

Senator's Saucy Request Roils EB-5 Regional Centers

By Angelo A. Paparelli



Imagine you're the general counsel of Coca Cola (or of any other company that takes great pains to safeguard the internal secrets that endow the organization with competitive advantages over other firms in the same industry). On your desk lands a letter from a U.S. senator in the minority party asking that your company turn over "voluntarily" a raft of legitimately sought business information as well as sensitive business secrets ([in the case of Coke it would be its secret formula](#)).

What do you do?

This is the dilemma faced by America's EB-5 regional centers -- organizations approved by U.S. Citizenship and Immigration Services (USCIS) to accept \$500,000 or \$1 million from foreign investors, each of whom hopes to create 10 full time jobs for American

workers and thereby obtain a green card. The senator in question is Tom Coburn, M.D., whose "oversight efforts," maintains, "are meant to shed light on various challenges facing the federal government that should be addressed by agency management and congressional oversight."

A conceptual successor to Sen. William Proxmire, who until retirement in 1988, released his "[Golden Fleece Award](#)," Sen. Coburn publishes "[Wastebook](#)," which highlights what he asserts reflect the "Most Egregious Spending of 2013."

Sen. Coburn, the Ranking Member of the [Senate's Homeland Security and Governmental Affairs Committee](#), has apparently issued to every one of the [440 USCIS-approved Regional Centers](#) a letter seeking a reply by March 7, 2014 responding to each of the items below:

- Any approval from USCIS to participate in the EB-5 program regarding the regional center and its business plan, including any subsequent recertification;
- The total annual amount of investment and the number of individuals by country of origin making investments through the regional center since it has been in operation;
- The name, address, and a description of each business in which the regional center has made an investment of funds and the number of jobs created by each investment;
- Any fees charged to EB-5 applicants or received by the regional center, including amount and description;
- A list of any current or former corporate officers of the regional center, including title, position, and dates of employment, and
- The name and address of any individual or entity -- either foreign or domestic -- that the regional center has an agreement with to provide legal, accounting, recruiting or consulting services, as well as a description of the service provided.

The letter comes as little surprise to close watchers of the EB-5 scene, particularly observers who paid close attention to the Senate debate ultimately leading to the approval of President Obama's nomination of the former USCIS director, Alejandro Mayorkas, to serve as Deputy Secretary of the Department of Homeland Security (DHS). In seven pages of dense, three-column text published on [December 20, 2013 in the Congressional Record \(pp. S9072-S9079\)](#), the EB-5 regional center program figured more prominently than any other subject managed by Director Mayorkas during his four-year term at USCIS. In the course of debate Republicans complained that whistleblower complaints alleging improper intervention by Mr. Mayorkas into an EB-5 regional center adjudication, which triggered a long-simmering investigation by the DHS Office of Inspector General, should be concluded before a vote on the nomination. For

his part, Mr. Mayorkas denied the allegations, testifying at an earlier committee hearing that he made the decision to approve the regional-center designation request solely based on the facts and the law. Democrats argued that the OIG investigation had become politicized and had produced no credible evidence of wrongdoing by Mr. Mayorkas.

Recognizing that the Mayorkas nomination would be approved by the majority party, Sen. Coburn nonetheless urged postponement of the vote:

We should wait for this investigation to be completed. I know we are not going to; we are going to roll this right through here. It is a disservice to Mr. Mayorkas. It is a disservice to the American people. It is a disservice to this body. All that I have heard from people who know Mr. Mayorkas are positive things. It is positive, but a legitimate investigation is ongoing.

Undeterred by the approval of the Mayorkas nomination, Sen. Coburn apparently has determined that he will go directly to the source, circumvent USCIS and the DHS OIG, and seek extensive information from every approved regional center as well as from its trade group, the [Association to Invest In the USA \(IIUSA\)](#).

While regional centers might consider ignoring the request, coming as it does from a single senator of the minority party, [that path is fraught with risk](#). Yet, voluntarily complying is also risky. Sen. Coburn's letter offers no assurance that the information provided -- much of which may be viewed as proprietary and a trade secret -- will be treated in confidence. This is unlike similar information submitted to USCIS when filing a request for designation as a regional center, or when providing updated information on an annual basis on [Form I-924A](#). As the IIUSA reported to Sen. Coburn in its Feb. 20 reply to Sen. Coburn:

It is important to note that our members may consider specific information included on Form I-924A to be proprietary and confidential, and to our knowledge USCIS has treated it so in responding to Freedom of Information Act (FOIA) requests for it.

Indeed, FOIA (5 U.S. Code § 552(b)(4)), expressly exempts from disclosure to third parties information submitted to Executive Branch departments and agencies that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential [information]." in turn, [Presidential Executive Order 12,600](#) provides for pre-disclosure notice and an opportunity to object if an individual or business submits "confidential commercial information" to a federal agency and a third party requests it under FOIA.

Some may wonder why regional centers are concerned. After all, the thinking goes, it comes with the territory, when dealing with a government program, that requests for data and documents ought be expected. Aside from the lack of FOIA protection or other assurance of confidentiality from Sen. Coburn, the requests he makes involve clearly competitive data that may make it materially more difficult for one regional center

among 440 others to attract qualified foreign investors. His request asks for such internal, sensitive data as a regional center's "business plans," and a listing of the parties with which it conducts its business (including law firms), together with a "description of the service provided" -- a subject that could well involve attorney-client privileged information. Moreover, were these parties to be identified, presumably other regional centers might seek out their finite services as well, and thus impair their ability to serve existing center clients. Why should Sen. Coburn, even if unwittingly, allow one regional center to leverage and exploit competitive commercial information amassed by another center?

Even more disturbing, the Senator's request comes at an unhelpful time when -- as [reports of the latest Stakeholder Engagement of February 26, 2014 confirm](#) -- USCIS has moved aggressively to strengthen and improve the EB-5 program by increasing security concerns, program integrity, predictability and transparency.

Sen. Coburn's request also may undermine the robust economic benefits that the EB-5 program has spawned if current and prospective regional centers conclude that participation in the EB-5 is unwise because it will result in the sharing of competitive secrets with third parties. A FY2012 study by [IMPLAN Group, LLC](#) -- the originators of the widely accepted IMPact PLANning ("IMPLAN") econometric model which measures and forecasts economic impact -- found in peer-reviewed studies vetted by university economists associated with the Association for University Business Economic Research (AUBER) that the EB-5 program produced an economic impact which has increased dramatically over the prior two years. IMPLAN's FY 2012 study found that the EB-5 program had contributed more than \$3.39 billion to U.S. GDP, supported over 42,000 U.S. jobs, and generated over \$712 million in federal/state/local tax revenue.

While Sen. Coburn certainly is not prohibited from asking for information on the EB-5 program, he should temper his use of the requested information with a measure of caution and prudence. One especially helpful step he could take would be to assure all regional centers that he will exercise restraint and refrain from releasing confidential competitive information which would needlessly harm law-abiding regional centers that are doing precisely what Congress intended, namely, helping to create much-needed American jobs through the prudent use and management of foreign investors' funds.