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U.S House of Representatives
Committee on the Judiciary

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	Regulatory Accountability of 2011

Chairman Smith, Ranking Member Conyers and distinguished Members of the Committee, good morning and thank you for giving me the opportunity to participate in this important hearing. My name is Arnold Baker and I am the Chief Executive Officer of Baker Ready-Mix in New Orleans, Louisiana. I am also the Chair of the National Black Chamber of Commerce. My company was started in 2003 with five employees. We now have nearly 60 employees. Although we are a small business, we are supplying a good deal of the concrete that is rebuilding New Orleans in the aftermath of Hurricane Katrina. Reconstructing the city's levees, floodwalls, roads, sidewalks, houses, and public buildings requires concrete – a lot of it. And New Orleans will need much more of it in coming years.

Unfortunately, as discussed below, a swarm of major new regulations coming out of Washington are threatening Baker Ready-Mix's ability to stay in business and keep rebuilding New Orleans. Together, these sweeping rules will make it much more difficult for me to sell concrete, to give health coverage to my employees, and to grow jobs. Federal agencies need to do a much better job of understanding the full impact their regulations will have on businesses and jobs – along with possible alternatives – **before** they impose the most costly new rules. Businesses like mine, who already fight to stay on top of the sea of **existing** regulations, need to have certainty that **new** rules are well-conceived and supported by adequate data.[1] H.R. 3010, the Regulatory Accountability Act of 2011, would accomplish these goals.

The Regulatory Accountability Act Will Restore Balance to the Regulatory Process

Federal agencies often fail to understand the full impact that their regulations – along with those of ***other agencies*** – will have on businesses and the economy as a whole. While these agencies are currently required to undertake some consideration of the impacts their

[1] Small businesses like mine do not have the time or the resources to actively participate in the rulemaking process. It is a major challenge for most businesses simply to understand how new regulations will affect them. For example, to understand the four recent EPA rules discussed below, a company would need to read over 1,350 pages of the *Federal Register* and relevant supporting documents. It is not realistic to expect a company like Baker Ready-Mix to take on such a task with the large number of new rules being written each year.

rules will have on regulated entities and the economy,[2] these reviews are limited and often conducted in a piecemeal fashion.

To address this problem, the Regulatory Accountability Act has been introduced in both the House and the Senate, with bipartisan support. The legislation would put balance and accountability back into the federal rulemaking process, without undercutting vital public safety and health protections. The bill focuses on the process of developing regulations. Better process will produce better substance. The Regulatory Accountability Act would achieve these goals by:

- Giving the public an earlier opportunity to participate in shaping the most costly regulations before they are proposed. At least 90 days prior to the time the rule is proposed, the agency must provide the public with a written statement of the problem to be addressed, as well as the data and evidence that supports the regulatory action. The agency must accept public comments on the proposal.
- Requiring agencies to select the least costly regulatory alternative unless the agency can demonstrate that the more costly alternative is necessary to protect public health, safety, or welfare.
- Requiring agencies to consider the cumulative impacts of regulations and the collateral impacts their rules will have on businesses and job creation.
- Allowing stakeholders to hold agencies accountable for complying with the Information Quality Act, which requires agencies to use data that is objective and reliable. The public would also have the opportunity to correct data that does not meet IQA standards.
- Providing for on-the-record administrative hearings for the most costly rules to verify that the agency has "done its homework" and that the proposed rule is well-conceived and well-supported.

[2] *See, e.g.,* Executive Order 12,866 (1993)(requiring interagency economic review of "major rules" that are likely to have an annual effect on the U.S. economy of $100 million or more); Regulatory Flexibility Act, 5 U.S.C. § 601, *et seq.* (requiring federal agencies to consider the impact their proposed rules will have on small businesses and small governments).

- Restricting agencies' use of "interim final" regulations, where the public has no opportunity to comment before a regulation takes effect; the Act would allow expedited judicial review of the agency's decision to issue an interim final rule.

Regulations Impacting Baker Ready-Mix: How Would the Regulatory Accountability Act Have Addressed Them?

Let me give some specific examples of the impacts that new regulations are having on my company and ways that the Regulatory Accountability Act would have benefitted businesses such as mine:

EPA Rules Affecting Cement Plants. One of the most critical ingredients in concrete is cement, which is the "glue" that holds together the other ingredients of concrete: gravel, sand, crushed rock, fly ash, etc.[3] Without cement, we could not make and sell concrete. Just within the last few years, however, the U.S. Environmental Protection Agency has issued or proposed several rules that will adversely impact cement production at U.S. plants.

