

The background features abstract, overlapping green geometric shapes, primarily triangles and polygons, in various shades of green, creating a modern and dynamic visual effect.

Shaping Policy Through Corporate Involvement


By Mike Chase @CrimeADay

In-House Panelists

- Mike Chase, Shipman & Goodwin
- Melissa H. Brown, Associate General Counsel, Koch Companies
- Nathan Morris, Sr Director, US Chamber Institute for Legal Reform
- Shana O'Toole, Founder & President, Due Process Institute
- William Shepherd, Holland & Knight


Business interests shape law and regulation


- Tens of thousands of pages of regulations added to Federal Register each year, often at behest of or in response to industry

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- Submission of comments by impacted industries matter
 - Also pay attention to analogous industries since regulations are often cribbed from other regulations.

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➤ Responsible business decisions can also prevent reactive regulation


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- Some regulatory response is unavoidable
 - May be driven by economic intervention
 - Government's interest in tax revenue
 - Competitive interests

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Anti-competitive interests shape criminal law

- Early examples included the butter v. margarine battles of the late 1800s
 - Butter industry was concerned about competition from new, cheaper margarine

- Industry lobbied for laws that would make margarine unappealing
 - Prohibitive margarine tax was imposed
 - Restrictive labeling requirements implemented
 - Supreme Court even had to step in to hold that it was unconstitutional for state laws to criminalize the sale of non-pink margarine (*Collins v. State of New Hampshire*)
 - To this day, unlabeled, single serve margarine must be served in triangular shaped portions to avoid federal criminal liability
 - *all because dairy industry was concerned about competition*

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- Other industries followed suit
 - Dentists protested the mail-order denture business during WWII
 - The law (which remains on the books) made it a crime to mail dentures into a state, if the person making the dentures was not licensed as a dentist in that state
 - Days of congressional testimony for and against the law made clear that what was claimed to be a health concern, was equally a protectionism concern

- A few margarine dealers were criminally charged for violating margarine regulations and were some of the first business owners to test out regulatory crimes created at the behest of dominant market players



➤ More recent examples might include

- Taxi vs. Uber
- Tobacco vs. Vaping
- Traditional car dealerships v. Tesla

Proactively identify externalities and sources of complaint

- Bike-share services, pay attention to abandoned bikes
- Social media services, pay attention to possible illicit uses of platform
- Lemonade stand, pay attention to cups becoming litter

Federal regulations, often made punishable by criminal penalties, are increasingly more numerous and broad in scope

- There are hundreds of thousands of them
- They regulate everything from mailing bees, to flying drones, to what can legally be called "fruit cocktail," or who can compete with the post office by delivering letters

Corporate citizens can help shape regulatory, legislative and enforcement policy by not just avoiding the protectionist strategies of days past (i.e. urging the creation of new criminal statutes), but by being mindful of the penalties that currently exist when participating in the regulatory process

- When industry is aware of the penalty provisions applicable to certain regulatory schemes, they can more appropriately tailor their comments and input on future regulatory efforts

Good corporate citizenship through proactive compliance makes further regulation (and regulatory crime-making) less likely

- Live in a climate where the answer to unenforced or poorly enforced rules is often the creation of a new rule
- Better proactive adherence may deter unnecessary proliferation of regulations
- Think of the industry specific regulations that are obviously responsive to bad actors

What about affirmative lawsuits, challenging federal state regulatory rules?

- What makes a corporate actor decide it's worth it to spend time and money and on taking policy positions in litigation?

As non-parties in litigation:

- How do corporations get involved in amicus filings?
- What is the impetus – good corporate citizenship? Tangential interest in the subject matter?
- Why do corporations take on the PR risk of taking potentially controversial positions when they can just choose not to get involved?

Direct Policy Action:

- Lobbying is the most commonly thought of way for corporations to effectuate change
- Supporting others who lobby in ways that create synergy with your company's values

How Else to Build or Support Environment For Policy Change?

- Thought leadership
- Op-eds
- Published articles
- Management & Leaders Who Reflect Values/Goals and Support Efforts
- Community Events
- Financial Support of Non-profits
- Hiring Outside Counsel Who Are Involved in Judicial Nominations, Lawyers' Committees & Other Valuable Policy-Related Roles