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Responsive regulation and application of grading systems in the food safety regulatory regimes of developing countries

Abu Noman Mohammad Atahar Ali

University of Wollongong, anmaa964@uowmail.edu.au

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Responsive regulation and application of grading systems in the food safety regulatory regimes of developing countries

Abstract

The traditional tit-for-tat philosophy in the food safety regulatory regime in most developing countries has been proven ineffective in most cases. Rather, starting with persuasion, advice, and then escalating to more severe punishments for the continuing non-compliance as suggested in the responsive regulation by Ayres and Braithwaite has been proved more effective in the food safety regulatory regime of some jurisdictions. Responsive regulation aims to increase responsibility among corporations. So, if a corporation shows responsibility, it should be rewarded, and if a corporation shows irresponsibility, it should be reprimanded (if necessary). There is no logic in seeing and treating every manufacturer the same, considering their regular compliance or regular non-compliance with regulation. Furthermore, in a free market economy, food manufacturers have to compete everyday with their counterparts in regard to safety and standards. Considering these situations, current research suggests that the grading system can be introduced into the food safety regulatory regime of developing countries. Once the food manufacturers are rewarded for their compliance by upgrading their current grade, they can use this reward for advertising, which will help their business flourish. Conversely, if any manufacturer shows irresponsibility and continuously produces unsafe and low quality food, it can be degraded from an upper to lower grade. However, even the lowest graded manufacturer will have to maintain the minimum standard of safety required by the state regulations. This concept can be called "responsibility ensures upgrading, irresponsibility risks downgrading". In short, this article suggests that the responsive regulation can be applied by moderating with grading system in the food safety regulatory regime of the developing countries. A qualitative research method has been used in this research, and extensive literature has been analysed.

Keywords

regulation, responsive, regulatory, grading, regimes, application, countries, systems, food, safety, developing

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ABU NOMAN MOHAMMAD ATAHAR ALI

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Responsive Regulation and Application of Grading Systems in the Food Safety Regulatory Regimes of Developing Countries

Abu Noman Mohammad Atahar Ali, University of Wollongong, Australia

Abstract: The traditional tit-for-tat philosophy in the food safety regulatory regime in most developing countries has been proven ineffective in most cases. Rather, starting with persuasion, advice, and then escalating to more severe punishments for the continuing non-compliance as suggested in the responsive regulation by Ayres and Braithwaite has been proved more effective in the food safety regulatory regime of some jurisdictions. Responsive regulation aims to increase responsibility among corporations. So, if a corporation shows responsibility, it should be rewarded, and if a corporation shows irresponsibility, it should be reprimanded (if necessary). There is no logic in seeing and treating every manufacturer the same, considering their regular compliance or regular non-compliance with regulation. Furthermore, in a free market economy, food manufacturers have to compete everyday with their counterparts in regard to safety and standards. Considering these situations, current research suggests that the grading system can be introduced into the food safety regulatory regime of developing countries. Once the food manufacturers are rewarded for their compliance by upgrading their current grade, they can use this reward for advertising, which will help their business flourish. Conversely, if any manufacturer shows irresponsibility and continuously produces unsafe and low quality food, it can be degraded from an upper to lower grade. However, even the lowest graded manufacturer will have to maintain the minimum standard of safety required by the state regulations. This concept can be called "responsibility ensures upgrading, irresponsibility risks downgrading". In short, this article suggests that the responsive regulation can be applied by moderating with grading system in the food safety regulatory regime of the developing countries. A qualitative research method has been used in this research, and extensive literature has been analysed.

Keywords: Food Safety, Responsive Regulation, Grading System, Developing Countries

Introduction

The traditional 'tit-for-tat' system of regulation is an old notion. The 'tit-for-tat' approach, generally means that increasingly serious violations of laws are dealt with by increasingly severe sanctions, and finally with the ultimate sanctions, such as imprisonment or cancellation of a licence to continue the business.¹ However, the effectiveness of the 'tit-for-tat' approach has long been a matter of debate. Ayres and Braithwaite admit that the 'begin with guns' approach is often effective when the regulatory agencies try to ensure compliance,² as it is sometimes anticipated that tough sanctions will force corporations to comply with the law.³ But persuasion, encouragement or cooperation, even cheaper than sanctions, is also believed to make a regulatory system effective. If the system lacks effective sanctions, however, this could reflect the assumption of a great degree of willingness to comply on the part of the regulated. Compliance itself is, in fact, an effective element of an effective regulatory system. Thus, Ayres and Braithwaite introduced responsive regulation (RR) bringing both deterrence and compliance under same umbrella, which has been admired by authors across a wide range of legal scholarship.

¹ Australian Law Reform Commission, "Principled Regulation: Federal Civil and Administrative Penalties in Australia," (Report Number 95, 2002), 76; see also Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010), 97.

² Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992), 19.

³ *Ibid.*, 20.

The current study suggests that as RR encourages being responsible, it can be commonly argued that responsiveness of a regulatee can generally be increased by providing rewards for its responsiveness. This study will generally consider the application of RR in developing countries (DCs) and their food safety regulatory regimes (FSRR).⁴ Grading has been suggested in the FSRR of DCs where RR will be presumably effective as the driving regulatory philosophy. Upgrading has been proposed as reward, with downgrading proposed as humiliation or punishment for unresponsiveness. In the last section, this article will demonstrate how this grading system under RR can be applied in the FSRR of the DCs.

