U.S. House of Representatives

Committee on Oversight and Government Reform

Darrell Issa (CA-49), Chairman

Assessing Regulatory Impediments to Job Creation

PRELIMINARY STAFF REPORT
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In February 2009, President Obama signed E.O. 13502 to strongly encourage the use of project labor agreements (PLAs) in construction projects in which the total cost to the federal government is $25 million or more.[201] In April 2010, the Department of Defense, General Services Administration, and National Aeronautics and Space Administration issued a final rule implementing the Executive Order.[202] A PLA is a contract awarded only to contractors and subcontractors that agree to recognize unions as the representatives of their employees on that job; use the union hiring hall to obtain workers; obtain apprentices exclusively through union apprenticeship programs; pay fringe benefits into union-managed benefit and pension programs; and obey unions' work rules, job classifications and arbitration procedures. This is significant for the construction industry as 85 percent of the construction workforce has decided not to join a labor union.[203] Accordingly, this policy effectively excludes 85 percent of the industry's workforce from benefiting from government contracts.

The PLAs, and subsequent final rule, are met with skepticism from the private sector. Associated Builders and Contractors (ABC) points out that studies have found that PLA's "increase the cost of construction by as much as 18 percent."[204] These higher costs determine whether a construction company can make additional hires or must make unwanted layoffs. The Associated General Contractors (AGC), who notes that the unemployment rate in construction remains above 18 percent, believes the E.O. has already caused "great upheaval in the federal market, created an environment that is encouraging bid protests, strained relationships between Federal owners and the contracting community, and placed Federal agency career procurement personnel under an inordinate amount of political pressure to meet the Administration's expectation to award more PLAs."[205] In addition, AGC, as well as the Construction Industry Round Table, believe the E.O. is inconsistent with the Competition in Contracting Act, which directs federal agencies to strive to "obtain full and open competition."[206]

B. Regulations Affecting the Financial Services Sector

In reaction to the credit crisis and home mortgage meltdown that led to recession, agencies with responsibility for the financial services sector have dramatically ramped up their rulemaking activities. Much of the current regulatory activity is directly attributable to the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the "Dodd-Frank Act."[207] Of the nearly 500 rulemakings stemming from the Dodd-Frank Act that are scattered throughout a number of federal agencies, there is some

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201 Exec. Order No. 13,502, 24 C.F.R. 5 (2009).

202 Use of Project Labor Agreements for Federal Construction Projects, 48 C.F.R. § 536.271 (2010).

203 Letter from Sean Thurman, Senior Manager, Associated Builders and Contractors, to Darrell Issa, Chairman, Comm. on Oversight & Gov't Reform 2 (Jan. 7, 2011) (on file with author).

204 *Id.*

205 *Id.*

206 *Id.* Letter from Mark A. Casso, President, Construction Industry Round Table, to Darrell Issa, Chairman, Comm. on Oversight & Gov't Reform 4 (Jan. 6, 2011) (on file with author).

207 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No., 111-203, H.R. 4173, 111th Cong. (2010).

evidence that regulations affecting the financial services industry may limit the job creation and growth capabilities of U.S. businesses.[208]

The American Financial Services Association (AFSA) brought to Chairman Issa's attention a 2010 study by academics at the George Mason University Law School stating that regulations implemented under the Dodd-Frank Act could reduce economic growth by as much as 4 percent.[209] Similarly, the Commodity Markets Council (CMC) points out that the financial services industry is simply overwhelmed because the July 2011 implementation date set by the Dodd-Frank Act "is so tight, the quantity of rules so large, and the subject matter so complex...". The activities of CMC members "represent the complete spectrum of commercial users of all futures markets, including agriculture."[210]

While it is beyond the scope of the report to discuss all regulations identified by respondents, or required under the Dodd-Frank Act, the report will discuss several of the regulations that were of concern to multiple organizations. Appendix I provides a chart categorizing all the responses received and noting which organization identified the problematic regulation.

