Testimony of Barry Rutenberg

On Behalf of the
National Association of Home Builders

Before the

House Committee on Oversight and Government Reform

Hearing on

"Continuing Oversight of Regulatory Impediments to Job Creation: Job Creators Still Buried by Red Tape"

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Chairman Issa, Ranking Member Cummings, members of the committee, thank you for the opportunity to testify this morning.

My name is Barry Rutenberg and I serve as NAHB's Chairman of the Board and a home builder from Gainesville, Florida.

On behalf of the over 140,000 members of the National Association of Home Builders (NAHB), I want to thank you for holding this hearing and for your continued interest in investigating federal rules and regulations that should be a part of Congress' oversight efforts. NAHB represents members involved in a wide variety of activities, including the development and construction of single-family for-sale housing; the development, construction, ownership, and management of affordable and market-rate multifamily rental housing; and the development and construction of light commercial properties. We are affiliated with more than 800 state and local home builder associations throughout the country, and since the association's inception in 1942, NAHB's primary goal has been to ensure that housing is a national priority and that all Americans have access to safe, decent and affordable housing, whether they choose to buy or rent a home.

It should not be overlooked that the home building industry has been hit hard by the impacts of the Great Recession, with the construction sector currently experiencing a 17% unemployment rate with nearly 1.5 million jobs lost in the residential construction sector, which includes single-family and multifamily construction, land development and remodeling. In normal economic times, housing constitutes approximately 17% to 18% of Gross Domestic Product and is an important source of job creation.

As NAHB represents all aspects of the residential construction industry, our members have daily interaction with scores of federal regulations. Because of our experience, NAHB members have an acute understanding of how the federal government's regulatory process impacts real-world small businesses. Given the regulatory environment we face as an industry and as small businesses, I would like to share with you our thoughts on some key regulations that should receive increased federal oversight. Housing serves as a great example of an industry that would benefit from smarter and more sensible regulation.

Access to Financing/Dodd-Frank

In response to the financial crisis, Congress passed the *Wall Street Reform and Consumer Protection Act* ("Dodd-Frank") that authorized significant changes to mortgage lending practices, including the ability-to-repay standard, which in defining the QM (qualified mortgage) will set the ground rules for mortgage financing, and the risk retention and QRM (qualified residential mortgage) provisions, which will determine the future shape of the secondary mortgage market. The ability-to-repay provisions set minimum standards for mortgages by requiring lenders to establish that consumers have a reasonable ability to repay at the time the mortgage is consummated, and state that certain high-quality, low-cost loans are presumed to

meet this standard. The risk retention measures mandate how much "skin in the game" mortgage securitizers must have and which mortgages are exempt from risk retention.

NAHB supports regulatory changes aimed at more rational lending practices, greater lender accountability and improved borrower safeguards; however, it is critical that such mortgage lending reforms are implemented in a manner that causes minimum disruption to the mortgage lending process. New reforms should not limit consumer financing options or increase the cost. NAHB believes a housing finance system that provides adequate and reliable credit to home buyers at reasonable interest rates through all business conditions is critical our nation's economic health. According to an NAHB Housing Market Index survey conducted in January 2012, 69 percent of builders report that qualifying buyers for mortgages is a significant problem for them.

The Consumer Financial Protection Bureau (CFPB) has the responsibility for issuance of the final QM rules and have announced that they will publish a final rule by the end of this year and prior to the January 2013 statutory deadline. CFPB must be able to balance competing viewpoints as consumers must have access to affordable credit and responsible lenders should be able to operate in an environment without excessive penalties and litigation. Overly restrictive rules will prevent willing, creditworthy borrowers from entering the housing market even as owning a home remains an essential part of the American dream.

Another key factor in housing's current depressed state has been continued confusion and roadblocks in the banking community over the issue of Acquisition, Development and Construction (AD&C) lending. The lack of lending has stymied recovery of our industry and scores of others. Our members have spent years caught in an 'argument' between banks and federal regulators who take turns pointing fingers at one another when we seek answers to the questions of who is to blame for the lack of lending to the construction sector. Our members have been run around a hamster wheel on the question of whether federal banking regulators are pressuring the banks not to lend, whether the local examiners are 'acting rogue against the wishes of the DC chiefs', or if institutions are overhauling and downsizing portfolios independent of regulator/examiner pressure. NAHB believes that Congress has the authority to get to the heart of the problem and to help us to jumpstart our industry and the national economy.

Thus, to remedy this situation, NAHB supports H.R. 1755, the *Home Construction Lending Regulatory Improvement Act of 2011*, which has been introduced by Representatives Gary Miller (R-CA) and Brad Miller (D-NC).

H.R. 1755 offers a solution to the regulatory obstacles to the credit needs of our industry. It directs the banking regulators to issue new guidance in three key areas that have resulted in the credit window being slammed shut on our industry. H.R. 1755 removes the barriers to lending while preserving the regulators' ability to assure the safety and the soundness of the financial institutions they oversee.

The three key components of the bill direct bank regulators to 1) cease implementing a 100 percent capital bank lending limit for AD&C loans as a "hard" limit, and utilize the 100 percent of capital criteria as it was intended; 2) use "as-completed" values when assessing the collateral of residential AD&C loans they intend to fund to completion and use "arms length transactions" standards when assessing new loans; and 3) abstain from compelling a lender to call or curtail AD&C loans where the home builder is making payments in accordance with the loan documents.

