Construction Industry Round Table

Mark A. Casso, Esq.
President
Construction Industry Round Table
8115 Old Dominion Drive, Suite 210
McLean, VA 22102
Phone: 202-466-6777
Email: mcasso@cirt.org

April 16, 2015

The Honorable Ron Johnson
Chairman; and
The Honorable Tom Carper
Ranking Member
U.S. Senate Committee on Homeland Security
and Governmental Affairs
340 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Johnson & Ranking Member Carper:

On behalf of the Construction Industry Round Table (CIRT)[1], I want to thank you for your request of the Round Table to participate in the critically important effort to review the *cumulative* impact the federal "regulatory complex" has on every day aspects of American lives, lands, and liberties.

Introduction

The design and construction industry – is a highly labor intensive endeavor that provides good paying jobs in communities across the country. Given the work is highly decentralized the firms tend to be small and/or operate in a locale even if they are part of a larger organization. As such, the industry provides vital job opportunities in many locations and participates as a critical member of its community. Just as important as the *direct* employment opportunities created – the design/construction community also plays a vital role in supporting the nation's ability with respect to global competitiveness, economic activities, and national security, as well as impacting the extraordinary quality of life enjoyed by all Americans.

So, when the design/construction industry is burdened with unnecessary or ineffective mandates that often take valuable time they also cost jobs[2] . . . thus, regulatory delays, redundancies, inefficiencies, and red tape collectively have a direct impact on costs and therefore the vitality and ability of our industry to remain profitable and hire more people.

---

[1] *The Construction Industry Round Table (CIRT) strives to create one voice to meet the interest and needs of the design and construction community. CIRT supports its members by actively representing the industry on public policy issues, by improving the image and presence of its leading members, and by providing a forum for enhancing and/or developing strong management approaches in an ever changing environment through networking and peer interaction.*

The Round Table is composed of approximately 115 CEOs from the leading architectural, engineering, and construction firms in the United States. Together these firms deliver on billions of dollars of public and private sector infrastructure projects that enhance the quality of life of all Americans while directly employing half-million Americans.

[2] *Unemployment in the construction industry remains one of the highest, averaging* ***11.33% in 2013, 8.92% in 2014, and 9.97% in 2015*** *(non-seasonally adjusted). [Source: Table A-14, Bureau of Labor Statistics].*

Measuring the "Regulatory Complex" Overall Burden on the Design/Construction Community

The process of designing and constructing is one of man's most complex and daunting endeavors. This complexity is borne not just from the number of parties and interested players that may have a hand in or influence over a given project, but also from the number of layered jurisdictions (federal, state, local, etc.) that are involved.

The cacophony of laws, regulations, and rules that we insist on heaping on our private sector job creators is ***unprecedented*** and their ***cumulative burden*** is not really known or fully appreciated.[3]

In an effort to better understand the general impact or burden created by the "regulatory complex" on the design/construction industry, CIRT undertook a series of steps to try to quantitatively measure the costs with its members.

The CIRT Sentiment Index, conducted among the Round Table's 115 members, gathered and analyzed information with respect to the burden placed upon the industry by the regulatory complex.[4]

The findings are extraordinary – when the answers were weighed the additional *costs* and *time* incurred as the result of "red tape" was **10 percent.**[5] If extrapolated out to cover the annual dollar activities of the industry (even at the sluggish levels of the past few years)[6] – it still amounts to somewhere around **$90-100 billion dollars in waste and inefficiency** (per year) for infrastructure related projects.

Combining these findings (of 10 percent burden) with studies conducted by the federal agencies that attempt to identify the number of jobs supported

---

[3] *The most recent CIRT Sentiment Index report found "uncertainty of the direction of government, especially regarding decisions directly affecting the economy;" as among the top three business concerns.* [See, 1st Qtr./2015 CIRT Index Report].

