADVOCATES—

04



CREATE INDEPENDENT INTERVENTION CAPACITY

POLICY
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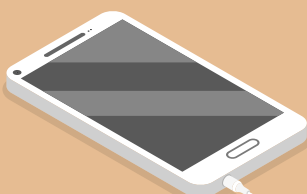
Monitoring of regulatory action often demands expertise and extensive time commitments. Where large bodies of economic or scientific data must be evaluated or where experts must be hired or consulted, the citizen or small business is at a clear disadvantage. Not so with a large regulated interest with its lawyers, accountants, and technical personnel. Some would argue that is precisely these matters of scale, resources, and complexity that have made regulation inhospitable to citizens. Others might say that the primary answer to these difficulties lies not in citizens banging their heads against regulatory walls, but in professionalizing and institutionalizing public interest advocacy that is capable of acting at the direction of citizens.



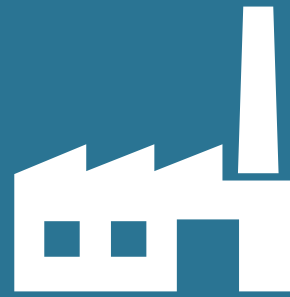
A number of democratic governance systems rely on independent representatives to pursue citizen grievances and untangle bureaucratic difficulties. This function often has combined investigative, advocacy, and public education roles. Some see these roles as aids to navigating governmental processes.

In a number of such democratic governance systems, it is thought essential that this intervention capacity be protected from politics. This protection may come in the form independent agencies or in the form of public funding of public-private partnerships and other quasi-governmental arrangements. Regulatory agency interests in efficiency may not always align with the public interest and attempts at community relations and citizen input may be more a matter of appearances rather than the substance of authentic participation.

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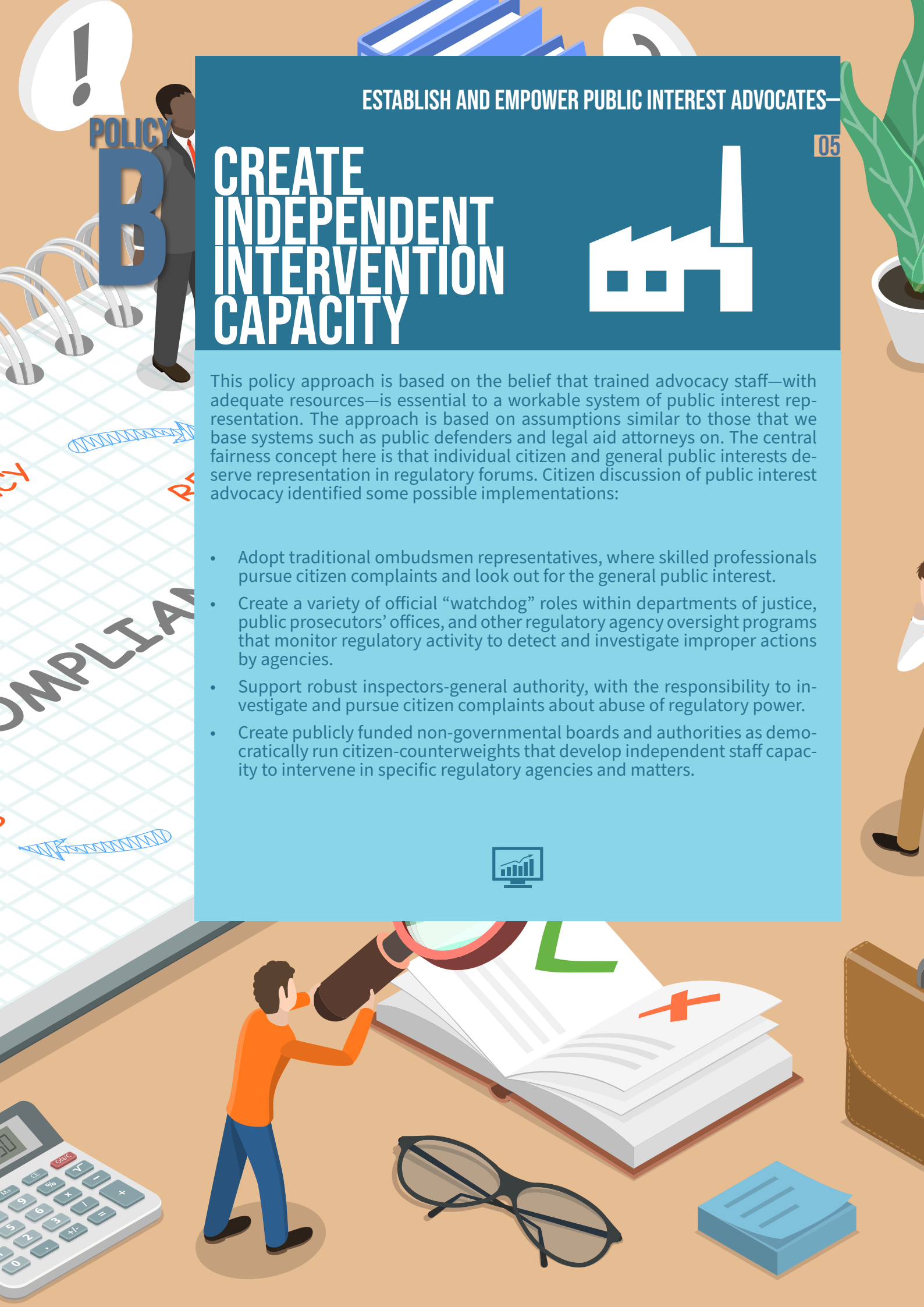