The Key Features of Responsive Regulation

RR suggests that “in order to be effective, efficient, and legitimate, regulatory policy should take neither a solely deterrent nor an entirely cooperative approach.”⁵ Ayres and Braithwaite espoused a pyramidal approach which starts with persuasive measures and then escalates to deterrence when necessary. Human beings are born with a sense of responsibility and “it is in the nature of human beings to want to be trusted”.⁶ Thus, continuing punishments can kill the good will and responsiveness of a person. On the other hand, if a law is based on only assumed compliance persuasion, and if it is thought that people will be motivated to be responsible in every case, this is also equally problematic because a total persuasion based strategy will be exploited when the economic rationality motivates a regulatee.⁷ In fact, several instances of legal scholarship suggests that a solely persuasive approach could overindulge the violating regulatees, while a completely deterrent approach could discourage them, as well as lead to a deterioration in the relationship between the regulators and the regulatees.⁸

RR targets the achievement of maximum levels of regulatory compliance by persuasion.⁹ Starting with persuasion in the lower stage of the pyramid actively encourages duty holders to regulate themselves by motivating them positively.¹⁰ However, the most unique feature of RR is the introduction of *regulatory enforcement pyramid of sanctions* (REPS). REPS is “an attempt to solve the puzzle of when to punish and when to persuade.”¹¹ REPS is an enforcement based and action oriented pyramidal plan where at the bottom parts of the pyramid comparatively (and gradually) more space is given in comparison to the other parts. The reason for this is that most regulatory action will take place “at the base of the pyramid,” where persuasion will be used to attempt to convince regulatees to comply with the regulations,¹² the process of which has been

⁴ Note: ‘safety’ is a relative term: see Marion Nestle, *Safe Food: The Politics of Food Safety* (University of California Press, 2010) 27. The meaning of the term ‘safety’ can vary based on person, religion, culture, geographical locations and so on. However, this study will mean the word ‘safety’ from scientific point of view only. Adulterations by different harmful, inferior substances and additives in foodstuffs by human being as well as unhygienic practices to foodstuffs that cause various chronic and non-chronic, infectious and non-infectious diseases will be considered as safety concerns in this study.

⁵ Vibeke Lehmann Nielsen and Christine Parker, “Testing Responsive Regulation in Regulatory Enforcement,” *Regulation & Governance* 3 (2009): 376.

⁶ John Braithwaite, *Restorative Justice and Responsive Regulation* (New York: Oxford University Press 2001), 36.

⁷ Ayres and Braithwaite, *Responsive Regulation*, 19, 24.

⁸ R. C. Simpson, “Safety and Health at Work: Report of the Robens Committee 1970-72,” *The Modern Law Review* 36, no. 2 (1973): 196-7; see also Peter Mascini and Eelco Van Wijk, “Responsive Regulation at the Dutch Food and Consumer Product Safety Authority: An Empirical Assessment of Assumptions Underlying the Theory”, *Regulation & Governance* 3 (2009): 28-9.

⁹ George Gilligan, Helen Bird and Ian Ramsay, “Civil Penalties and the Enforcement of Directors' Duties,” *University of New South Wales Law Journal* 22, no. 2 (1999): 426; see also Michelle Welsh, “Civil Penalties and Responsive Regulation: The Gap between Theory and Practice,” *Melbourne University Law Review* 33 (2009): 910.

¹⁰ Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: System and Sanctions* (Oxford University Press, New York, 1999), 117.

¹¹ Braithwaite, *Restorative Justice*, 30.

¹² Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007), 196; Colin Scott, “Regulation in the Age of Governance: The Rise of the Post-Regulatory State,” in *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance*, eds. Jacint Jordana and David Levi-Faur (Edward Elgar, 2004), 157.

described as the “most restorative dialogue-based approach.”¹³ It is notable that persuasion may include motivation, education, advice, training, and so on.¹⁴ It also may embrace surveillance programs or media releases for encouraging a greater consciousness about legal and regulatory obligations.¹⁵ If persuasion does not work, the regulators may consider an escalation in the REPS and proceed to a warning letter. If the warning letter also fails to secure compliance, then the regulators may impose a civil monetary penalty in an attempt to prompt compliance. The next step will be the criminal penalty in the event that the civil penalty fails. If all the prior steps fail, regulators will move to plant shutdown or temporary suspension of the licence in the case of a corporation. Finally, if the temporary suspension of licence does not work, regulators will have no option but to escalate to the last step of the pyramid and revoke the licence.¹⁶

Application of Responsive Regulation in Food Safety Regulatory Regime

The RR is currently applicable in New South Wales, Australia with great success.¹⁷ The RR has also been empirically applied by the Dutch Food and Consumer Product Safety Authority (DFCPSA),¹⁸ and this empirical research has found that despite having clear guidelines and rules for inspection, food inspectors need to be given some discretionary powers. It has been reiterated that consideration of circumstances is significant for escalation or de-escalation of the REPS. In fact, correctly utilizing discretion is a matter of experience which can hardly be expected from someone who lacks it. Thus, for a proper application of RR in the FSRR of any jurisdiction, this necessitates the proper training of the inspectors.¹⁹

Application of Responsive Regulation in the Developing Countries

Braithwaite admitted that RR is basically designed for developed economies and it faces some limitations when being applied in a developing country (DC).²⁰ First, the regulatory capacities (for example, the regulatory bodies, their infrastructures, functions, powers, etc.) of DCs are not as polished as those in developed ones.²¹ Secondly, responsiveness can work properly where there is a society with a strong state, markets, civil society, etc.. The institutional strength of these organizations facilitates the governance capabilities of the other institutions.²² The weaker organizational capacity of the DCs is also liable to be due to a lack of regulatory staff with sufficient education that can make the RR operate properly.²³ Thirdly, the weaker markets of such countries inhibit the progress of state capacity, and a weaker state contributes to slowing

¹³ Braithwaite, *Restorative Justice*, 30.