EPA's Lead Renovation, Repair and Painting Rule (RRP)

With the new home construction market still at historic lows, the effort to find work in retrofitting and upgrading older housing (remodeling) has been attractive to many builders. Unfortunately, recent amendments and changes to the EPA's Lead Renovation Repair and Painting rule (RRP) have further constrained small businesses in the homebuilding industry, particularly the remodeling industry that are making every effort to comply.

The final rule, which took effect April 22, 2010, requires renovation work that disturbs more than six-square feet in a pre-1978 home to follow new lead-safe work practices supervised by an EPA-certified renovator and performed by an EPA-certified renovation firm. Poor development and implementation by EPA has resulted in considerable compliance costs and has hindered both job growth and energy efficiency upgrades. Moreover, NAHB remains concerned about the lack of availability of reliable lead testing kits. Current test kits can produce up to 60 percent false positives, meaning that in many cases, consumers are needlessly paying additional costs for work practices that are unnecessary.

The first important change to the RRP was finalized on July 6, 2010, when EPA disallowed homeowners in pre-1978 homes that do not have young children or a pregnant woman from waiving a contractor's compliance obligations, or "opt out" of the RRP, when undertaking renovation work. Not only does this change further restrict a consumer's choice about critical renovation work in older homes, but it also dismantles everything EPA originally included its original 2008 RRP to ensure that it was not overly costly to small businesses. The EPA stated that the inclusion of the opt out provision decreased the number of homes subject to the RRP from 77.8 million down to 37.6 million.[1] Furthermore, EPA states that the removal of the opt out costs an additional $507 million for small businesses in the first year alone.[2]

EPA's removal of the opt out provision made it more difficult for small businesses to absorb the regulatory impact. According to the U.S. Census Bureau's American Community Survey, approximately 38,317,131 owner-occupied housing units built before 1979 do not have a child under six living there, roughly 88.5% of all the housing stock in the U.S. built before 1979.[3] With the removal of the opt out provision, those homeowners no longer have the option of

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[1] *U.S. EPA, Economic Analysis for the TSCA Lead, Renovation, Repair, and Painting Program Opt-Out and Recordkeeping Proposed Rule for Target Housing and Child-Occupied Facilities, ES-2. (October 2009).*
[2] *Economic Analysis for the 2009 Proposed Rule (page ES-4)*
[3] *U.S. Census Bureau, American Community Survey. 2007 Public Use Microdata Files.*

foregoing the costs of compliance with RRP when hiring a professional remodeler to work on an older house. For the small contractors, these additional costs have to be passed onto the consumer which increases the chances a consumer will hire another, likely uncertified, contractor to do the work, or worse, do the work themselves and actually increase the likelihood of disturbing lead-based paint. The restoration of the opt out provision would allow households that do not have young children or pregnant women the chance to undertake professional renovation work – most frequently energy efficiency upgrades – without facing compliance costs for a regulation that legitimately does not apply to anyone in the household.

In addition to incorporating the opt out to reduce the number of homes subject to RRP, the 2008 RRP also relied on the predicted existence of a test kit that, at the time the rule was enacted, was not available. EPA expected the more accurate test kit to be commercially available by September 1, 2010, and explicitly rejected other options to reduce cost of the regulation because of the anticipated test kit.[4] The new test kit (Phase II) was to supposed to replace the first version (Phase I), which EPA acknowledges has a significantly high false-positive result rate. If contractors use the kits to test pre-1978 homes for lead before renovation work begins and results are negative, (meaning there is no presence of lead-based paint) then they can bypass RRP compliance. However, with an overly-sensitive test kit with false positive rates ranging from 47%-78%, RRP requirements will be imposed onto renovations where there is no lead present at regulated levels. EPA said it was committed to having more accurate kits, thereby reducing the number of false positives and saving costs on RRP compliance. In fact, EPA's cost calculations rely upon the availability of the Phase II kits beginning in September 2010. <u>As of today, Phase II test kits are still not available and EPA has no estimate as to when they will be available.</u> When EPA promulgated its final lead paint rule, it offered that if improved test kits were not commercially available, it would initiate a rulemaking to extend for one year the effective date of the rule.

Although EPA is still allowing contractors to use Phase I test kits, the entire benefit of having better kits that would reduce the compliance costs for small businesses has been entirely overlooked. After months of informal pleas to EPA to adjust the RRP to account for the substantially higher compliance costs, NAHB formally petitioned EPA to undertake a rulemaking and develop a revised economic analysis. The EPA has never responded to NAHB's petition or other requests about the test kits. With inaccurate and overly-sensitive test kits, and the removal of the opt out, there is little opportunity for relief for remodelers undertaking renovation work in pre-1978 homes. Given the unreliability of commerically available lead testing kits, NAHB believes EPA should delay the rule's effective date.