1. Dodd-Frank Federal Reserve Board Debit Card Interchange Fees and Routing

The Dodd-Frank Act directs the Federal Reserve to issue rules to set debit interchange fees.[211] The Federal Reserve recently outlined a proposal that would cap debit interchange fees at 12 cents per transaction, which is about half the current market rate.[212] Interchange fees are a per transaction charge paid by merchants to card issuers and are generally viewed as lucrative fees because they are charged by banks to merchants every time a customer swipes a debit card. The fee is typically calculated as a percentage of the purchase being made and essentially represents the amount of each transaction that a debit card's issuer retains.

The Financial Services Roundtable (The Roundtable), the SBE Council, and Credit Union National Association (CUNA) all identified the Federal Reserve's regulation of interchange fees as problematic. According to the Roundtable, a trade association representing 100 of the largest financial services companies, the Federal Reserve Board's proposed regulation of interchange fees through price controls is of paramount concern. The Roundtable estimates that the Board's proposal would "remove

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208 U.S. Chamber of Commerce, Center for Capital Markets, Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010: Regulatory Authority, http://www.centerforcapitalmarkets.com/resources/dodd-frank-wall-street-reform-and-consumer-protection-act-of-2010-regulatory-authority/ (last visited Feb. 4, 2011).

209 DAVID S. EVANS & JOSHUA D. WRIGHT, THE EFFECT OF THE CONSUMER FINANCIAL PROTECTION AGENCY ACT OF 2009 ON CONSUMER CREDIT (Jan. 7, 2010).

210 *Id.*

211 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No., 111-203, H.R. 4173, 111th Cong. §1075 (2010).

212 Tim Chen, *Fed Looks to Cap Debit Interchange, Checking Institutions Cringe*, FORBES, Jan. 7, 2011, *available at* http://blogs.forbes.com/moneybuilder/2011/01/07/fed-looks-to-cap-debit-interchange-checking-institutions-cringe/?boxes=Homepagechannels.

an estimated $15 billion from the financial services marketplace"[213] and hurt small businesses and consumers in the long run.

The SBE Council, with nearly 100,000 members and 250,000 small business activists nationwide, is also concerned that "[p]roposed Federal Reserve rules regarding interchange fees and forthcoming Consumer Financial Protection Bureau (CFPB) regulations... could make a currently challenging problem much worse for small business owners" [214] by further restricting access to, and increasing the cost of, capital and credit for our nation's entrepreneurs. CUNA noted that since 70 percent of credit unions offer debit cards to their members, implementing interchange fee regulations is seen as "the most chilling effect" on the industry.[215] Credit union executives reported that they may be forced to impose monthly checking account fees in the neighborhood of $15-$20.[216]

2. The Consumer Financial Protection Bureau (CFPB)

The Dodd-Frank Act created the Consumer Financial Protection Agency (CFPB) as an independent bureau at the Federal Reserve, with a broad mandate to prohibit unfair, deceptive, or abusive practices with respect to consumer financial products and services. This Bureau was created in response to concerns that the recent economic crisis was caused largely by financial institutions that were not regulated strictly enough.

However, it appears that the language creating this entity was unnecessarily broad and did not adequately define the appropriate scope and role of the Bureau. Respondents who commented on the CFPB are concerned that when the Bureau comes into existence in July 2011 it will have an unprecedented amount of authority to regulate the market for consumer financial products in the years to come. Specifically, the Roundtable cites a 2010 study, which found that future regulatory actions taken by the Bureau, including implementation of most federal financial consumer protection laws, removal of "unfair, deceptive and abusive"[217] consumer lending products, and extensive loan program disclosures on existing products like payday loans, could reduce net job creation by 4.3 percent.[218] The American Financial Services Association (AFSA) is concerned about the autonomous CFPB's "extraordinary authority over all facets of consumer credit" and its shocking lack of congressional oversight.[219] AFSA notes that the Dodd-Frank Act "fails to give any statutory direction to the new CFPB to determine

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213 Letter from Steve Bartlett, President and CEO, Financial Services Roundtable, to Darrell Issa, Chairman, Comm. on Oversight & Gov't Reform 1 (Jan. 9, 2011) (on file with author).