¹⁴ Scott, “Regulation in the Age of Governance,” 157.

¹⁵ Referring the Australian Securities and Investments Commission (ASIC) website in Gilligan, Bird and Ramsay, “Civil Penalties and the Enforcement of Directors’ Duties,” 428.

¹⁶ Ayres and Braithwaite, *Responsive Regulation*, 35; see also Morgan and Yeung, *An Introduction to Law and Regulation*, 196; Scott, “Regulation in the Age of Governance,” 157; John Braithwaite, “Policies for an Era of Regulatory Flux,” in *Deregulation or Better Regulation? Issues for the Public Sector*, eds. Brian Head and Elaine McCoy (South Melbourne: Macmillan, 1991), 24. Quoted in Fiona Haines, *Corporate Regulation: Beyond Punish or Persuade* (Oxford: Clarendon Press, 1997), 218-19; Freiberg, *The Tools of Regulation*, 97-8.

¹⁷ See Productivity Commission, “Performance Benchmarking of Australian and New Zealand Business Regulation: Food Safety,” (Commonwealth of Australia, 2009) xx.

¹⁸ See Mascini and Wijk, “Responsive Regulation at the Dutch Food,” 31.

¹⁹ See generally, Robert A Kagan and John T. Scholz, “The ‘Criminology of the Corporation’ and Regulatory Enforcement Strategies,” in *Enforcing Regulation*, eds. Keith Hawkins and John M. Thomas (Kluwer-Nijhoff Publishing, Boston, 1984), 86–7.

²⁰ Note: DCs have numerous problems, such as, corruption, lack of infrastructure, lack of education and technology and so on. But these concerns has not been further analysed in this article due to the scope and bulk of the current study. However, the current paper is the part of a larger study (the author’s PhD project) on the application of the RR in the developing country. Interested readers can wait until the publication of the author’s PhD thesis in 2013.

²¹ John Braithwaite, “Responsive Regulation and Developing Economies,” *World Development* 34, no. 5 (2006): 884, 886.

²² John Braithwaite, “Institutionalizing Trust: Enculturating Distrust,” in *Trust and Governance*, eds. Valerie Braithwaite and Margaret Levi (New York: Russell Sage Foundation, 1998), 352–64.

²³ Braithwaite, “Responsive Regulation and Developing Economies,” 889.

down every institutional infrastructure.²⁴ Fourthly, DCs have a general problem of corruption among regulatory bureaucrats and the non-governmental organizations (NGOs) are hardly strong enough to work as watchdogs in combatting this problem. The overall state regulatory capability of DCs are, in general, very weak, and they (DCs) have to deal with a less settled and less powerful business sector.²⁵ Thus, some countries do not possess sufficient and strong state regulatory capacity to get the best outcomes that are predicted from RR theory.²⁶

There are also some positive aspects of RR for DCs. The REPS suggests that an inspector will not apply a sanction on his/her first visit, but rather he/she will try to persuade the regulatee through advice and motivation by letting them know that he/she (the inspector) will soon return, and if the same poor conditions are found in regard to the corporation, he/she will have no other alternative but to penalize as per the rule. If the regulatee agrees with these terms, the future punishment will also appear fairer, as the REPS work with compliance.²⁷ This proposition of the REPS indirectly suggests that the corporations need to learn to be more responsible so that they do not need to be warned further or penalized upon further inspection. In practice, this compliance method is a useful option for DCs. Most of these countries do not have a mechanism to implement all state legislation. Moreover, a government like this hardly possesses the capacity to enforce each and every law and rule. Hence, Braithwaite recommends that, due to weak enforcement capabilities, DCs need to use the REPS for compliance so that they can reduce the regulators' burden.²⁸ Therefore, it is strongly believed that RR has potential for DCs.²⁹

However, considering the aforementioned limitations, it can be argued that for an effective implementation of RR in the DCs, modification of this theory is needed in a way that considers the circumstances of the particular country and its regulatory regime. The following sections of this study will attempt to discuss modifications of the RR in order to apply it in DCs.

Responsibility Ensures Upgrading, Irresponsibility Risks Downgrading

The RR aims to increase responsibility among corporations. Therefore, corporation that shows responsibility should be rewarded. Conversely, if a corporation shows irresponsibility it should be reprimanded and downgraded as necessary. To demonstrate the current situations of the DCs in general, as an example: food manufacturer 'A' is continually behaving responsibly and has long complied with all regulations; while on the other hand food manufacturer 'B' has demonstrated continued non-compliance with the regulations and produced unsafe food. Here, unless the licence of manufacturer 'B' is suspended or revoked, it can compete in the same market with 'A' and may be profitable, perhaps even more so than manufacturer 'A,' who may have outlaid greater expenditure to ensure regulatory compliance. This situation simply may discourage the good actors like 'A' to continue being good and it may encourage the bad actors like 'B' to continue to breach regulations, perhaps even more frequently and seriously, for greater profit.