<u>EPA and the Army Corps of Engineers Clean Water Act "Guidance"</u>

NAHB remains concerned regarding a forthcoming Clean Water Act "Guidance" from the EPA and the Army Corps of Engineers. This guidance will significantly expand the scope of features, including ditches, mudflats, prairie potholes, considered subject to the Clean Water Act. The

[4] *73 Fed. Reg. 21712 (April 22, 2008).*

agencies responsible for producing this Guidance, which was submitted to the Office of Management and Budget in February 2012, failed to conduct extensive cost-benefit analysis, meaningful small business regulatory impact analysis, and robust regulatory impact analysis. The Guidance will reverse recent Supreme Court decisions, such as the Rapanos case, and will ignore Congressional intent under the Clean Water Act for Congress is the only entity that may expand the scope of water subject to the Act. In practical terms, the Guidance will result in an increase in jurisdictional determinations which will result in an increased need for additional permitting requirements. NAHB is extremely concerned about the direction of this Guidance and encourages increased scrutiny of the Guidance.

DOE Building Codes

Further, our members have been particularly frustrated with efforts by DOE to push for significant increases in energy code requirements at recent model code development hearings, while simultaneously ignoring pleas from the regulated community on how to implement such requirements. Specifically, NAHB and DOE both supported an increase of 30% in minimum energy code compliance for the next edition of the energy code (IECC), but DOE refused to provide NAHB with any information on how it calculated that 30% increase. NAHB made the request both formally (through FOIA) and informally (directly to DOE staff) on numerous occasions. It is unrealistic to expect the regulated community to comply with an energy code mandate if the Agency in charge refuses to share how the mandate is to be achieved.

Green Rating Systems for Federal Buildings

The Energy Independence and Security Act of 2007 (EISA) authorized the Department of Energy (DOE) and the General Services Administration (GSA) to review green building rating systems every five years and determine if any should be adopted by the federal government. To comply with these requirements, an initial determination was made to use the US Green Building Council's (USGBC) LEED rating system. This established a monopoly for LEED, giving the USGBC a significant advantage because of the influx of federal dollars. The federal government should not choose winners and losers in the marketplace. NAHB believes that agencies should be able to use any legitimate, consensus based standard.

One major omission in the GSA/DOE review is consideration of residential construction. Although GSA's portfolio is largely commercial, other agencies participate in residential construction. One option that should be considered is the ICC 700 National Green Building Standard (NGBS), the first and only American National Standards Institute (ANSI) approved residential green rating system. This standard has been independently evaluated and found to be comparable to LEED. In fact, a report from the Cincinnati Chapter of the American Institute of Architects found that both rating systems are essentially equivalent in rigor, but that the NGBS is more affordable and more user friendly. It is important to note that the NGBS is also a consensus based standard and has been certified as such by ANSI. The National Technology Transfer and Advancement Act of 1995 requires the federal government to recognize and incorporate existing consensus standards in policy initiatives. While many claim to be

consensus-based, without a formal, independent, third-party approval, it is hard to know if the process is truly consensus based.

GSA and DOE are currently undergoing an updated review of green rating systems. NAHB would like these agencies to consider the National Green Building Standard as an option to meet the requirements of EISA. Furthermore, NAHB believes that no one system should have a monopoly on federal green buildings and all legitimate, consensus based standards should be options at the federal level.

OSHA's Fall Protection Standard

In December 2010, OSHA changed its residential construction fall protection regulation. OSHA rescinded its Interim Fall Protection Guidelines, which set out a temporary policy that allowed employers engaged in certain residential construction activities to use alternative procedures instead of conventional fall protection, such as guardrail systems, safety net systems, or personal fall arrest systems, for any work that is conducted 6 feet or more above lower levels. Returning to the original fall protection standard has proven to be challenging because OSHA has not provided specific guidance regarding how it will interpret the standard or how builders are expected to comply in determining when the use of conventional fall protection is considered infeasible or its use creates a greater hazard. Given these uncertainties, builders have little assurance that their actions will meet OSHA's requirements and could be saddled with costly fines or citations even though they were making good faith efforts to comply. We believe OSHA's fall protection regulation should be reviewed under Executive Order 13563, "Improving Regulation and Regulatory Review," to help make it more effective and less burdensome for small businesses.

Lacey Act

Prompted by a growing concern about interstate profiteering in illegally taken wildlife, Representative John Lacey of Iowa introduced the Lacey Act in 1900, producing America's first federal wildlife protection law. The original law intended to conserve and protect certain species of wildlife in the states. Through a series of amendments over the last century and most recently in 2008, the current Lacey Act has expanded to criminalize trade in protected species of both plants, including wood products, and animals. Today, the Lacey Act generally makes it unlawful for any person to import, export, transport, sell, receive, acquire or purchase fish, wildlife, or plants taken, possessed, transported, or sold in violation of any federal, state, foreign, or Native American tribal law, treaty or regulation.

NAHB supports the goals of the Lacey Act and the prevention of trade in illegally harvested plant and plant products. Unequivocally, we do not support illegal logging in any place at any time.

NAHB supports H.R. 3210, the *Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act* or "RELIEF Act", legislation that recognizes the essential need to

hold harmless those who, unknowingly and without any culpability, are found to be in possession of products that run afoul of the Lacey Act.

Modern day civil forfeiture law, the Civil Asset Forfeiture Reform Act, was indeed contemplated by Congress as a part of the Lacey Act through the 2008 amendments. Recognizing the need to hold harmless those who exercised due care in the acquisition of wood and plant products, Congress sought to exempt honest business owners, and instead, provide the U.S. government more targeted tools to go after egregious, knowing violators.