214 Letter from Karen Kerrigan, President and CEO, Small Business & Entrepreneurship Council, to Darrell Issa, Chairman, Comm. on Oversight & Gov't Reform 7 (Jan. 12, 2011) (on file with author).

215 Letter from Bill Cheney, President and CEO, Credit Union National Association, to Darrell Issa, Chairman, Comm. on Oversight & Gov't Reform 1 (Jan. 5, 2011) (on file with author).

216 *Id.*

217 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No., 111-203, H.R. 4173, 111th Cong. §1001-1100 (2010).

218 DAVID S. EVANS & JOSHUA D. WRIGHT, THE EFFECT OF THE CONSUMER FINANCIAL PROTECTION AGENCY ACT OF 2009 ON CONSUMER CREDIT, (Jan. 7, 2010).

219 Letter from Bill Himpler, Executive Vice President, American Financial Services Association, to Darrell Issa, Chairman, Comm. on Oversight & Gov't Reform 1 (Jan. 27, 2011) (on file with author).

the adequacy of existing state laws and regulations under which these companies operate before imposing new federal burdens."[220] Likewise, DBA International, the "voice for the debt buying industry," [221] is very concerned about the CFPB's new, far-reaching rulemaking authority. They suggest Congress make comprehensive amendments to the existing Fair Debt Collection Practices Act[222] (FDCPA) which is the primary statutory authority regulating the debt industry, before the CFPB starts issuing new FDCPA regulations.

3. Dodd-Frank SEC Facilitating Shareholder Director Nominations ("Proxy Access")

The Dodd-Frank Act also extended the rulemaking authority of the U.S. Securities and Exchange Commission. The Business Roundtable (BRT), an association of CEOs from leading U.S. companies, believes that a number of these regulations will be "burdensome and costly" and have a "negative consequence to the economy and jobs."[223]

BRT and its members are particularly concerned about what they see as a new federal right to proxy access created by the SEC. The SEC rule, issued in August, requires companies to include board of director nominees by certain shareholders in their proxy materials.[224] Under the rules, shareholders will be eligible to have their nominees included in the proxy materials if they own at least three percent of the company's shares continuously for at least the prior three years. According to the BRT, the SEC's rule "undermines decades of state law, precedent and organic evolution of corporate law" and could have serious consequences for economic growth and job creation.[225] Accordingly, the BRT and the U.S. Chamber of Commerce sued the SEC in September to vacate the rule.[226] Shortly thereafter, the SEC announced it would delay implementation of the rule pending the outcome of the court challenge.[227]

4. Dodd-Frank SEC Conflict Minerals

On December 15, 2010, the SEC issued a rule that would apply to public companies that use conflict minerals, such as gold, tantalum, tin, or tungsten, for products they manufacture.[228] Under the rule, a company must disclose to the SEC whether its

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220 *Id.*

221 Letter from Stuart Blatt, President, Debt Buying Association International, to Darrell Issa, Chairman, Comm. on Oversight & Gov't Reform 1 (Jan. 10, 2011) (on file with author).

222 Fair Debt Collection Practices Act, Pub. L. 109-351, §§ 801–2, 120 Stat. 1966 (2006).

223 Letter from Larry Burton, Executive Director, Business Roundtable, to Darrell Issa, Chairman, Comm. on Oversight & Gov't Reform 3-Attachment (Jan. 7, 2011) (on file with author).

224 Facilitating Shareholder Director Nominations, 17 C.F.R. §240.12b-2 (2010).

225 Letter from Larry Burton, Executive Director, Business Roundtable, to Darrell Issa, Chairman, Comm. on Oversight & Gov't Reform 3-Attachment (Jan. 7, 2011) (on file with author).

226 Business Roundtable v. SEC, No. 10-1035 (D.C. Cir. filed on Nov. 30, 2010).

227 SEC Order Granting Stay of Commission's Facilitating Shareholder Director's Nomination Rules, File No. S7-10-09, *available at* http://www.sec.gov/rules/other/2010/33-9149.pdf.

228 Conflict Minerals, 74 Fed. Reg. 80948 (proposed Dec. 23, 2010) (to be codified at 17 C.F.R. pt. 229, 249).