



Tuesday, October 26
4:30pm-6:00pm

811 - I'm Mad and Not Going to Take It Any More — Challenging Government Action

Bill Cobb

Deputy Attorney General for Civil Litigation
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Robert Johnson

Chief Attorney - Environmental & Safety
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Reed Rubinstein

Senior Counsel
U.S. Chamber of Commerce

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Faculty Biographies

Bill Cobb

Office of the Attorney General of Texas

Robert Johnson

Rob Johnson is chief attorney - environmental & safety, for Exxon Mobil Corporation, based in Houston, Texas. In this position Mr. Johnson is responsible for the provision of legal advice on environmental and safety law issues to Exxon Mobil Corporation and its worldwide affiliates. He leads a team of 18 lawyers and other legal professionals and assistants.

Prior to his current assignment, Mr. Johnson served as assistant chief attorney, ExxonMobil Production Company, with responsibility for legal advice to ExxonMobil upstream affiliates in the US, West Africa, and Asia-Pacific. Before the merger of Exxon and Mobil, Mr. Johnson held a variety of legal positions with Mobil Corporation, including litigation and upstream assignments. He joined Mobil, he was an associate in the Washington, DC office of Hunton & Williams.

Mr. Johnson has been an active member of ACC, serving as a board member and president of ACC's Houston Chapter, and a board member of the ACC Houston Diversity Foundation. He is also active in pro bono work at ExxonMobil. He has served as chair of the Oil and Gas Committee for the Institute of Energy Law. His other community service activities include serving as an assistant scoutmaster with the Boy Scouts of America.

Mr. Johnson received his law degree from Georgetown University, and his undergraduate degree from American University in Washington, DC.

Reed Rubinstein

U.S. Chamber of Commerce

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The Working Paradigm

- Engage The Regulators
- Validate The Agency's Data And Methods
- Appropriately "Comment" On Agency Proposals
- Reach Out To OMB
- Seek Allies
- Litigate

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Engage The Regulators

- Consider meetings to shape regulatory action.
 - Formulate and pursue realistic objectives.
 - Note that *everything* you say is public record.
- Generally, it is unwise to sit back and wait for proposed rules to be promulgated before acting.
 - The better approach is to respond to formal and informal agency requests for information as rule-writers *may* welcome input.
- Staff properly.
 - Be substantive and explain why your concerns matter in a broad sense.
 - Listen!

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Engage The Regulators (cont.)

- Create a credible, professional, technical relationship.
 - Agencies generally appreciate substantive, technical discussions.
- Engagement is a process that requires multiple contacts in multiple ways with multiple actors.
 - One-off contacts and/or uncoordinated efforts are generally ineffective.
- Data, policy, and legal issues are all fair game.

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Validate Agency Data And Methods

- The Information Quality Act governs all information "disseminated" by an agency. 44 U.S.C. §3516 note.
 - All information must meet quality standards (67 Fed. Reg. 8452).
 - "Affected persons" may "seek and obtain correction" of information disseminated in violation of the IQA.
 - "Influential" information must be objective, accurate, reliable, and unbiased, and agencies must provide a high level of transparency "about data and methods."

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Validate Agency Data And Methods (cont.)

- Agencies all have IQA "guidelines" that set the procedures for requesting disclosure of data, methods, and support, and for requesting correction of inaccurate statements.
- IQA remedies are currently being tested in court.

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Appropriately "Comment" On Agency Proposals

- Comments generally "create the record." This is critical for future litigation, among other things.
- Comments are your opportunity to reach multiple constituencies. Use plain English and remember who *really* matters.
 - Provide as much data as possible detailing the impact of proposed actions on your industry.
 - You must show why, as a matter of fact and law, the agency should change its proposed course of action.

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Reach Out To OMB

- Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) reviews rules with significant economic impact.
- OIRA is generally more receptive to cost-benefit analyses.
 - OIRA is where you can effectively make your economic impact case.

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Litigate

- The Administrative Procedure Act generally controls.
 - Limited scope of review.
 - Courts defer to agencies on matters perceived to be within their unique expertise (*Chevron*).
- "Procedure" is often dispositive.
 - You must be in the correct forum.
 - You must have standing (direct and/or associational).
 - You must "check the boxes" of agency proceedings.
 - You must plead properly.

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Seek Allies At All Stages

- Trade associations
- Governmental agencies
- Public interest groups
- Media

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Litigate (cont.)

- Regulatory litigation is often a process, not an event.
 - Litigation may be the continuation of politics by other means.
 - Coordination with additional party-intervenors or *amici curiae* can be key.
 - Note the “cultural differences” between ALJs, district court judges, and appellate panels.
- Remedies, and the associated metrics of success, vary.
 - An ALJ may overturn agency action.
 - A court may vacate or remand a rule.
 - The government may settle.

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Working With Your Trade Association

- Multiple Benefits.
 - Broad perspective that can help frame strategic plan.
 - Deep knowledge of substance and process, expertise, and connections with all key stakeholders.
 - Significant cost efficiencies.
 - Can provide political cover/mitigate recusal problems.

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Working With Your Trade Association (cont.)

- Challenges and issues.
 - Resources are not unlimited. KEY: You need to be willing to bring sweat equity to the table and not just your \$\$s.
 - Trade associations vary in strength, depth, and assets.
 - Your issue may not be the Association's issue (e.g., industry wide vs. more narrow impact).
 - “Lowest common denominator” concerns.
 - Coordination can be frustrating.
- You may still need to engage/comment on your issue



Extras from ACC

We are providing you with an index of all our InfoPAKs, Leading Practices Profiles, QuickCounsels and Top Tens, by substantive areas. We have also indexed for you those resources that are applicable to Canada and Europe.

Click on the link to index above or visit <http://www.acc.com/annualmeetingextras>.

The resources listed are just the tip of the iceberg! We have many more, including ACC Docket articles, sample forms and policies, and webcasts at <http://www.acc.com/LegalResources>.