The U.S. Department of Justice, however, has virtually eliminated this important defense for honest business owners through a broad misinterpretation of the law. By deeming Lacey-violative wood and plant products "contraband", innocent companies are left without legal standing to challenge a government taking in court. Coupled with a requirement that the U.S. government enforce an almost limitless set of foreign laws, builders, and ultimately consumers, are left at great risk.

The entire supply chain dealing with imported wood products—including builders and consumers—are held personally liable to certify that the timber product did not come from plant material that was taken, transported, possessed or sold in violation of any foreign law. The way the law is currently structured leaves wide open the entire chain of custody of a timber product, including builders who have no way of knowing the origin of a particular piece of lumber, a component of a cabinet, closet door or crown molding, to the details of an enforcement action.

Considering all of the components that may go into the construction of a house, it quickly becomes clear how daunting it would be to identify and track down the source for each component of that final product. The sheer number of different sources of wood that could be included in the finished home makes it nearly impossible for a builder or remodeler to know with certainty where and under what circumstances the individual components were sourced.

Further, because our builders generally buy their products through U.S. suppliers or importers, and all products that enter the United States must pass through U.S. Customs, the products have already gone through the required foreign paperwork, documents and permits to allow them to enter the United States at the outset. For the U.S. government to later determine the products, or a component of a product, violate the Lacey Act after its entry into the United States is unfair and illogical. There is no reasonable expectation that the supply chain should know when or if a violation had occurred, much less the underlying laws that had been violated.

Holding a remodeler, for example, responsible for knowing, much less understanding, the laws of a particular country where his or her wood cabinet was sourced is simply irrational.

With this in mind, it is of the utmost importance that honest business owners, including home builders, have the right to seek the return of goods acquired through the exercise of due care. Amending the Lacey Act to include reaffirmation of civil forfeiture law provides an important liability protection for the business community and ultimately the consumer.

Furthermore, U.S. trade laws give little consideration to the interests of consumers and downstream industries. This bias has limited the ability of American consumers to receive products and services of the highest quality at the lowest cost, and of U.S. businesses to provide jobs and increase production. It also encourages other countries to adopt similar protectionist policies that limit the choices of their citizens and opportunities for U.S. exporters.
To preserve the integrity of the Lacey Act and help advance its policy objectives, NAHB also recommends that the law should be revised to be more focused and transparent about which foreign laws may give rise to a violation. By narrowing the scope of foreign laws covered by the Lacey Act, such as those laws that promote the protection or conservation of threatened or endangered plants or plant products, builders would be provided with greater certainty about the law, their obligations, and subsequently, be able to more accurately estimate and account for costs in building homes.

We appreciate the opportunity to testify before the House Oversight and Government Reform. We have highlighted several key items in the body of this testimony, but also for the sake of thoroughness, we have attached additional examples of burdensome regulations impacting our industry.

Onerous Regulations for Home Building & Remodeling Industries
July 2012

Acquisition, Development and Construction (AD&C) Lending

- **Agencies.** FDIC, Office of the Comptroller of Currency (OCC), Office of Thrift Supervision (OTS), Department of Treasury, Federal Reserve Bank
- **Background.** NAHB urges congressional oversight into federal bank regulator activity that without immediate action will be a major impediment to the housing recovery and an increasing threat to the ability of many small builders to survive the economic downturn. The home building industry continues to experience a significant adverse shift in terms and availability on land acquisition, land development and home construction (AD&C) loans, and builders with outstanding loans are facing mounting challenges.
- **Impact.** Lenders are refusing to extend new AD&C credit or to modify outstanding AD&C loans in order to provide more time to complete projects and pay off loans. Lenders themselves often cite regulatory requirements or examiner pressure on banks to shrink their AD&C loan portfolios as reasons for their actions. While federal bank regulators maintain that they are not encouraging institutions to stop making loans or to indiscriminately liquidate outstanding loans, reports from NAHB members in a number of different geographies suggest that bank examiners in the field are adopting a significantly more aggressive posture. Moreover, some institutions appear to be overhauling and downsizing portfolios independent of regulator/examiner pressure.
- **Impact on Home Building.** As a result of this regulatory pressure, the home building industry is having extreme difficulty in obtaining credit for viable projects. Builders with outstanding construction and development loans are experiencing intense pressure as the result of requirements for significant additional equity, denials on loan extensions, and demands for immediate repayment. In short, the credit window seems to have been slammed shut for builders all over the country.

Mortgage Lending Regulations

- **Agencies:** The Consumer Financial Protection Bureau (CFPB) has the responsibility of issuing a final rule establishing standards for complying with the Dodd-Frank Act's ability-to-repay requirement, by defining a "qualified mortgage" (QM). Six federal agencies (the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Federal Housing Finance Agency, Securities and Exchange Commission and Department of Housing and Urban Development) will likewise finalize another Dodd-Frank rule on the qualified residential mortgage (ORM) exemption.
- **Background:** The Dodd-Frank Wall Street Reform and Consumer Protection Act authorized significant changes to mortgage lending practices. Two of the provisions that will have a major impact on the cost and availability of mortgage financing are the Ability to Repay standard and the Credit Risk Retention Rules. The Ability to Repay provisions set minimum standards for mortgages by requiring lenders to establish that consumers have a reasonable ability to repay at the time the mortgage is consummated, and state that certain high-quality, low-cost loans (defined as Qualified Mortgages) are presumed to meet this standard. The Credit Risk Retention provisions require securitizers to retain 5% of the credit risk on loans packaged and sold as securities. An exemption was

allowed for "Qualified Residential Mortgages" (QRMs) which were not explicitly defined by the Dodd-Frank Act.