One of the originators of RR, Braithwaite, addressed the above issue in a recent piece of scholarship. He suggested the introduction of 'reward' for showing responsibility arguing that human beings mostly are responsible, and they are encouraged to be more responsible if they are rewarded.³⁰ Furthermore, corporations do business in markets and there they must always be economically competitive to survive. In a free market economy, food manufacturers have to compete everyday with their counterparts in regard to food safety and standards. So, once they are rewarded for their compliance, they can use this reward in their advertising which may help them flourish their business. Following the suggestion of Braithwaite, in order to apply the RR in

²⁴ See generally Braithwaite, "Responsive Regulation and Developing Economies," 886.

²⁵ Braithwaite, "Responsive Regulation and Developing Economies," 885, 889.

²⁶ See generally Scott, "Regulation in the Age of Governance," 158.

²⁷ Braithwaite, "Responsive Regulation and Developing Economies," 888.

²⁸ *Ibid.*

²⁹ *Ibid.*, 884.

³⁰ John Braithwaite, "Rewards and Regulation," *Journal of Law and Society* 29, no. 1 (2002): 12-26.

the FSRR of a DC, it is argued that a grading system can be introduced in the food industry, especially in the food manufacturing sector. This can be a thoughtful initiative rather than having all (responsible and irresponsible) food manufacturers in a same category. There is no logic in seeing and treating every manufacturer the same and considering their regular compliance or regular non-compliance with regulation. Grading, especially upgrading, can be treated as one kind of reward, as Braithwaite suggested. If a particular food manufacturer shows greater responsibility by complying with the regulatory provisions and manufactures safe and quality foodstuffs continuously, it should be upgraded from a lower grade to a higher grade. Conversely, if any manufacturer shows irresponsibility and continuously manufactures unsafe and low quality food, it should be degraded from an upper to lower grade. This concept can be called "Responsibility Ensures Upgrading, Irresponsibility Risks Degrading."

Grading Classifications

Generally, grading can be defined as the general category of a commodity classified on the basis of one or more of its characteristics, such as the properties or qualities of that commodity.³¹ It is argued that for the food manufacturing industry, and to accommodate such a system within RR, there can be three grades for food manufacturers, such as Grade A (best or safest), Grade B (moderate or safer), and Grade C (satisfactory or safe).

It is worth mentioning that scaling of grades is not the way to distinguish 'safe' food from 'unsafe food;' rather it is a way of recognizing the responsible behavior of manufacturers in the food industry. It is should be clear that all the 'Grade A,' 'Grade B,' and 'Grade C' foods are safe for consumption. So questions may arise that if all the foods are safe, what is the incentive to achieve 'Grade A' status? It is because manufacturers always look to gain more profit. Further, everyone will be fond of garnering honor and recognition of his/her effort to produce the safest food. The higher status a manufacturer achieves, the higher and broader doors of business and profit will be gradually opened for it. For example, if a food manufacturer achieves 'Grade A' and becomes famous domestically, more foreign importers will be interested in importing food from it. Consequently it will encourage manufacturers to be more responsible and achieve 'Grade A' status.

Now the question becomes how a manufacturer will be graded for these categories. The ongoing discussion will concentrate on this issue. In general, the following method may be applied in grading devices in the DCs:

- 1) If any particular food manufacturer wants to start a food business as a 'Grade A' manufacturer, before they receive approval from the main food safety regulatory body of the respective DC to enter the market, it would have to have its food standards, manufacturing processes, environment, cleanliness, and all other relevant matters considered in regard to food safety and recognized by several network partners (NP),³² one domestic food safety related non-governmental organisation (DFSNGO) of the respective DC, and two developed country food safety authorities (DCFSA);³³ for example: the Food and Drug Administration (FDA) of United States, and the Food Safety Authority (FSA) of United Kingdom, who would be considered the NP with the particular manufacturer. Here the issue may come down to the point on dealing with the situation concerning the staggering differences with regard to food safety and standards between the USA and the UK in applying the grading system within developing

³¹ See John W. Freebairn, "Grading as a Market Innovation," *Review of Marketing and Agricultural Economics* 35, no. 3 (1967): 147.

³² For details of the 'network partners' and the related 'network governance', see Peter Drahos, "Towards an International Framework for the Protection of Traditional Group Knowledge and Practice," in UNCTAD-Commonwealth Secretariat Workshop, Geneva, February 4-6, 2004: 40. See also Braithwaite, "Responsive Regulation and Developing Economies," 890.

³³ The reason for engaging the developed country food safety authority as network partner is that it will reduce the chances of corruption in managing recognition from a food safety authority.

economies. In this case, the related food manufacturer may discuss with all of its NPs to solve the issue. And the highest standards should be observed as far as possible maintaining the commonly consented requirements of the NPs regarding the disputed points. Further, most of the developed countries follow the food standards prepared by the *Codex Alimentarius* (codex) today. Hence, the *Codex* standards can be taken as the borderline if necessary while addressing the differences between food standards of two developed countries.