[4] *CIRT conducts a quarterly sentiment index among its 115 members to gauge their views on the direction of the overall economy, specific market areas, and with respect to current or topical policy/business issues of interest. "Attachment A" covers the results of the questions with respect to the impact/cost of red tape.* [See, CIRT Sentiment Index, 1st Qtr./2011]

[5] *To arrive at the overall 10 percent figure, the responses in Exhibits 3 were weighed from among the individual findings.* [See, Attachment A].

[6] *"Construction Put in Place" data provided by the U.S. Census Bureau on total dollar expenditures in the industry are: $930.5B (2013) and $982.1B (2014), which are off by approximately 20% from the high of $1.2Trillion in 2006.*

(directly in construction) by "a dollar" of construction activity – the magnitude in ***loss*** **job opportunities** is truly staggering at approximately: **1.0 million**.[7]

These findings are not unique to the design/construction industry as shown by other measures and studies that compare different U.S. States and how they create favorable or unfavorable job expanding environments. An analysis by *Investor's Business Daily* of Bureau of Labor Statistics figures found that only16 states between 2009 and 2012 had enjoyed job growth.[8] Not surprisingly, most of these states all had some common business friendly attributes, such as: tax rates, regulatory constraint, tort reform, and the size of state government.[9]

Specific Regulatory Burdens

The examples of "red tape" found in procurement of services, environmental requirements, public safety, financial requirements (FinReg), project delivery, payment systems, benefit mandates (health care reform), taxes, and other related areas – are the subject of the comments below.[10]

---

[7] *This estimate is based on a study conducted by the USDOT, "Employment Impacts of Highway Infrastructure Investment" (April 2008). The 2008 report reviewed and revised earlier work, concluding that approximately 11,920 "construction oriented employment person-years" were supported and/or impacted by an additional $1.0 Billion dollars of expenditures.*

EVEN IF the 1.0 million job loss number could be off-set by productivity gains or better use of the idled manpower associated with "red tape," it STILL REMAINS a very large number of jobs not supported or created as the result of inefficiency. For example: cutting the estimate in half or 50% (still amounts to 500,000 loss jobs), cut 67% (amounts to 330,000 loss jobs), or even if the estimate is reduced by 75% (it amounts to 250,000 loss jobs), any or all of which are unconscionable.

[8] *"Jobs Up in Just 16 States Since Obama Took Office" Investor's Business Daily, at page A-1 (05/18/2012), by John Merline.*

[9] *IBD also examined state business friendliness rankings from Forbes, CNBC, George Mason University's Mercatus Center, the Tax Foundation, and Chief Executives magazine – again, the states ranked at the top of two or more of these lists enjoyed nearly twice the job growth of those states in the bottom 10 of two or more of the lists. Id.*

[10] *The comments/examples raised within this letter ARE NOT related to "building codes/standards" that some 44,000 jurisdictions, all 50 states, several territories, and the federal government each amend, adopt, interpret, and enforce with five major sets of construction codes and over 2,000 technical standards governing the site selection, design, and construction of buildings (NOTE: just "buildings" are covered above – in other words "vertical construction" – not roads, bridges, environmental remediation, etc.) [See, NCSBCS and its 54 national partners web site entitled: Streamlining the Nation's Building Regulatory Process. (www.ncsbcs.org/newsite/Streamline/Stream.htm)]*

The more general burdens facing the design and construction industry are not necessarily unique, but rather all too common place and frustrating. Some examples that have been identified by CIRT members include:

- Abolish Insourcing Rules. The federal government should rely on the private sector for services readily available (the "Yellow-Pages Test") – eliminating elaborate requirements, insourcing, cross-agency services, that compete with private-sector firms.

- Restrict Abusive Litigation to Force Rulemakings. Constrain the abusive use of litigation by certain groups to force federal agencies into settlements in order to achieve their goals. This practice has been particularly egregious with respect to EPA rulemakings.

- Prevent Politicization of Federal Procurement Decisions. The numerous restrictions and new reporting requirements threatened in the past by a *draft* Executive Order only apply to private sector companies competing for Federal contracts—ignoring like activities by government employee unions. [Should this effort be renewed, CIRT will oppose it in whatever form it takes].