- **Impact:** NAHB has concerns about potential adverse impacts on the availability and cost of mortgage credit for both rulemakings. Of the two rules, the Ability to Repay/Qualified Mortgage (QM) rule will have the greater impact because it applies to all residential mortgages, while the QRM only relates to mortgages that are securitized.
- **Impact on Home Building:** A narrowly defined QM would put many of today's sound loans and creditworthy borrowers into the non-QM market, undermining prospects for a housing recovery. NAHB urges the CFPB to include a safe harbor in the definition of a QM that would provide some assurance to lenders that they will not be subject to increased litigation if they use sound underwriting criteria. While consumer advocacy groups are asking the CFPB to finalize a QM definition that provides a "rebuttable presumption of compliance" instead of a safe harbor, NAHB is concerned that without a safe harbor, banks would further restrict home lending because they would be fearful of the risks of litigation if consumers are unable to repay a mortgage. NAHB is concerned that the proposed QRM rule would likewise undermine a housing recovery by negatively impacting the cost and availability of mortgage financing, including underwriting standards for commercial real estate and multifamily loans.

EPA Guidance Concerning Clean Water Act Geographic Jurisdiction

- **Agency**. U.S. Environmental Protection Agency
- **Background.** The Clean Water Act (CWA) provides EPA and Army Corps of Engineers with authority over "navigable waters," which Congress defines as "the waters of the United States." The U.S. Supreme Court has issued three main cases concerning the government's geographic jurisdiction under the Clean Water Act:
    1. *United States* v. *Riverside Bayview Homes, Inc.,* 474 U. S. 121 (1985)
    2. *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers,* 531 U. S. 159 (2001), and
    3. *Rapanos v. United States*, 547 U.S. 715 (2006).
    4. *Sackett v. Environmental Protection Agency (2012)*

  In *Rapanos*, Chief Justice Roberts suggested that the government develop a regulation that establishes the scope of its authority. Subsequently, (December 2007 and June 2008) the EPA and Army Corps of Engineers developed guidance (not a regulation) concerning the government's jurisdiction. These guidance documents attempted to interpret all three of the Court's opinions. NAHB understands that EPA has drafted a new guidance document that focuses on CWA geographic jurisdiction and this third guidance document has been developed without input from the land development community.
- **Impact.** In *Rapanos*, the plurality noted that "[t]he average applicant for an individual [CWA section 404] permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes." Furthermore, the Court recognized that each year over $1.7 billion is spent obtaining wetland permits.
- **Impact on Home Building**. Currently, there is broad interpretation of the term "the waters of the United States" and broad regulations governing stormwater discharges. Subsequently, a large majority of home builders are required to obtain CWA discharge permits and many land developers must often obtain federal permission to use their

private property. Therefore, increasing the number of federal permits required for a construction project would force even more home builders to deal with the federal permitting backlog and the high price of getting a permit. Such costs and time delays will affect the availability and affordability of new homes.

Lead-Based Paint – Renovation, Repair and Painting Rule (RRP), Clearance Testing

- **Agency**. U.S. Environmental Protection Agency
- **Background.** EPA finalized the RRP in 2008 requiring remodelers to be trained and certified, use lead-safe work practices, and keep records for remodeling and renovation work performed in pre-1978 homes. As part of a settlement agreement with interest groups, EPA agreed to amend the 2008 rule by eliminating the "opt-out" provision allowing homeowners with no children under six living in the home to waive the rule's requirements, and doubled the amount of homes subject to the rule. Lastly, EPA's original economic analysis relied heavily upon the availability of an improved pre-renovation test kit, supposed to be available in September 2010, but such kit does not exist and EPA has not agreed to adjust its corresponding economic analysis about the burden on businesses.
- **Impact.** EPA estimated the 2008 RRP rule cost at $490.7 million in the first year and between $279.1–301.2 million in subsequent years once fully implemented with a fully qualifying test kit (identified and commercially available). EPA's removal of the opt-out provision and its failure to develop or identify a test kit has resulted in a regulation that will cost an estimated $826.7 million in the first year and between $722.1–779.2 million in subsequent years. [*The removal of the opt-out, according to EPA, adds $336 million in the first year of the regulation and $194-209 million in subsequent years once fully implemented. The lack of a qualifying test kit alone is responsible for an added cost of $250-270 million per year*.]
- **Impact on remodeling**. The remodeling industry is impacted because the rule does not apply to home owners, who can undertake the work themselves without following the rule, thereby increasing the risks of creating a lead hazard and harming children, or choose uncertified "black market contractors" who do not comply with the rule's requirements and avoid the additional costs, making uncertified work cheaper to consumers. This impairs the ability of professionally-trained and certified remodelers to undertake critical energy efficiency and upgrade work in older homes who must compete with DIY and non-compliant "contractors."