CREATE INDEPENDENT INTERVENTION CAPACITY



This policy approach is based on the belief that trained advocacy staff—with adequate resources—is essential to a workable system of public interest representation. The approach is based on assumptions similar to those that we base systems such as public defenders and legal aid attorneys on. The central fairness concept here is that individual citizen and general public interests deserve representation in regulatory forums. Citizen discussion of public interest advocacy identified some possible implementations:

- Adopt traditional ombudsmen representatives, where skilled professionals pursue citizen complaints and look out for the general public interest.
- Create a variety of official “watchdog” roles within departments of justice, public prosecutors’ offices, and other regulatory agency oversight programs that monitor regulatory activity to detect and investigate improper actions by agencies.
- Support robust inspectors-general authority, with the responsibility to investigate and pursue citizen complaints about abuse of regulatory power.
- Create publicly funded non-governmental boards and authorities as democratically run citizen-counterweights that develop independent staff capacity to intervene in specific regulatory agencies and matters.



PROMOTE DIRECT CITIZEN REGULATION—

06



ENLARGE
THE
PUBLIC'S
ROLE

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Regulation is often thought of as the opposite of town hall democracy, with emphasis on expertise as opposed to majority rule. Many regulators have had negative experiences with the public: disruption of agency proceedings, low-information citizen participation that ignores established procedure and precedents, and unrealistic expectations of what can be accomplished in the regulatory process. Regulators may feel scapegoated by elected officials who establish regulatory frameworks and then dodge responsibility for the consequences of the outcomes of regulation. Yet it may be possible and even beneficial to apply democratic practice to certain regulatory areas. Such direct citizen participation in regulation may be helpful where the public's will and desires are key measures of whether regulation is "successful". And regulators may find that democratic practices may remove them from the "blame game".



Enlarging the citizen role in regulation by direct public participation in establishing rules, setting enforcement priorities, and assessing penalties may prove too complex for certain areas of regulation. It is hard, for example, to imagine how one might do this at the national level in areas like financial regulation or national security. It is easier to imagine how this might be accomplished at the local level or even at some state or regional levels. It might be suggested that in many cases direct citizen regulation will not be an entirely black and white matter of do it or do not. Some regulatory agencies may have subcomponents or functions that are easily "democratized", while other parts of the regulatory mission may pose significant challenges for public input.



This policy approach looks to move toward direct citizen regulation where it links what citizens do best: approve or disapprove of certain activities and promulgate basic rules by referenda. It is less likely to involve citizens in assessments of data, measurements related to standards, and investigations of violations. But even in those cases there may be opportunities to bring citizens "up to speed" to facilitate deeper citizen involvement.