2) If any manufacturer wants to start a food business as 'Grade B' company, it would need to be recognized by one DFSNGO and one DCFSA.

3) If any food manufacturer wants to start a food business as a 'Grade C' company, it could do so by being recognized by one DFSNGO.

4) Most importantly, no food company would be allowed to start business unless its safety and standards are recognized by the respective country's domestic food safety authority (DFSA).

Once any particular food product enters the market, all NP need to reaffirm their certification by further field monitoring as to whether these particular food products are maintaining their true standard in the market or not. Monitoring activities with the NP must be coordinated and thus NP must monitor the improvement or degradation of the food standard at both the production stage as well as when it is sold to consumers.³⁴

Any manufacturer can directly start business as 'Grade C' or 'Grade B' or 'Grade A' by fulfilling the above mentioned criteria. However, a food manufacturer's licence could not be suspended unless (if initially at a higher grade) it falls from 'Grade A' to 'Grade C' and then fails to maintain even that standard. Creating appropriate criteria is important here as is the involvement of NP. NP should be chosen very carefully. Recognition from the DCFSA³⁵ is wiser, as their standards are already accepted across the world. This would be preferable to the involvement of more than one DFSNGO or the food safety authorities of other developing countries, if possible.

Once the particular manufacturer achieves certification by their NP and applies to the DFSA for market entrance, the relevant DFSA will consider and verify the certifications (certificates of recognition) by the other bodies involved. Then, respective DFSA may allow the particular food product of the manufacturer concerned to be sold in the market. There can be a seal affixed beside the indication of what grade has been achieved for the particular product and an indication to consumers of what the grading means. Every year the manufacturer would need to renew their grading certification. For example, if the FDA certifies a particular food product of a particular DC in 2013 as one that maintains all food standards of the USA, this certificate will be valid for one year. The manufacturer would then have to renew it in 2014. In the interim, an inspector or a consumer can challenge the grading, and the manufacturer would have to demonstrate the quality of the product to the relevant authority.

While a food business may wish to start operation as a 'Grade C' company, the proposed system would allow it to be gradually upgraded to a 'Grade B' or 'Grade A' manufacturer. In practice, it may be tough to manage the number of certifications required from the NP. In this case, if a 'Grade C' company in a DC maintains their standard successfully for one year, (that is, it has passed the initial grading and first subsequent certification processes) the requirements for the manufacturer to be upgraded as 'Grade B' company can be relaxed in recognition of this success. In such an instance, the required recognition from one DCFSA can be deleted as reward for the consecutive successes. Such a manufacturer can be upgraded to a 'Grade B' manufacturer

³⁴ Jacques Pelkmans and Jeanne-Mey Sun, "Towards a European Community Regulatory Strategy: Lessons from 'Learning-by-Doing,'" Regulatory Cooperation for an Interdependent World (Paris: OECD Publishing, 1994), 190.

³⁵ A developed country under this study should be recognized by the United Nations Development Program (UNDP) as a 'developed country.'

by managing recognition from only one DFSNGO. In the case of a ‘Grade B’ manufacturer of a DC, the same can happen for upgrading into ‘Grade A’ manufacturer, and requirements can be relaxed to only obtaining recognition from only two NP: one from a DFSNGO, and another from a DCFSA. The important fact is that to be recognized as a ‘Grade A’ food manufacturer, recognition from at least one DCFSA should be must.

In addition, whenever any food manufacturer fails to maintain ‘Grade C’ standard, it will be downgraded a position on a ‘name and shame’ list and will be under observation — unless its offences are such that its licence is permanently cancelled as sanctions have escalated to the apex level of REPS. During its time on the ‘name and shame’ register, the licence of any food manufacturer will be cancelled unless it upgrades its standard to at least the starting business grade, that is, as ‘Grade C’ manufacturer. A manufacturer whose business has been entered in the ‘name and shame’ register should only be given the chance to restart business as ‘Grade C’ business, so that they are not pressured to upgrade standards suddenly.

The proposed grading system to be applied in the FSRR of DCs is represented in Figure 1.