Lacey Act

- **Agencies.** Animal and Plant Health Inspection Service, U.S. Customs and Border Protection, Federal Bureau of Investigation, U.S. Fish and Wildlife Service, U.S. Forest Service, National Oceanic and Atmospheric Administration, Office of the Inspector General, U.S. Coast Guard, U.S. Immigration and Customs Enforcement, U.S. Department of Justice
- **Background.** Recognizing the need to hold harmless those who exercised due care in the acquisition of wood and plant products, Congress in 2008 sought to exempt honest business owners from overzealous government enforcement by including reference to the Civil Asset Forfeiture Reform Act in the 2008 Amendments to the Lacey Act. The U.S. Department of Justice, however, has virtually eliminated this important defense for honest business owners through a broad interpretation of the law. By deeming wood and plant products under Lacey "contraband", innocent companies are left without legal

standing to challenge a government taking in court. The result is that the entire supply chain dealing with imported wood products—including builders and consumers—are held personally liable to certify that the timber product did not come from plant material that was taken, transported, possessed or sold in violation of any foreign law. The way the law is currently structured leaves wide open the entire chain of custody of a timber product, including builders who have no way of knowing the origin of a particular piece of lumber, a component of a cabinet, closet door or crown molding, to the details of an enforcement action.

- **Impact.** The Animal and Plant Health Inspection Service is receiving an estimated 40,000 importation documents each month, and they have calculated that it is costing the Federal Government and the regulated community of importers approximately $56 million annually to comply with the declaration requirement.
- **Impact on Home Building.** The ability to operate effectively in the home building industry and to price a home competitively depends on the degree to which the builder's overall costs are certain and predictable. Predictability is of paramount importance as it allows builders to accurately estimate and account for costs in building homes. Further, the more confidence a builder has in pre- and post-construction costs, the more cost-effective the home building process is, as well as the builder's ability to pass those corresponding savings through to homeowners. This impact is of particular concern in the affordable housing sector where relatively small price increases can have an immediate impact on low to moderate income home buyers who are more susceptible to being priced out of the market. As the price of the home increases, those who are on the verge of qualifying for a new home purchase will no longer be able to afford to purchase a new home. A 2012 priced-out analysis done by NAHB illustrates the number of households priced out of the market for a median priced new home due to a $1,000 price increase. Nationally, this price difference means that when a median new home price increases from $225,000 to $226,000, 232,447 households can no longer afford that home.

EPA Regulation of Greenhouse Gas Emissions

- **Agency**. U.S. Environmental Protection Agency
- **Background.** On May 7, 2010, EPA issued its first regulation setting limits on greenhouse gas (GHG) emissions from cars (the "Auto Rule"), as part of a suite of regulations focused on curbing GHGs. Although the Auto Rule is for mobile sources (cars and trucks), EPA believes this regulation triggers requirements for any stationary sources of GHG. In an effort to temporarily exempt small stationary sources, EPA issued the GHG Tailoring Rule in June 2010; however, the Tailoring Rule still allows EPA to revise emissions' thresholds downward to include small stationary sources such as single family or multifamily projects over time. EPA proposes its first revision to the Tailoring Rule in March 2012.

  NAHB, along with a coalition of others, filed a legal challenge to EPA's interpretation and NAHB's policy opposes using existing environmental statutes to regulate GHGs. In February 2012, the Circuit Court for the District of Columbia heard oral arguments in the case but has not rendered a decision. Previously, the court denied a motion to stay the regulations. NAHB supported legislation (S. 3072), sponsored by Sen. Jay Rockefeller (D-WV), to set a two-year moratorium on EPA regulating stationary sources, preventing EPA from taking any action under the Clean Air Act with respect to stationary source

permitting or standards of performance relating to carbon dioxide or methane, but the legislation did not receive a vote in the 111th Congress.

- **Impact.** By regulating GHGs from mobile sources as a pollutant under the Clean Air Act, EPA believes it is essentially bound to regulate GHGs from stationary sources as well. This establishes the debate over whether or not GHGs are considered traditional "pollutants" for purposes of regulating stationary sources and, if so, it would be extremely challenging for the Agency to propose things like permitting, new source performance standards, and non-attainment areas for naturally-occurring and globally-constant gases like carbon dioxide, for example.
- **Impact on Home Building**. EPA data shows that 515 new single family homes and 6,400 new multifamily dwellings would exceed the statutory 250 ton-per-year threshold triggering pre-construction permitting under the Clean Air Act for prevention of significant deterioration (PSD). If these new developments require federal permitting, it could thwart the delicate housing recovery that appears to have been started.

