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How can the SEC advance the public's interest? 3/8/15

"Regulatory capture is neither corruption nor control. Corruption and control are actions of the regulated entity. Regulatory capture is characterized by the regulator's attitude, not the regulated entity's actions. A regulator is "captured" when he is in a constant state of "being persuaded": persuaded based on a persuader's identity rather than an argument's merits. Regulatory capture is reflected in a surplus of passivity and reactivity, and a deficit of curiosity and creativity. It is evidenced by a body of commission decisions or non-decisions—about resources, procedures, priorities, and policies, where what the regulated entity wants has more influence than what the public interest requires. The active verb "capture" signals an affirmative effort, to take someone captive. But the noun "capture," and the passive verb form "to be captured," signal a state of being. One can enter that state through one's own actions or inactions. One can allow oneself to be captured. One can assist, and sustain, one's own captivity.

If regulatory capture is a state of being, assisted and sustained by the captive, what roles are played by others? Regulatory capture is enabled by those who ignore it, tolerate it, accept it or encourage it: legislators who under-fund the commission or restrict its authority, presidents and governors who appoint commissioners unprepared for the job, human resource officials who classify staff jobs and salaries based on decades-old criteria unrelated to current needs, intervenors who treat the agency like a supermarket where they shop for personal needs, and who treat regulatory proceedings like win-loss contests rather than building blocks in a policy edifice. These actions and inactions feed a forest where private interest trees grow tall, while the public's needs stay small…

No vision, no priorities: In a captured agency, its leaders don't ask the big questions:

Issue-framing by the parties: [D]escription is prescription. If you can get people to see the world as you do, you have unwittingly framed every subsequent choice.

Procedures that value positions over perspectives: Capture is implicit in how agencies organize their proceedings. In captured agencies, litigating parties emphasize positions over perspectives. The agency invites and rewards this practice by asking "What do you want?" rather than "What do you know?" When hearing orders (the initial orders stating the issues to be decided) merely restate the parties' requests, rather than articulate a public interest purpose, that is evidence of capture. The commission becomes a commercial interest arbitrator at best, a supermarket for private interest shoppers at worst. Policy leadership is missing. In the hearing room, the parties ask each other hours of questions aimed at their own interests. The commissioners and hearing examiners mostly observe, on the mistaken premise that oppositional sparks will light up a public interest path. The parties treat the agency staff as a mediator for short-term settlements rather than as a transmitter of the commission's vision (a real likelihood if there is no vision, as described above). The commission accepts these settlements instead of directing its staff to pursue its vision.

External political actions and inactions:

"What's good for the company is good for the country": It is common for benefit-seekers to describe their private interests in public interest terms.

"…a regulator that acts like a judge undermines the agency's effectiveness. He assumes that the parties, their interests, their arguments, and their legal citations comprise the full intellectual universe requiring regulatory attention. This assumption relies on one or more of the following premises, each one wrong:

(1) the scatterplot of private interests appearing in a proceeding will display some pattern from which the commission can discern the public interest;

(2) the public interest is synonymous with satisfaction of those private interests;

(3) the private interests' evidentiary submissions will produce information sufficient in relevance and objectivity to discern the public interest;

(4) the opportunity for access equals the reality of access (i.e., all possible private interests have hearing room resources sufficient to get the commission's ear); or

(5) through the static and friction of private interest opposition, a regulatory "truth" will emerge.

Accepting any of these premises undermines effectiveness, by:

(1) inducing intellectual passivity, because the proceeding and the record become party-centric rather than public-centric ("What are the parties seeking?" instead of "How do I advance the public interest?");

(2) imposing the wrong time horizon (the parties' short-term goals rather than the public's long-term needs);

(3) reducing the regulator's objectivity (because the regulator learns the issues from parties' arguments rather than impartial sources);

(4) distorting the regulator's time management, because as the parties load the record with conversation among themselves (testimony, cross examination, and briefs), procedural law compels the regulator to read every page, leaving insufficient time and mental space to read and think on her own; or

(5) substituting private settlements for public interest solutions (regulation, unlike marital dissolutions and fender-benders, requires policymaking, not dispute resolution)."

http://law.emory.edu/ecgar/content/volume-1/issue-1/essays/regulatory-capture.html