POLICY
C

PROMOTE DIRECT CITIZEN REGULATION— ENLARGE THE PUBLIC'S ROLE

07



Citizen discussion of this policy approach looked extensively at matters of degree in citizen participation. Some thought of this approach in terms of opposing presumptions: direct citizen regulation might be the assumed position unless it is shown that significant barriers make it impractical or it might be assumed that enlarged citizen participation may proceed after findings affirmed its practicality. Discussants found the following participatory forms worthy of consideration:

- Enable Town Hall, Caucuses, and Congresses, with citizens having power to shape regulation.
- Create Citizen Boards of Review to evaluate regulatory decisions and processes.
- Include citizen representatives in the rulemaking process.
- Rely on binding citizen referenda for decisions establishing, repealing, or limiting regulatory frameworks.
- Use other public participatory tools to shape initial regulatory proposals (such as deliberative polling, advisory referenda, deliberation days, and participatory budgeting, among other citizen dialogue and deliberation methods).



TRANSITION TO REPRESENTATIVE DEMOCRATIC REGULATION—

RELY ON OUR SYSTEM OF REPRESENTATIVE DEMOCRACY TO SELECT OUR REGULATORS



08

In contrast to Policy C, this policy approach is indirect, relying on elections and other citizen expressions of preferences to choose those in charge of regulation. It would transfer what is now the appointive power of the executive branch (and occasionally the legislative branch) in selecting the chief regulatory officers to the voters. Citizens would evaluate and express preferences for candidates for regulatory offices in manners similar to other elected public offices. A case may be made that some regulatory officials perform functions that should be held to a higher degree of accountability to the public. When such officials are the “employees” of an elected executive branch official—who might be responsible for a number of diverse regulatory agencies—such accountability is more difficult to achieve.

The case for such a representative democratic transition is that there would be the possibility of more direct accountability to the voters, more exposure of the key regulatory issues at stake, and more scrutiny of the professional qualifications and ethical standards of potential regulators. Where Policy C was seen as most workable at the local level by citizen discussants, this Policy D was seen as an intermediate step that might prove workable for some state level regulatory frameworks, like public utility commissions.

An example of how this approach might work that is frequently mentioned is the regulation of public utilities. Utility rates and the creation of utility infrastructure are often of great interest to citizens and business. Yet in systems where elected executive branch officials appoint the chief regulators (who sometimes serve beyond the terms of the elected executive branch official) it can be difficult hold the agency regulators to account. The executive branch official may not be able to “un-appoint” the agency regulator and it may be unfair and unwise to vote elected chief executives out of office when they are otherwise performing their duties.

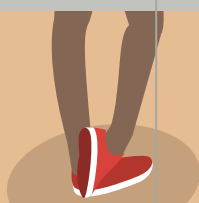
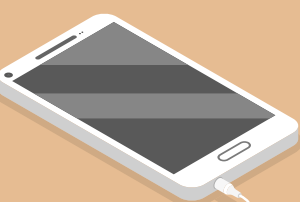
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RELY ON OUR SYSTEM OF REPRESENTATIVE DEMOCRACY TO SELECT OUR REGULATORS



Citizen discussions also produced a sense that the selection of democratic regulatory officials would benefit from some separation from typical partisan election processes. It was thought that nominees for regulatory office should usually be non-partisan, that they should be vetted and rated by independent panels of related professionals, and that, in some cases, qualifying credentials (licenses, certifications, etc.) should be required. Discussions produced the following possible elements of this policy approach:

- Elect the chief regulatory officials in areas of regulation the public deems vital and where accountability is thought important to the public interest.
- Provide for minority party representation where the regulatory body has multiple members and is elected in partisan elections.
- Fund the campaigns of candidates for regulatory office through modest amounts of public financing and publicly-sponsored forums that tend to focus on candidate qualifications and vital regulatory issues.
- Apply strict disclosure and divestment requirements to regulatory candidates concerning their connections with or financial holdings in the businesses subject to the regulatory body in question.



RELY ON CITIZEN JURIES—

10



DEVELOP A HYBRID MODEL THAT USES CITIZENS AS FACT FINDERS

POLICY E

In contrast to the broad public participation in the general regulatory processes of Policy C, this policy approach relies on citizens to decide individual cases of regulatory enforcement in way similar to juries in court trials. Some discussions of this approach initially thought of Policy E as an expansion of the traditional legal frameworks of Policy A, while other discussions saw the citizen jury as a possible implementation of Policy C. Further developmental discussions by test groups arrived at treatment of the citizen jury as a special case that relies on an old common law institution within the context of modern regulatory decision-making.



