PASSING THE REINS ACT WOULD REVOLUTIONIZE RULEMAKING AND BENEFIT THE CONSTRUCTION INDUSTRY

By Eugene J. Heady, © Smith, Currie & Hancock LLP

Impressions of the moment may sometimes hurry [Congress] into measures which itself, on mature reflection, would condemn. — Alexander Hamilton

In 1788, Alexander Hamilton addressed checks and balances in our legislative process and noted that the incorporation of hurdles and roadblocks into the legislative process was important “to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design.” See The Federalist No. 73 (Alexander Hamilton). I recently travelled to Washington, D.C. to meet with several Senators and Congressmen to discuss and garner support for several pieces of legislation that are important to the health and vitality of our construction industry and to urge those Senators and Congressmen to work diligently to repeal bad laws that are hurting our industry and to stand against pending legislation that will negatively impact our industry. While much legislation moves at a snail’s pace through Congress, all too often we see bad legislation hurried through Congress in an effort to address a perceived pressing need or cries from constituents. Not surprisingly, bad laws, as well as good or well-intentioned laws, oftentimes lead to bad regulation. Regrettably, our elected Congress has delegated much of its rulemaking authority to federal agencies where unelected federal bureaucrats then promulgate regulations which have the full force and effect of laws passed by Congress. While small business owners in the construction industry are focusing on meeting payroll and while their employees are working hard building this nation, unelected federal bureaucrats are working overtime coming up with new rules and regulations, which unnecessarily burden small business. In 2010 alone the federal government issued 3,200 new regulations and rules. That is roughly 9 rules per day. Over the past decade, the federal government has issued nearly 38,000 new final rules.

WHAT IS THE FINANCIAL BURDEN AND ECONOMIC IMPACT OF REGULATIONS?

In 1976, Congress created the Office of Advocacy of the U.S. Small Business Administration to serve as an independent voice for small business. A 2010 study sponsored by the Office of Advocacy, entitled “The Impact of Regulatory Costs on Small Firms,” sought to quantify the economic impact of regulations on small businesses and determine if those impacts are disproportionate when compared to large businesses (defined as those with 500 or more employees). Based on data through 2008, the study demonstrated that the annual cost to the economy of federal regulations in the United States increased to more than $1.75 trillion in 2008. The 2008 regulatory burden on small businesses was $10,585 per employee compared to a regulatory burden on large businesses of $7,755 per employee. To be fair, note that the Office of Advocacy is...
only required by law to measure the direct costs and other effects of government regulation on small businesses. In contrast, the Office of Management and Budget (OMB) is charged with analyzing the qualitative and quantitative benefits as well as the costs of proposed and final federal regulatory actions. Against that backdrop, it is not surprising that the Obama administration has been critical of the Advocacy study’s findings. While the Advocacy study did not consider qualitative or quantitative benefits of federal regulations and while the study cannot appropriately be used to inform discussion about any regulatory costs incurred since 2008, evidence from the business community suggests that the regulatory burden on businesses, and particularly on construction businesses, remains staggering and continues to stifle economic recovery of the hard-hit construction industry.

**HOW DID WE GET TO THIS POINT AND WHAT HAS CONGRESS DONE TO AVOID BAD REGULATIONS?**

For decades, Congress has delegated much of its rulemaking authority to the Executive Branch. Most federal agencies, under current law, are authorized to promulgate rules and regulations to carry out their statutory missions. Thus, for decades, Congress has also struggled to exercise some control over the rulemaking authority that it has delegated.

For example, at one point Congress would use a “legislative veto” whereby Congress delegated rulemaking authority to a federal agency but simultaneously reserved the power to override agency decisions on a case-by-case basis. In 1983, however, the Supreme Court in *INS v. Chadha* struck down the legislative veto as unconstitutional.

Congress later passed the Congressional Review Act (CRA), which requires that agencies submit any rule to both houses of Congress before the rule takes effect. Rules are classified as nonmajor and major. While in the aggregate, nonmajor rules can have a significant and profound impact on our economy, the immediate concern is the promulgation of major rules. A major rule is a rule that based on OMB’s review standards is likely to result in: an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States based enterprises to compete with foreign-based enterprises in domestic and export markets. The CRA provides that a major rule can take effect sixty days after its submission to Congress unless Congress enacts a joint resolution of disapproval. The joint resolution of disapproval is then submitted to the President for signature or veto. Given that the sitting President will generally support rules promulgated by federal agencies operating under the Executive Branch, the odds of the President signing a resolution of disapproval are slim. So, while the CRA was intended to give Congress the ability to block bad laws, as a practical matter, the CRA has had no effect in reining in bad regulations. Since the CRA was enacted in 1996, Congress has successfully used the CRA’s procedures to overturn an agency rule only one time, where the disapproval resolution was passed and submitted during the transition between Presidents of different political parties at the end of President Clinton’s second term and beginning of President George W. Bush’s term.