- ***"Cement Maximum Achievable Control Technology (MACT)" Rule***[4] - This rule imposes extremely stringent new standards for fine particles and other emissions from cement plants. This rule will require cement companies to install very costly new control equipment. By itself, this rule is expected to cost **$3.4 billion** to implement and result in the closure of at least 18 of 100 cement plants across the U.S., over and above the plants that have already closed.[5] As a result, domestic cement production is expected to fall below 50% of the cement consumed in the U.S.; within a few years, more than half of the concrete used on American projects will be made with foreign cement.[6] If the Regulatory Accountability Act had been law when EPA began the cement MACT rulemaking process, stakeholders would have been able to provide better data for the agency to use in setting the standards.

[3] The most common type of cement is Portland cement, which is a mixture of calcium, silicon, aluminum, iron, to which gypsum and fly ash are added. Lime and silica make up about 85% of the mass of the cement.
[4] National Emissions Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry, 75 Fed. Reg. 54,970 (September 9, 2010) (Final Rule).
[5] Portland Cement Association, 2011 estimate.
[6] *Id.*

EPA would have had to demonstrate that its data supported the standards it selected, and that the data was supported by the Information Quality Act. EPA also would have likely had to select a less costly alternative and consider the cumulative impact of multiple regulatory impacts on the cement manufacturing industry (and on ***other*** industries, like ready-mix concrete, that heavily depend on cement).

- ***Fly Ash Rule***[7] - Fly ash is added to cement to make it stronger and more durable. My company now adds fly ash to about 90% of our concrete products to improve their performance and lifespan. EPA has proposed classifying fly ash as a hazardous material, or, alternatively, as a nonhazardous solid waste with special disposal restrictions. Either action by the agency is likely to result in customers rejecting fly ash in our products, forcing us to use more costly and less suitable materials. This rule, by itself, could add 10% or more to the cost of concrete. If the Regulatory Accountability Act had been in effect, EPA would have likely been required to have on-the-record administrative hearings to show why such a dramatic regulatory change was necessary and the data that supported the change. The agency would have had to fully consider the impact that a change in solid waste classification would have on multiple industries and recycling practices.
- ***Greenhouse Gas Rule***[8] - EPA's regulatory program to limit CO_2 and other greenhouse gases hits cement plants very hard. Already, CO_2 emission limits have been proposed for several construction and modernization projects at cement plants. These limits will result in higher production costs for cement, which in turn will make concrete more expensive. Had the Regulatory Accountability Act been law, EPA would have had to hold on-the-record hearings and carefully evaluate the impact of greenhouse gas rules on businesses of all sizes, and on the economy as a whole.[9]

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[7] Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities, 75 Fed. Reg. 35,128 (June 21, 2010) (Proposed Rule). Fly ash is one type of by-product that is produced when coal is burned in boilers or other combustion units. Fly ash is currently used extensively as an ingredient in a variety of products, including gypsum, concrete, and other building materials.

[8] *See* Greenhouse Gas Emission Standards for Light-Duty Vehicles, 75 Fed. Reg. 25,324 (May 7, 2010) (Final Rule), and Prevention of Significant Deterioration and Title V GHG Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (Final Rule).

[9] To date, EPA has not conducted any thorough comprehensive evaluation of the cumulative effect of greenhouse gas rules on small businesses or the economy as a whole.

- ***Nonhazardous Solid Waste Definition Rule***[10] - EPA recently revised the definition of materials that can be burned for energy recovery in combustion units like boilers and cement kilns. Many nonhazardous materials that have traditionally been burned for energy recovery in cement kilns – such as tires, used oil, plastic, carpet, and wood waste – now have to be sent to a commercial/industrial incinerator unit. This means that cement plants will either have to replace these readily available materials with far more costly fuels or install new control equipment in order to qualify as an incinerator. Either way, their increased costs will be passed along to their customers, including Baker Ready-Mix. As a result, concrete costs will rise. Again, the Regulatory Accountability Act would have required EPA to understand how the revised definition of solid waste would impact the use/recycling of materials such as tires and used oil and how it would impact cement manufacturing.

The combination of the four EPA rules described above is anticipated to add as much as **$20 to $36** to the cost of every ton of cement that Baker Ready-Mix purchases.[11] This represents a 33% price increase for one of my company's most critical manufacturing components. Because we are a small business, we can't spread our increased costs over a large number of projects the way larger companies can. When you consider that a difference of as little as $1 per ton of concrete can determine whether my company wins or loses its bid for a particular project, a cost increase of this magnitude would be disastrous. I may be put in the position of having to shrink my workforce rather than expanding it.