- Eliminate Mandatory Project Labor Agreements (PLA). Allow the marketplace to effectively determine how the work should be performed – regardless of whether one is a union or non-union contractor. A PLA negotiated by the *owner* provides no benefit to the industry. Contractors are continually being asked to simultaneously price the project on a union and merit shop basis which is adding cost to overhead – and can be time consuming.

- Revise the FARS (Federal Acquisition Regulations) to allow for Qualifications Based Selection (QBS) of Construction Managers at Risk and Design Build Teams. All of the branches of the government are still trying to impose Bid-Build rules and regulations to alternative forms of procurement inhibiting the chances for success. A number of industry studies have shown that alternative delivery methods (CMAR or CM/GC, DB, etc.) provide greater value relative to cost, schedule, quality, etc. in a teaming, collaborative environment. The government allows Qualifications Based Selection for the procurement of architectural and engineering services but insist on a pricing component for the selection of the builder. As industry utilizes more and more teaming methodologies is it imperative that the entire design and construction team be selected simultaneously prior to the initiation of drawings and specifications. Enabling legislation to allow early selection of the entire team would greatly enhance the utilization of ever changing technology, such as Building Information Modeling (BIM).

- Allow lower tier (Subcontract) Disadvantage Business Enterprise (DBE) to count towards the scores established for the project. Establish realistic minority and DBE goals on a project by project basis. In many cases, the current minority and DBE goals are unrealistic and create havoc within the industry because the scope of work is incompatible with the skill sets of the minority contractors available in the local marketplace.

- Simplify the Buy America Act.
  Create one "Buy America Act" for all federal agencies to reflect what can be reasonably procured in the United States.

- Better Define the Qualifications for Quality Control Personnel. Reduce the emphasis that quality control personnel must have an engineering degree in lieu of practical experience in many cases. This results in removing the "builder" from a QA/QC career path in construction firms because of our insistence upon a college degree when it is not necessary. Some agencies require a significant number of specialized people on site during construction beyond the traditional QA/QC, Safety and Superintendent. This is not cost efficient nor does it add value.

- Institute standard procurement policies for all federal agencies. NAVFAC, USACE, AFCEE, VA, GSA, NIH, NSA, CIA, etc. Every agency has a procurement group and all of them interpret and use the FAR in their own unique way. One set of consistent rules would be much better. If construction procurement was centralized, it would eliminate a lot of the duplication of effort and positions in the federal government and simplify the ability of industry to respond.

- Create a consistent policy among federal agencies for LEED certification levels. Some agencies are concerned about first cost and operational savings and other agencies are still interested in a LEED rating but it may have little to do with savings or measurable value.

Tax Related Burdens

In addition to the specific regulatory matters there are tax related issues that also create unnecessary or costly burdens (arising from both the code itself and enforcement) to U.S. businesses, including design and construction firms.

Tax Simplification

The U.S. tax code is too complex – even the IRS agrees. The IRS Taxpayer Advocate Service routinely cites complexity of the tax code as the most serious problem facing taxpayers and the IRS alike and recommends that Congress substantially simplify the Internal Revenue Code. Tax complexity creates a substantial economic burden which effectively "de-stimulates" economic growth. The annual cost of U.S. income tax compliance alone is estimated to be $431.1 billion. These excessive, non-productive compliance

costs are dollars diverted from productive activities and investments that would promote economic growth and jobs creation.

Eliminate the Burdensome Look-Back Calculation Requirement for Long-Term Contracts

The look-back calculation determines the amount of interest that needs to be paid to (or refunded by) the IRS on the income from long-term contracts. Look-back interest is calculated once a job has been completed and the final contract revenue and total contract costs are known.[11]

Possible Solutions

Beyond listing individual examples of problems with regulations and over complex jurisdictional matters, are there any larger solutions to consider?