**WHAT CAN CONGRESS DO TO RECLAIM ITS POWER FROM THE FEDERAL BUREAUCRATS AND SCRUTINIZE AND REIN IN BAD REGULATIONS?**

In 2011, Representative Geoff Davis introduced in the House, H.R. 10, Regulations From the Executive in Need of Scrutiny Act of 2011 (the “REINS Act”). A companion bill, S. 299, was introduced in the Senate by Senator Rand Paul. The REINS Act passed in the House but died in committee in the Senate. In 2013, the REINS Act was reintroduced as House bill, H.R. 367 and Senate bill, S. 15. Enactment of the REINS Act of 2013 would revolutionize our current system of government by requiring that all major rules promulgated by federal agencies receive affirmative congressional approval before becoming effective and having the full force and effect of law. Under the REINS Act, anytime any agency promulgates a new regulation carrying the force of generally applicable federal law, which qualifies as a major rule under the OMB’s review standards (meaning it has a nationwide economic impact in excess of
$100 million annually), that regulation will be viewed as a proposal. The regulation would not take effect until it has been passed into law by the House of Representatives and by the Senate and submitted to the President for signature or veto. Thus, unlike the current CRA procedure, which provides that Congress may pass a joint resolution disapproving a regulation promulgated by an administrative agency, the REINS Act would require Congress to pass a resolution affirmatively approving any new major rule before it can take effect. In other words, such regulations would not become law without Congress acting. That is exactly what our founding fathers intended and what we need to do here.

At a time when we’re trying to rejuvenate our economy and create jobs, we need to have better accountability and transparency in Congress for the regulatory burdens that the federal government places on small businesses. The REINS Act is a commonsense measure that would do just that. By putting power back into the hands of our elected representatives, the REINS Act would effectively give workers and small business owners a voice in the process of approving regulations that will ultimately affect their jobs, families and communities. Passing the REINS Act would ensure that job creators don’t have to worry about unelected bureaucrats imposing costly and onerous regulations on them without the approval of their elected representatives. What can you do to help? As of June 2013, the REINS Act of 2013, House bill, H.R. 367, as introduced by Representative Todd C. Young had 160 cosponsors and its companion Senate bill, S. 15, introduced by Senator Rand Paul had 21 cosponsors. I urge you to contact your elected representatives in Congress immediately and ask them to support this legislation by becoming cosponsors of these bills and working to keep the REINS Act from dying in committee.

Gene invites you to connect with him on LinkedIn at:
http://www.linkedin.com/in/constructionlawgeneheady

Eugene J. Heady is a Partner in Smith, Currie & Hancock’s Atlanta office. Smith, Currie & Hancock is a national law firm focusing on construction law, government contracts, environmental law, and commercial litigation. Gene is also a mediator and arbitrator and is a member of the American Arbitration Association’s national Panel of Construction Arbitrators. Gene is a regular contributor to the Construction Connection Newsletter. He has over 30 years of experience as a problem solver in the construction industry. Following a successful career in the construction business, Gene began practicing law in 1996. He represents and assists owners, general contractors, builders, subcontractors, suppliers, architects, engineers, designers, sureties, real estate developers, and manufacturers in avoiding and resolving disputes related to construction projects throughout the continental United States, Alaska and the Caribbean. His work involves private, local, state and federal government contracts and commercial, industrial and institutional construction projects. Gene literally grew up in the construction industry; his father was a successful electrical contractor. Unlike most construction attorneys, Gene has hands-on experience. Gene has worked with the tools, at the drafting table and at the helm of a construction company. In 1981, Gene earned a B.S. degree in Engineering from the University of Hartford, majoring in Electrical Contracting. Before law school, he worked in the electrical construction business as a project engineer, project manager, and construction business owner. Gene is a prolific writer and has published numerous works related to the construction industry and alternative dispute resolution. He is also a frequent lecturer on construction law topics. Contact Gene at gjheady@smithcurrie.com or directly at 404-582-8055.

Follow this link to read this article and other related topics:
http://www.constructionconnection.com/blog/partners/legal/

*This material is the copyrighted property of Construction Connection. We hereby authorize employers, managers and workplace safety and health professionals to use this material in their workplaces or practices in accordance with the guidance contained in the material. To this end, permission is granted to use such copyrighted material solely for non-commercial, instructional, personal, or scholarly purposes. Use of the material for any other purpose, particularly commercial use, without the prior, express written permission of the copyright owner(s) is prohibited.*