Stormwater Regulations Revision to Address Discharges from Developed Sites

- **Agency:** U.S. Environmental Protection Agency
- **Background.** Under section 402(p) of the Clean Water Act, the Environmental Protection Agency regulates stormwater discharges from municipal separate storm sewer systems (publicly owned conveyances or systems of conveyances that discharge to waters of the U.S. and are designed or used for collecting or conveying storm water, are not combined sewers, and are not part of a publicly owned treatment works), stormwater discharges associated with industrial activity, and stormwater discharges from construction sites of one acre or larger. Under EPA's regulations, these stormwater discharges are required to be covered by National Pollutant Discharge Elimination System (NPDES) permits. EPA has initiated a national rulemaking to establish more stringent requirements on stormwater discharges from new development and redevelopment and make other regulatory changes to municipal separate storm sewer systems. It is expected that these regulations will take into account the potential discharges from the site after construction is completed, which is an unprecedented level of regulation.
- **Impact.** By developing a new stormwater rule, EPA could significantly increase the costs associated with stormwater management for new development and redevelopment.
- **Impact on Home Building.** The homebuilding industry will have to implement long term stormwater flow controls and design sites to manage long term stormwater flow. The cost of homebuilding could rise as these new systems are implemented. The administrative burden on state and local government will also increase as they adopt and manage the implementation of these new policies.

Proposed Rule for Coal Combustion Residuals (CCR) under RCRA

- **Agency**. U.S. Environmental Protection Agency
- **Background**: In June 2010, EPA proposed a rule to reverse longstanding "beneficial use" policy exempting electric utilities that generate vast quantities of coal combustion residuals (CCR) or coal ash from strict permitting and disposal requirements under the Resource Conservation and Recovery Act (RCRA). The "beneficial use" policy was authorized by Congress (Bevill amendment) and allows EPA to exempt specific waste streams from RCRA based on eight criteria. EPA recognized labeling CCR as a

"hazardous waste" under RCRA could halt the emerging "beneficial use" market for products containing CCR, such as drywall, concrete, soil conditioners, and road material aggregates and conducted two analyses on coal ash. These analyses concluded CCR and products containing CCR wastes did not pose a threat to human health or the environment, and EPA exempted CCR. As a result, CCR wastes are covered under Solid Waste Disposal Act (SWDA) and its disposal is enforced by States, not EPA. EPA's current proposal reverses the two Bevill analyses and seeks to regulate "un-encapsulated" (utility wastes) CCR wastes under RCRA, but not CCR wastes that are "encapsulated" (construction materials); however, EPA does not clarify if it would regulate CCR wastes in disposed building materials (after demolition). While EPA recognizes using CCR waste in construction material (drywall and concrete) actually reduces GHG emissions between 12.5-25 million metric tons of CO_2 equivalent per year, the reversal on the "beneficial use" policy risks undermining EPA's efforts to encourage the use of construction material containing CCR and creates confusion for the industry and consumers about whether or not construction materials containing CCR are considered "hazardous wastes" by EPA.

- **Impact**. According to EPA, approximately 40% of all drywall contains CCR wastes and CCR wastes replaces 15% to 30% of cement binding agents used in the formation of concrete. Because various green building rating systems and standards (including the NGBS) give reference to products containing CCR, and award points for its use in programmatic benchmarks for green construction as a recyclable material, the impact of this regulation could be broad.
- **Impact on Home Building**. NAHB members face regulatory uncertainty under EPA's proposal over the long term RCRA status of CCR containing construction materials at demolition and disposal. Builders also face confusion and potential consumer liability risks arising from EPA's position that drywall and concrete containing CCR wastes could be safe in residential use, but is considered a "hazardous waste" under RCRA if stored on an industrial site.

Other Regulatory Concerns

Federal Energy Efficiency Standard; National Energy Building Code

- **Agency**. U.S. Department of Energy
- **Background**. For years, the home building industry has relied upon and participated in the development of consensus-based building and energy codes for new home construction. Most recently, this process has been managed by the International Code Council (ICC) and the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE). Over the past few years, efficiency advocates, environmentalists, and product manufacturers have used this process to dramatically increase minimum energy code requirements that are replaced before they can even be implemented, not knowing the impact in the environment or to affordability. Furthermore, interest groups have lobbied Congress to pass minimum federal energy code mandates and push States to adopt aggressive energy codes in order to receive federal incentive funding. Because the ever-increasing energy code requirements are disconnected from reasonable energy savings payback to consumers, and unnecessarily increase the cost of new, more energy-efficient homes, NAHB has opposed federal legislation, and has

argued against code proposals with ICC or ASHRAE, that set unreasonable energy efficiency minimums or that have cost increases that are not cost effective. Keep in mind that these requirements are the "minimum," permissible under the law – every single new home must comply. For every $1,000 increase in the price of a mid level new home (nationally), 232,447 buyers will no longer qualify for the mortgage.

- **Impact**. Because the code development process is not a program with federal oversight, there is little recourse. Until recently, Congress had never considered usurping a State's right to set its own building and energy codes. With renewed lobbying by interest groups, and a federal agency that supports the interest groups' efforts, it has become more challenging to forestall the substantial increases. The federalization of the building energy code process will be critical as Congress continues to grapple with setting minimum efficiency standards. While dealing with the greatest downturn since the Great Depression new home construction has all but stopped. There have been 2 code cycles sine the downturn began in 2008 and very few new homes built to evaluate if energy conservation measures work. Codes have been increased by use of computer models, conducted by engineers who may not be "on the ground" seeing how these measures are being implemented in real homes. The stringency for energy codes needs to be pulled back until the housing supply can demonstrate that the increases indeed work. Until housing recovers, no increases should take place and the DOE should maintain their authorized role as technical advisors.
- **Impact on Home Building**. Significant increases in minimum energy code requirements can raise the costs of a new home from $3,000- $15,000, depending on the increase and area. This substantial price jump makes the newest, most energy-efficient homes harder to sell, or completely unaffordable, particularly for lower-to-moderate income families. These families that are the hardest hit by higher energy bills are thus relegated to the least-efficient, older housing. This is unfair and actually wastes energy. Energy efficiency has to be reasonable and affordable to the consumers that ultimately pay the costs for such requirements – i.e., future homebuyers and homeowners.