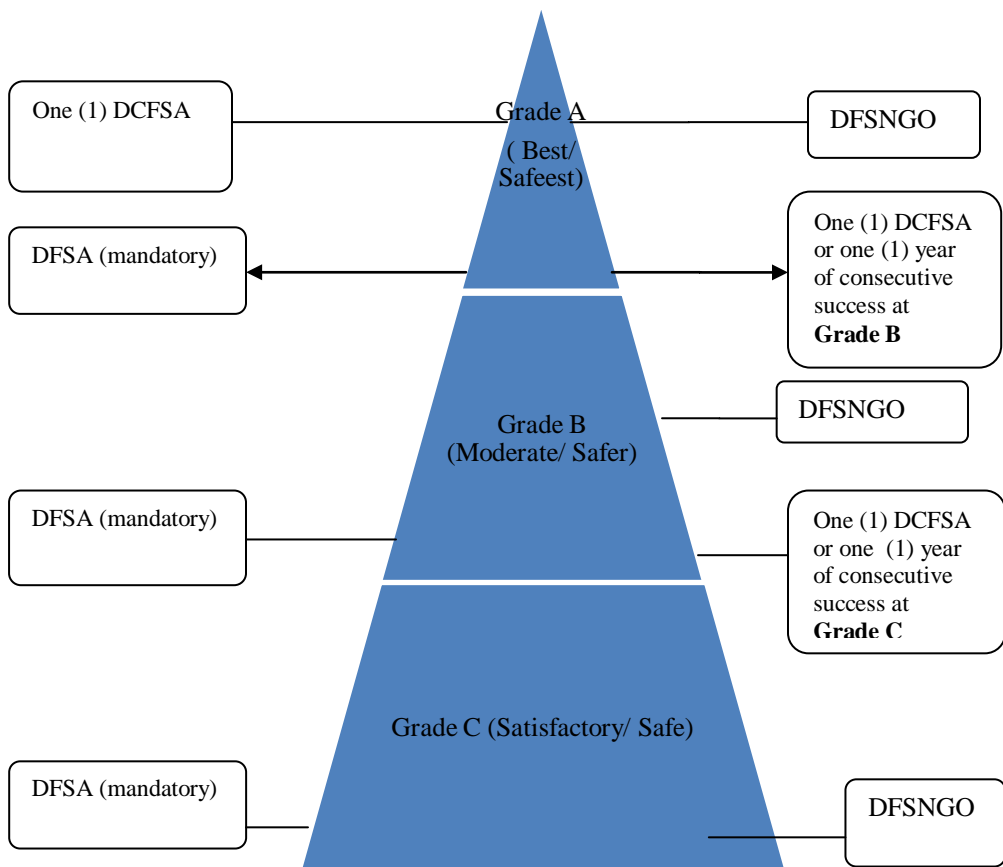


Figure 1: Graded Food Standard Pyramid for Food Manufacturers in DCs

Significance of the Grading System

In addition to the recognition and reward approach, a grading system can have various positive impacts on the food industry. The following discussion demonstrates the positive aspects of the adoption of a grading system in the FSRR in DCs.

Freebairn mentioned that grading will increase producers’ returns, their competitiveness in the market, as well bringing greater buyer satisfaction and marketing efficiency. He considered grading systems as a market innovation, and argued that it will help to trace the dynamics of the

consumers, manufacturers, and the market as well.³⁶ In practice, all buyers do not have the same buying capacity. Lower graded food³⁷ will be in a comparatively lower price range while higher graded foodstuffs will attract a higher price. The price range accommodates the buying capacity of all levels of consumers. Within a graded food industry, a consumer can choose a particular food product which he/she prefers and he/she is willing to pay for.³⁸

By acquiring a high grading, a manufacturer can possibly make more profit in his/her business, and consumers can benefit as well. For example, two similar biscuits with the same ingredients and fulfilling the same requirements are designated as manufactured by 'X' and 'Y' and both do business in the market. X has gained recognition from two DCFSA, for example, the FDA, and the FSA, and have acquired a 'Grade A' status. On the other hand, Y (with identical ingredients) has gained recognition of just the respective DFSA and one DFSNGO, and has been listed as 'Grade C.' Here X can easily price their product higher and can attract importers from developed countries, while Y cannot. However, in the case of 'X,' the manufacturer has benefited, and in the case of 'Y,' the consumers have benefitted, as they are getting the same foodstuff as those purchasing 'X,' but are enjoying it at a lower price. Finally, Y will try to gain the recognition required to be a 'Grade A' manufacturer and the whole situation is one where, ultimately, the market is competitive and consumers benefit both from a safety and economic perspective.³⁹

Moreover the international markets will also be benefited by the availability of the various graded safe foods. Especially a developed country (particularly the related NPs) can import foods from the respective DC, which has made safe foods following their (NP's) required safety standards. Practically, the grading of food products can make the markets and entire food industry more efficient. Quality and grade will be seen on the food label, which will eliminate the time and expense of arguments over the quality of the food.⁴⁰

Finally, the above arguments signify that none of the graded food products will be unsafe for consumption, which thus suggests that grading will be on the basis of domestic and international recognition. Once a DC communicates and maintains a network with other counterparts for recognition, then it feels its own weaknesses or strengths, which ultimately bring out the utmost safety. Therefore, introducing a grading system ultimately delivers more safety, as well as great market efficiency, as detailed above.

Enforcement of REPS in the Graded Food Industry

The application of REPS in a graded food industry cannot be identical for all food manufacturers. For example, where a 'Grade A' manufacturer initially violates the regulation, it naturally loses the right to continue its business as a 'Grade A' company. Thus, in the first instance after a warning letter has been sent and improvement notice served, the manufacturer should be kept under observation. In the event of a second instance of non-compliance, it should be downgraded to a 'Grade B' company as further warning. If the same company further violates the law, at that point it can be given a civil penalty. After the third violation, it loses the right to do business as 'Grade B' company and so can be downgraded to a 'Grade C' food manufacturer. After this, if the same manufacturer persists in violating the regulations, there is no chance of further downgrading, so, at that point, it can be given the criminal penalty. If a manufacturer is running a business as 'Grade C' company, and has been previously criminally penalized, again violates the law, at this point its licence should be suspended and added its name to the 'name and shame' register. If it cannot return to the food business within the timeframe, (for example, within one year) its licence should be permanently revoked and it should not be given permission to return

³⁶ See generally Freebairn, "Grading as a Market Innovation," 147, 148.