Citizen juries might be used in certain areas of regulation where determinations of fault or intent rests on the credibility of those cited for regulatory violations. Did violation occur or not? Who is responsible? What weight should be given to evidence and mitigating circumstances? Such a system of regulatory enforcement might confine itself to relatively simple determinations by a citizen jury of “yes” or “no” questions. Or a citizen jury might follow the more complex patterns of trial courts and have jury instructions that mandate certain findings if the jury answers questions one way as opposed to another way. It may also be the case in such a system that the citizen jury is assessing not only the character and reliability of those cited for regulatory violations, but of the character and reliability of the regulatory officials involved in the case.



This policy approach could act as a check on arbitrary and over-zealous regulatory enforcement that violates community sensibilities. Citizen jurors may detect patterns of abusive enforcement, overly technical application of rules to minor infractions, or cases where regulatory agencies have enlarged the scope of their enforcement powers beyond a common sense reading of the rules. Citizen juries may well acknowledge that a regulatory violation has indeed occurred, but the behavior of the regulators is more outrageous than the cited behavior of the violator. We could allow citizen juries to in effect nullify regulatory citations, as is sometimes the case with charges in criminal trials where juries may decide to not convict a defendant, even where evidence supports the charge.



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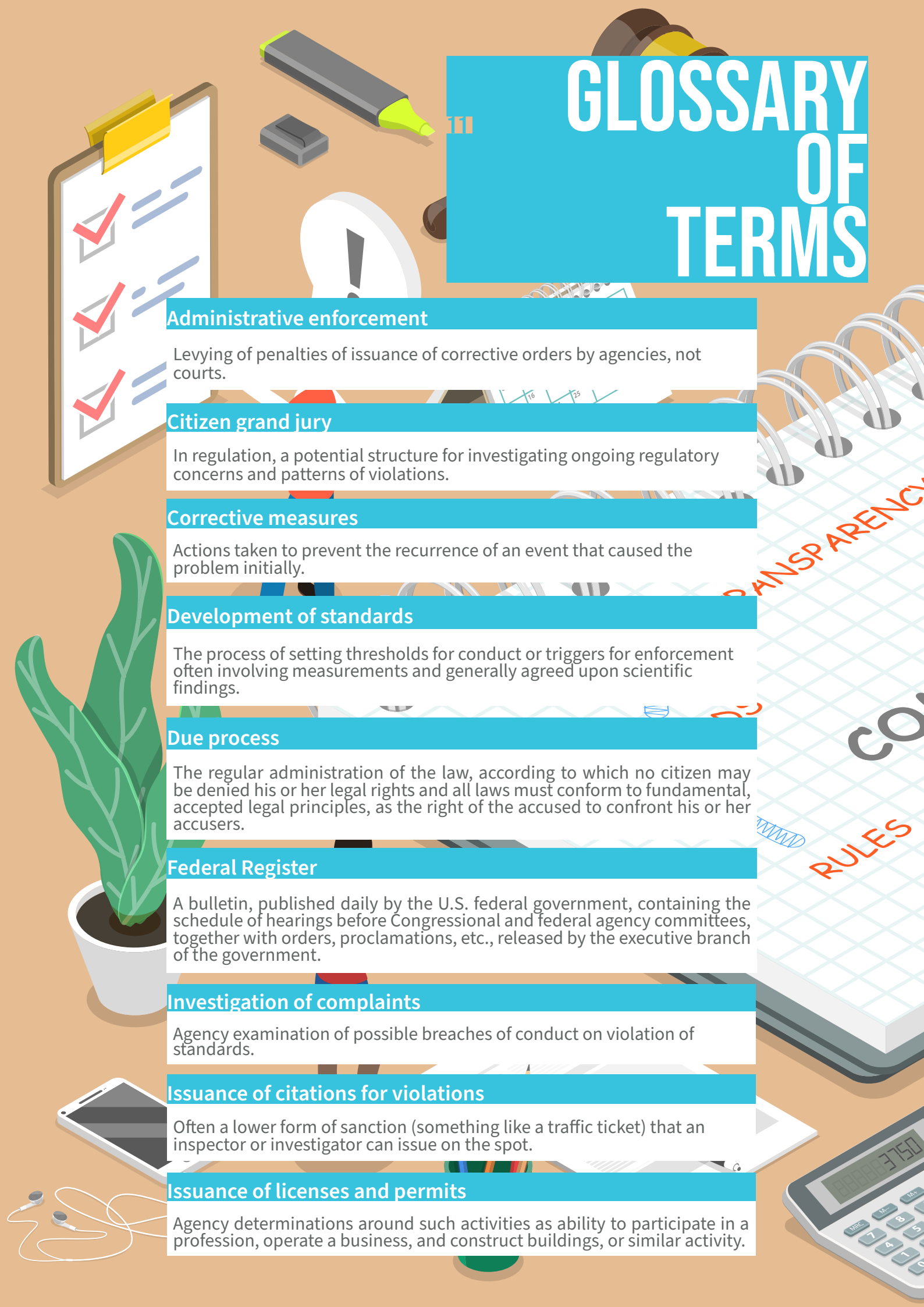
RELY ON CITIZEN JURIES— DEVELOP A HYBRID MODEL THAT USES CITIZENS AS FACT FINDERS