Federal Sustainability and Transportation Initiatives

- **Agencies**. U.S. Environmental Protection Agency, U.S. Dept. of Housing and Urban Development, U.S. Department of Transportation.
- **Background**. Ongoing efforts by the Administration to promote an urban-centric, dense, and "green" development standard, called "sustainable communities," have been increasing over the past two years. Combining housing, transportation and energy efficiency/green into one initiative under the term "sustainability" would be handled by a joint, intra-agency program to provide grants, funding, and other government support for housing and development projects meeting specific "sustainability" criteria. The Administration has promoted this approach as a way to both address climate change and to calculate the true "cost" of housing by including transportation using a proprietary model ("housing and transportation index" or "H&T index"). This calculation tool and methodology is not peer-reviewed and appears to be disconnected from market realities for both builders and consumers. Additionally, such government programs have proven to be heavily reliant upon LEED and other non-ANSI green rating systems without giving equal recognition for the ANSI-approved National Green Building Standard.
- **Impact.** Because the Administration wants to promote the sustainability, it could easily become a criteria requirement for accessing a variety of federal funding and grant

opportunities for housing and development projects. This process largely exists outside of the legislature and is often voluntary. However, funneling the government's limited resources for housing by forcing developers to use proprietary standards and calculation modules could prove to be unnecessarily costly, restrictive, and unaffordable for consumers in the long term.

- **Impact on Home Building.** Although efforts and initiatives to promote sustainability have been largely voluntary until now, it could become mandatory in the future. If this federalization of land use and "sustainability" concept filters down and becomes the requirement for accessing all federal housing funds, it could create problems for builders using other green programs that are not proprietary (like the NGBS) and that may not use the H&T index, particularly in rural, non-urban areas, for which the H&T index model is unworkable and inappropriate.

Committee on Oversight and Government Reform
Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)(5)

Name:

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2009. Include the source and amount of each grant or contract.

NONE

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

NATIONAL ASSOCIATION OF HOME BUILDERS
Chairman of the Board of Directors

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2009, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

NONE

I certify that the above information is true and correct.
Signature: Barry B Rutenberg

Date: July 17, 2012

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BARRY RUTENBERG
Chairman of the Board
National Association of Home Builders

Barry Rutenberg, a home builder and remodeler based in Gainesville, Fla., is the 2012 chairman of the board of the 140,000-member National Association of Home Builders.

He has more than 35 years of experience in the building industry, and is the owner of Barry Rutenberg and Associates, Inc., which has developed more than a dozen communities and more than 1,000 homes in the Gainesville area. Rutenberg's daughter, Lisa Kinsell, is the vice president of the company, and his son-in-law, Dale Kinsell, is the president. As an independent franchisee of Arthur Rutenberg Homes, which was founded by Rutenberg's father in the 1950s, the company represents a three-generation home building tradition in the Gainesville area.

Barry Rutenberg also serves as the vice chairman of Arthur Rutenberg Homes.

He has been active in the NAHB leadership structure at the local, state and national levels throughout his career, and was elected as NAHB's third vice chairman in 2009. Moving up the association's leadership ladder, he subsequently served as second vice chairman in 2010 and as first vice chairman in 2011. He was named chairman-elect in September 2011 and elected as chairman of the board at NAHB's International Builders' Show in February 2012.

A member of NAHB's board of directors since 1980, Rutenberg has served on more than 25 NAHB committees, councils and task forces. He also has served three two-year terms as an NAHB national vice president representing Florida and Puerto Rico.

As chairman of NAHB's Building Materials Task Force, Rutenberg testified before the International Trade Commission, and committees of the U.S. Senate and Canada's House of Commons.

Rutenberg was president of the Florida Home Builders Association in 2000, and in 1978 was the president of the Builders Association of North Central Florida, the local association representing home builders in the Gainesville area. He was selected by his peers as Florida Builder of the Year in 1994, and as the Gainesville Builder of the Year in 1982, 1993 and 1998.

In 2007, Rutenberg joined his father, Arthur Rutenberg, as an inductee in the Florida Housing Hall of Fame. Arthur Rutenberg was inducted in 1996, and when Barry joined him in 2007 they became the first father-son team in the Florida Housing Hall of Fame.

Rutenberg is involved in a wide range of philanthropic and civic organizations. He serves on the board of the Gainesville Area Chamber of Commerce, on the board of the Conservation Trust for Florida, and on the Issues Advisory Board of Florida Defenders of the Environment.

He graduated from Northwestern University in 1970 and earned a Master of Business Administration degree from Harvard University in 1972.

Rutenberg's wife, Kris, is a speech language pathologist on the clinical faculty at the University of Florida. They are the parents of two adult children and have two grandchildren.