³⁷ It is reiterated for emphasis that lower graded food does not mean unsafe or unhealthy in any aspects, because the domestic recognition of food standards will be the minimum criteria for a particular food product to be sold in the market.

³⁸ Freebairn, "Grading as a Market Innovation," 148.

³⁹ *Ibid.*, 153.

⁴⁰ *Ibid.*, 158.

to any kind of food business run by the same owners/directors. The figure 2 shows the entire application of REPS to a ‘Grade A’ food manufacturer.

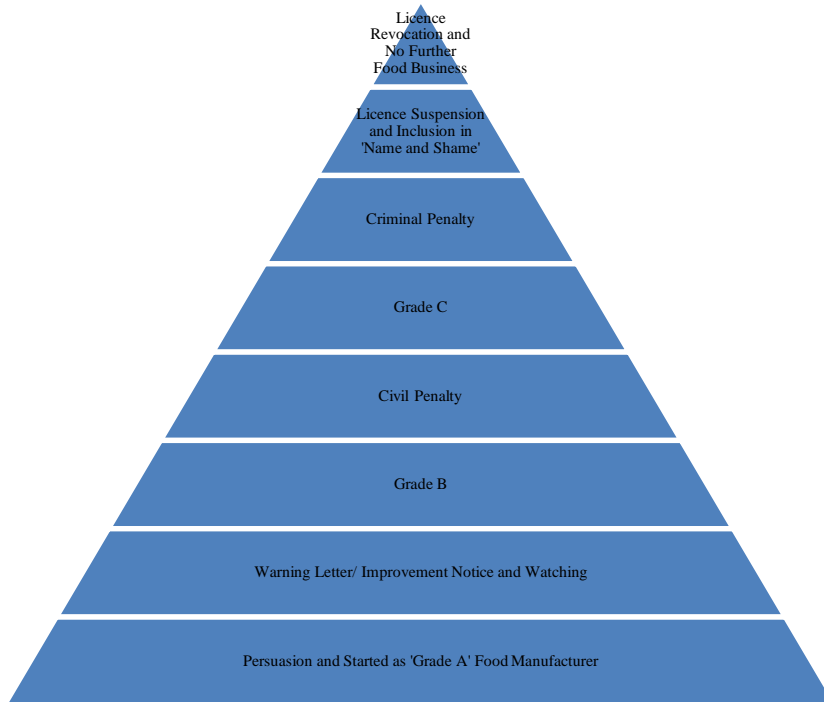


Figure 2: The Application of REPS in a ‘Grade A’ Food Manufacturer

Regarding a ‘Grade B’ manufacturer, the first violation should be addressed with a warning letter, improvement notice, and by observation as is usually the practice. In the event of a second violation, it should lose the right to run the business as ‘Grade B’ manufacturer. In this stage the inspector will not directly penalize, but rather downgrade the manufacturer to ‘Grade C’ company as further warning. In the event of a third violation, as there is no scope for more downgrading, the regulator, in accordance with the regulatory pyramid illustrated below, escalates the sanction to a civil penalty. Thereafter, its licence should be suspended and its name added to the ‘name and shame’ register. In the final stage, if the company cannot get back to business within the required period of time, as ‘Grade A’, ‘Grade B,’ or ‘Grade C’ food manufacturer, then licence of this particular food manufacturer should be permanently revoked and they cannot have any further opportunity to start food business again. The REPS for the ‘Grade B’ is shown in the Figure 3:

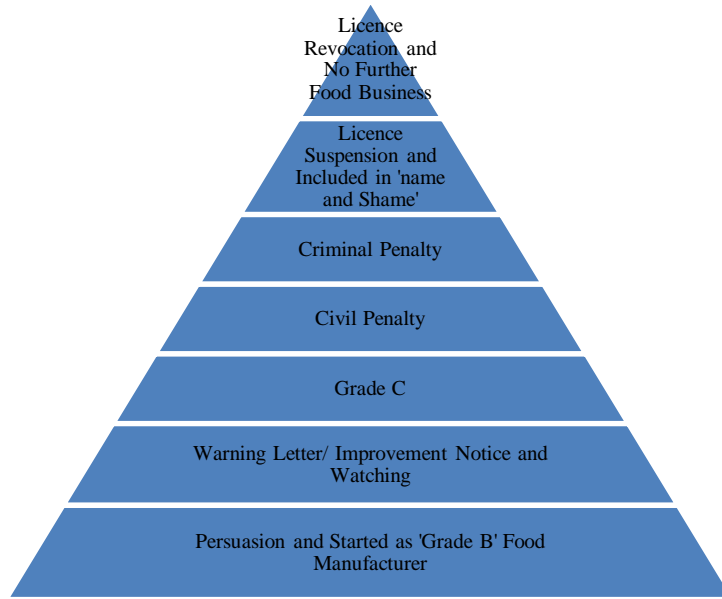


Figure 3: The Application of REPS in a 'Grade B' Food Manufacturer

With regard to a 'Grade C' manufacturer, the regular REPS will be applied as there is no scope for downgrading. After persuasion, the first violation will be addressed with warning letter/improvement notice and by observation. Then, further or continuing violations will cause sanctions to be escalated accordingly: to civil penalty, then criminal penalty, then licence suspension and entry in the 'name and shame' register, and finally to licence revocation and no further participation in the food industry. The REPS for the 'Grade C' is shown in the Figure 4.