Congress has offered a series of bills that deserve passage to address the many of the concerns of returning some accountability and balance to the regulatory process. Beyond these proposals other potential approaches can, and should, be explored. For example:

(1) Monetary: There should be financial penalties on agencies (just as they seek to levy on individuals and businesses) when they are found to overreach or abuse their authority or power through regulatory heavy-handiness.

This represents a potentially effective way to at least make some of the agencies "pause" before attempting to double-down on their expansive or otherwise unjustified rulemakings. Currently, EVEN IF an agency loses a case (or multiple cases) interpreting vast grants of authority to themselves[12] there are NO CONSEQUENCES (a hand slap at best) even when losing their arguments in court! BIG DEAL, the next day the agency can return right-back to interpreting another or next new rule in the same unreasonable self-aggrandizing expansive manner.

"When regulators lose court cases, it does not hurt them. Sure, they're probably angry at being told "no" but that's it. There are no penalties for

---

[11] *Contract revenue reported under the percentage-of-completion method is based on estimates. Look-back calculations determine whether the estimates that were used produced understatements or overstatements of taxable income in each open year of the contract. Look-back calculations are intended to ensure that neither the taxpayer nor the IRS will lose the "time value of money" on the income taxes that should or should not have been paid on income from long-term contracts.*

[12] *A good example of this unbridled and unaccountable agency behavior or quasi-independent commission activity can be seen in the EPA's most recent expansive definition rulemaking on the "waters of the U.S." (after the US Supreme Court has already ruled on a few occasions that the underlying statute doesn't give EPA broad unfretted authority); OR the recent FCC rulemaking going back once again under the guise of "Net Neutrality" (after White House direction) to attempt to claim the internet fits under laws passed decades before there was even an internet in existence.*

grabbing unwarranted power and mistreating citizens. An adverse court decision, or even a series of them, has no deterrent effect." [See, Thanks, EPA: Your New 'Navigable Waters' Rule Strengthens The Case Against Administrative Law, by George Leef, Law & Regulation article (2/6/2015); www.forbes.com].

THIS NEEDS to change – there should be a MAJOR MONETARY COST to the agencies – [especially considering the heavy fines they impose on the private sector, which can run into the billions as demonstrated by recent DOJ cases/settlements]. The court imposed fines vs. federal agencies bring accountability and *could be* returned to the GENERAL TREASURY.

(2) Limit Agency Waiver Authority: Another area that Congress should consider constraining is the recent approach of crafting the regulations so burdensome, so costly, and so unmanageable that they necessitate – waivers or so-called "Requests for Exemptions." This opens the entire process up to potential cronyism, favoritism, and political shake-downs.[13]

Conclusion

The above comments are not about regulatory abandonment -- but rather, putting balance back into the equation: Administration and Congress, and more importantly: between Citizen and Government.

Short of outright repeal and/or elimination of excessive regulations and rules, as well as streamlining them whereby actions are done concurrently and shared among and between jurisdictions/agencies[14] -- monetary penalties that curb excessive activity by impacting funding holds a yet unexplored avenue to rein in the federal leviathan.

Something must be done to redress the imbalance so that *American lives, lands, and liberties*, which seem to be at the whim and caprice of faceless, nameless, unaccountable bureaucrats – are protected. Otherwise, the "regulatory complex" will continue to spew-out rules/regulations that strangle economic activity and shackle our freedoms.

Sincerely,

Mark A. Casso, Esq.
President

---

[13] *Generally speaking this goes to the "evils" the Founders saw in "royal prerogatives" where the monarchs or their minions acted as lawmaker, enforcer, and judge all in one. [See points attributed to Columbia Law School professor Philip Hamburger in "Thanks EPA . ." cited in body of letter].*

[14] *Title III of H.R. 7 "The American Energy & Infrastructure Jobs Act of 2012" proposed steps to streamline some regulatory rules. Moreover, the current Transportation Act included streamlining provisions, which have been successful to the point this year H.R. 348 [RAPID Act of 2015l and this Committee's S.280 are including similar provisions for widespread use in the federal government.*