Use of a citizen jury system raises many other issues about how such juries would be set up and administered. Citizen juries might be smaller in size than the twelve-member bodies (with possible additional alternates) that we might first think of. They might be formed to make a finding in a particular case or they might be empaneled to hear a variety of cases before a regulatory agency over the course of a number of days. There may even be room within this approach for a citizen grand jury, where a group of citizens may be empaneled to hear evidence in matters involving patterns of ongoing activity and might issue findings on whether further regulatory enforcement is justified. Developmental discussion of these structural and administrative issues focused on the following:

- Eliminate barriers within the basic governance documents that might prohibit or limit this delegation of decision-making authority to citizens.
- Create fair systems of selection of citizen jury members for regulatory matters that provides for participation of diverse elements of the community population.
- Restrict the scope of challenges to potential citizen jury members, perhaps only allowing a challenge for a direct conflict of interest or relationship to a party in the controversy.
- Consider whether—in some regulatory cases—citizens with relevant qualifications or experiences might be empaneled as an expert jury.
- Develop educational materials that prepare citizens for participation in regulatory juries that help them understand the process and the basic subject matter of the enforcement action.





GLOSSARY OF TERMS

Administrative enforcement

Levying of penalties or issuance of corrective orders by agencies, not courts.

Citizen grand jury

In regulation, a potential structure for investigating ongoing regulatory concerns and patterns of violations.

Corrective measures

Actions taken to prevent the recurrence of an event that caused the problem initially.

Development of standards

The process of setting thresholds for conduct or triggers for enforcement often involving measurements and generally agreed upon scientific findings.

Due process

The regular administration of the law, according to which no citizen may be denied his or her legal rights and all laws must conform to fundamental, accepted legal principles, as the right of the accused to confront his or her accusers.

Federal Register

A bulletin, published daily by the U.S. federal government, containing the schedule of hearings before Congressional and federal agency committees, together with orders, proclamations, etc., released by the executive branch of the government.

Investigation of complaints

Agency examination of possible breaches of conduct on violation of standards.

Issuance of citations for violations

Often a lower form of sanction (something like a traffic ticket) that an inspector or investigator can issue on the spot.

Issuance of licenses and permits

Agency determinations around such activities as ability to participate in a profession, operate a business, and construct buildings, or similar activity.



Judicial branch

The branch of government charged with the interpretation of laws and the administration of justice; the judiciary.

Jury instructions

The set of legal rules that jurors ought follow when deciding a case.

Legislative branch

The branch of government having the power to make laws; the legislature.

Monitoring for compliance

Ongoing agency activity to assess conduct to existing standards or follow-up observation after an administrative order.

Nullify

To render or declare legally void or inoperative.

Ombudsman

A government official who hears and investigates complaints by private citizens against other officials or government agencies.

Planning

The preliminary “vision” that establishes a framework for subsequent activity, often in land use and zoning.

Private Attorneys-General

Informal term usually used today in the United States to refer to a private party who brings a lawsuit considered to be in the public interest, i.e., benefiting the general public and not just the plaintiff.

Rulemaking

In administrative law, rule-making refers to the process that executive and independent agencies use to create, or promulgate, regulations. In general, legislatures first set broad policy mandates by passing statutes, then agencies create more detailed regulations through rulemaking.

Setting of rates

Agency determination of pricing or pricing ranges, as in utility rates.

Whistleblower

A person who informs on another or makes public disclosure of corruption or wrongdoing.

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