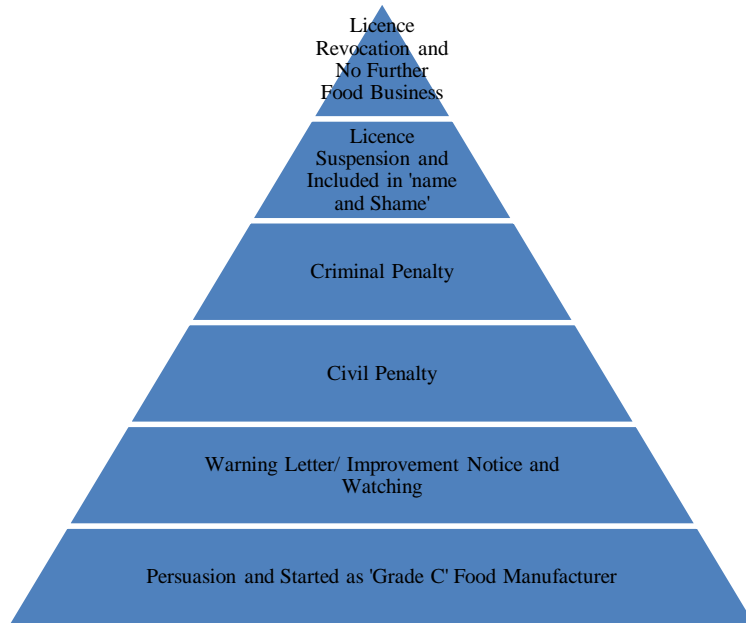


Figure 4: The Application of REPS for the 'Grade C' Food Manufacturer

It is worth mentioning that in every case of the escalation by the enforcement authorities in accordance with the pyramid, the report of the NP should be given a serious consideration. A DFSNGO can participate in the enforcement indirectly by assisting the anti-adulteration drive or by suing in public interest litigation available in many DCs. But a DCFSA cannot directly interfere in the judicial system of a sovereign country. However, all the NP (both domestic and foreign) can be indirectly included in the REPS. It would be done in the following way:

Firstly, the NP would have the power to give their recognition or withdraw such recognition in regard to a particular food manufacturer based on their standards, after having their inspection of every possible area; it is one kind of indirect enforcement — either positive in the case of a well-deserved upgrading, or negative in the event of having to downgrade the food manufacturer's grading or commenting negatively on their standards. A DFSNGO or DCFSA could do this after an independent inspection under the FSRR of the respective DC.

Secondly, there has been another proposal for the involvement of NP. Whenever an inspector inspects the particular food manufacturer and finds that it does not satisfy any particular 'Grade A', 'Grade B,' or 'Grade C' as described above, the inspector will first collect the particular food sample or any other evidence available, such as a video record on cleanliness, environment, temperature recordings, and so on. After collecting the evidence, he/she will send a copy or portion of such evidence to the respective NP for their comments to be submitted within a short span of time (for example within two weeks) so that the inspector can rapidly, and on the basis of the best advice, make a considered decision, before downgrading the particular manufacturer. At this stage, the NP have the opportunity to provide their opinion after testing the food sample in the laboratory or testing the evidence record. As an example, the NP may view videos for whether or not the manufacturer is maintaining the standard as earlier certified by that NP. Once the inspector receives the feedback from the NP, he/she can decide on the basis of his findings and feedback.

It is worth mentioning that, as described above in this study regarding the application of REPS, in every case the courts should have the power to intervene in every step, including the civil penalty, criminal penalty, licence suspension or cancellation, if needed. An aggrieved regulatee may wish to challenge any sanction under the REPS issued by the inspectors or any enforcement authority in an authorized court. In that case, the court will make the ultimate decision.

Summary and Conclusion

The RR has been based on the basic human philosophy of compliance, and a more natural and traditional enforcement style which suggests persuasion, warning, and negotiations for compliance.⁴¹ Braithwaite has demonstrated in his scholarship that insertion of reward can accelerate the responsibility the regulatees under the RR. Thus, the current study has argued that applying a grading system in the RR can gear up its applicability in the FSRR of the DCs. Finally, it is advised that the above modification of the RR, accommodating it with the FSRR of a DC, can be subject to further change or modification in regard to the number of NP, so as to make it more flexible.

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⁴¹ See generally Robert Kagan, "The Good Inspector", in *Law and Society Meeting*, Madison, June 1980: 1. See also Susan S. Silbey, "The Consequences of Responsive Regulation," in *Enforcing regulation*, eds., K Hawkins and JM Thomas (Boston: Kluwer-Nijhoff Publishing, 1984), 148.

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ABOUT THE AUTHOR

Abu Noman Mohammad Atahar Ali: Mr Abu N. M. Atahar is an active researcher and academic. He joined the Department of Law & Justice at Southeast University Bangladesh in 2006, having been a Senior Lecturer since 2010. Atahar has published in different law and business journals on areas including Consumer law, Labour law, Criminal Law, and on Constitutional law. He has contributed to a book on Biharis Community of Bangladesh during his undergraduate study. Currently, Mr. Atahar is conducting his Ph.D. on Food Safety Regulation at University of Wollongong, Australia. He is expected to finish his Ph.D. in early 2013.

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