

1 ISSUE ALERT | February 13, 2004

U.S. Chamber Seeks Information on Government Consent Decrees

The U.S. Chamber of Commerce (Chamber) has submitted Freedom of Information Act (FOIA) requests to some 30 federal agencies seeking information on how these agencies use consent decrees to establish regulatory policy. The Chamber wants to know how many consent decrees have been entered into, what rules govern their use, and whether they were subjected to public notice and comment.

The Chamber's actions are part of its ongoing effort to evaluate the prevalence of "Regulation by Litigation" - the practice whereby private groups sue federal agencies to force the agencies into settlement agreements. These settlement agreements can be far reaching, and can literally define entire regulatory programs for years into the future. For example, consent decrees were used to compel the U.S. Environmental Protection Agency to issue 40 sets of effluent limitations guidelines, and to force the U.S. Fish & Wildlife Service to designate critical habitat for numerous endangered species. In doing so, all established agency practices were bypassed.

The traditional process for making governmental policy is for Congress to pass laws and for federal agencies to implement those laws through rules or regulations. The rulemaking process is transparent because draft regulations must be published for public notice and comment, must undergo cost/benefit analysis, and must be reviewed by the White House Office of Management and Budget before being finalized. These safeguards operate as checks and balances on the process, however, when private deals are made through negotiated consent decrees, public policy is made behind closed doors and without public oversight.

"Regulation by Litigation" can be a serious problem if governmental policies are being made without public input. The Chamber will report on the results of its FOIA requests in the coming months. If you have any questions, or would like to discuss this matter in greater detail, please contact Bruce Lundegren, Director of Regulatory Affairs, at (202) 463-5415 or via e-mail at blundegren@uschamber.com.