The effect of these EPA rules will also ripple though the U.S. economy. Critical infrastructure projects in urban areas and communities all across the country depend heavily on concrete, and these projects could be cancelled or downsized because of sharp cost increases in cement. At a time when the country needs to put people to work, we shouldn't be cutting back on public works projects because agencies in Washington pile excessive new regulations on top of each other.

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[10] Identification of Non-Hazardous Secondary Materials That Are Solid Waste, 76 Fed. Reg. 15,456 (March 21, 2011) (Final Rule).

[11] Portland Cement Association, 2011 estimate.

Health Care and OSHA Actions

In addition to the new EPA regulations, we will also be significantly impacted by the huge number of regulations implementing the health care law enacted in March 2010. The cost of these new regulations will be so high that we've had to look at restructuring the company to stay below the 50-employee threshold so that we can still offer health care to our employees on our own terms.

The regulations being promulgated by the Departments of Labor, Treasury, and Health and Human Services to implement these laws increase the uncertainty felt by employers and businesses, both because of the substance of the regulations and the "anything-goes" process by which the Departments are issuing them.

- ***Healthcare rulemaking process*** - There are several ways in which recent health care law rulemakings would have been different if the Regulatory Accountability Act had been in place: many of the regulations, based on their economic impact, would qualify as "major rules" and thus be subject to increased public participation and on-the-record hearings. Even if their cost impact was not high enough to trigger these provisions, these regulations would likely have qualified due to their significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of U.S. based enterprises to compete with foreign-based enterprises in domestic and export markets. Also, the regulations being issued under this law would have to be the least costly alternative and the agencies would have to show that the costs justified the benefits and explain their reasoning. The agencies would also have to analyze alternatives that they did not choose in the same way. When considering the ultimate cost of these regulations, the agencies would have to include indirect costs, cumulative costs, and impacts on jobs and economic growth.
- ***"Grandfather Plan"-*** One of the most significant regulations promulgated to implement the health law was issued as an "interim final" rule. It implements the administration's promise that 'if you like your health care plan, you can keep it' – which was legislated into the statute under a provision referred to as "the

grandfathered plan" status provision.[12] Instead, the regulation is far more restrictive than what the health care law promised, with many more limitations and exceptions. It literally breaks one of the central promises made to pass the health care law – that employers and employees who liked their health plans would not have to change them. As a consequence, Baker Ready-Mix will be forced to find a new, less desirable plan. The Grandfather Plan Status regulation therefore triggers two key provisions of the Regulatory Accountability Act. As an interim final regulation, interested parties would have an opportunity to challenge whether this regulation should have been issued without a full rulemaking process. And the agency would have had to provide a specific statutory reference justifying the approach they took in the regulation.

- ***OSHA Noise Interpretation*** - Another agency action that highlights the need for H.R. 3010 was OSHA's use of a guidance document to reinterpret the term "feasible" as it applies to engineering and administrative controls under the noise control standard. H.R. 3010 specifies that before major guidance can be issued, the agency identifies the costs and benefits of the guidance and assures that such benefits justify such costs, just as if it were a regulation. It also directs the agency to confer with OMB's Office of Information and Regulatory Affairs (OIRA) to assure that the guidance is reasonable, understandable, and does not produce costs that are unjustified by the guidance's benefits. In the case of OSHA's noise interpretation, the agency did not do **any** cost-benefit analysis, and did not consult with OIRA. An independent economic analysis found that this guidance would have imposed more than $1 billion in costs on employers. Had the Regulatory Accountability Act been in place, this guidance would very likely not have been proposed. The planned guidance was subsequently withdrawn, but only after employers and their representatives had to make clear at every opportunity how damaging and unwarranted OSHA's interpretation was.

[12] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1251(a), 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 2301(a), 124 Stat. 1029 (2010) ("[n]othing in the Act shall be construed to require that an individual terminate coverage…in which such individual was enrolled on the date of enactment.").

The Regulatory Accountability Act Will Give Businesses More Certainty

By requiring federal agencies to do a better job of explaining the data supporting their regulations, and to more fully consider the impacts and alternatives to those regulations, businesses like mine will have greater confidence that the rules are needed and have been properly designed. Well-conceived and well-supported rules enable businesses to plan for their implementation, including making capital expenditures in equipment and training. Poorly-conceived, poorly-supported rules create uncertainty, unnecessarily high burdens, and reluctance to make future investments, including the hiring of additional employees. The Regulatory Accountability Act will lead to better regulatory outcomes, and greater certainty about future business investments, including hiring.

Thank you for allowing me this time. I will be happy to answer any questions you may have.