# Manufactured Housing Association for Regulatory Reform

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July 14, 2017

VIA FEDERAL EXPRESS AND ELECTRONIC SUBMISSION

U.S. Department of Energy
Office of General Counsel
Room 6A245
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Re: Reducing Regulation and Controlling Regulatory Costs Under Executive Orders 13771 and 13777 – Request for Information

Dear Sir or Madam:

The following comments are submitted on behalf of the Manufactured Housing Association for Regulatory Reform (MHARR). MHARR is a Washington, D.C.-based national trade association representing the views and interests of producers of manufactured housing regulated by the U.S. Department of Housing and Urban Development (HUD) pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5401, et seq.) as amended by the Manufactured Housing Improvement Act of 2000 (2000 reform law). MHARR was founded in 1985. Its members include mostly medium and smaller-sized independent producers of manufactured housing from all regions of the United States.

## I. INTRODUCTION

On May 30, 2017, the U.S. Department of Energy (DOE) published a Request for Information (RFI)[1] seeking public comment pursuant to Executive Order (EO) No. 13771 ("Reducing Regulation and Controlling Regulatory Costs") issued by President Trump on January 30, 2017 and Executive Order No. 13777 ("Enforcing the Regulatory Reform Agenda"), issued by President Trump on February 24, 2017, concerning DOE regulations, or portions thereof, that are "outdated, ineffective, or excessively burdensome" and, therefore, "appropriate for repeal, replacement or modification."[2] In relevant part, EO 13777 provides:

[1] See, 82 Federal Register, No. 102 at p. 24582, et seq.
[2] Id.

"Section 1. Policy. It is the policy of the United States to alleviate unnecessary regulatory burdens placed on the American people.

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Section 3 Regulatory Reform Task Forces *** (d) Each Regulatory Reform Task Force shall evaluate existing regulations ... and make recommendations to the agency head regarding their repeal, replacement or modification, consistent with applicable law. At a minimum, each Regulatory Reform Task Force shall attempt to identify regulations that: (i) eliminate jobs or inhibit job creation; (ii) are outdated, unnecessary or ineffective; (iii) impose burdens that exceed benefits; (iv) create a serious inconsistency, or otherwise interfere with regulatory reform initiatives and policies; (v) are inconsistent with the requirements of [the] Information Quality Act; [or] (vi) "derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified."

(e) In performing the evaluation described in subsection (d) of this section, each Regulatory Reform Task Force shall seek input and other assistance, as permitted by law, from entities significantly affected by federal regulations, including ... small businesses ... and trade associations."

(Emphasis added).

Pursuant to section 3(d) of EO 13777, agency Regulatory Reform Task Forces are required to "evaluate existing regulations (as defined in section 4 of Executive Order 13771)." That section, in turn, states that "for purposes of this order, the term 'regulation' or 'rule' means an agency statement of general or particular applicability and future effect, designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency...." Significantly, the Trump Administration's January 20, 2017 order to the heads of executive departments and agencies entitled "Regulatory Freeze Pending Review," further equates the term "regulation" with "regulatory action," as defined in section 3(e) of Executive Order 12866. That section provides that "regulatory action" includes "any substantive action by an agency ... that promulgates or is expected to lead to the promulgation of a final rule or regulation, including ... notices of proposed rulemaking...." (Emphasis added). Given this far-reaching definition of "regulatory action" and its consistent use in EOs and other administrative directives issued by the Trump Administration, MHARR maintains and asserts that DOE's June 17, 2016 proposed rule to establish "Energy Conservation Standards for Manufactured Housing"[3] is fully within the scope of EOs 13771 and 13777 and should – and must – be addressed by DOE within this proceeding and its implementation of those orders.

In accordance, therefore, with EO 13771 and EO 13777, MHARR – representing medium and smaller-sized manufactured housing industry businesses "significantly affected" by federal

[3] See, 81 Federal Register, No. 117 at p. 39756, et seq.

regulation and potential DOE manufactured housing energy regulation[4] -- asserts and maintains that DOE's proposed manufactured housing energy standards rule violates multiple, specific elements of these directives and is in direct conflict with the regulatory policies of the Trump Administration (and existing law) as expressed therein. Consequently, DOE, in accordance with the procedure established by those Executive Orders, should identify that proposed rule for rejection or withdrawal and re-assessment based on the regulatory policies expressed in EO 13771 and 13777, and as otherwise enunciated by the Trump Administration.

## II. COMMENTS

### A. DOE's Proposed Manufactured Housing Energy Standards Rule Violates the Express Terms, Provisions and Policies of EO 13777

Executive Order 13777, by its express terms, is designed and intended to "alleviate unnecessary regulatory burdens on the American people," including, among other things, regulations that "eliminate jobs," or "inhibit job growth," or "impose burdens that exceed benefits."

As is exhaustively documented and detailed in MHARR's August 8, 2016 written comments opposing the June 17, 2016 DOE proposed rule (hereby incorporated by reference herein as if restated in full),[5] that proposal would have exactly these effects by needlessly and substantially increasing the cost of manufactured housing – recognized and designated by federal law as a key source of affordable housing and homeownership[6] – by a factor of $6,000.00 or more, within an extremely price-sensitive market, to correct a "problem" that simply does not exist. In part, as stated by MHARR in its comments:

> "With public opinion surveys showing public trust in the federal government at an all-time low, the June 17, 2016 DOE proposed rule is a textbook illustration of why a majority of Americans have lost faith and confidence in the federal government generally and in federal agencies, such as DOE ... specifically. Purporting to address a "problem" that does not exist, the DOE proposed rule is a paradigm of over-reaching, oppressive and costly "big government" regulation, that will disproportionately harm lower-income Americans ... and crush smaller industry businesses, leading to a further decrease in homeownership (already at record-low levels), higher levels of homelessness, and an emasculation of free-market

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[4] All of MHARR's member manufacturers are "small businesses," as defined by the U.S. Small Business Administration (SBA) and "small entities" for purposes of the Regulatory Flexibility Act (5 U.S.C. 601, et seq.). MHARR would further note that comments opposing and/or questioning key aspects of the DOE June 17, 2016 proposed manufactured housing energy rule were filed by the Office of Advocacy of the U.S. Small Business Administration. See, Attachment 1, hereto.

[5] See, Attachment 2, hereto (without exhibits). MHARR also incorporates by reference herein its August 15, 2016 comments in response to DOE's June 30, 2016 Request for Information (RFI) concerning the impact of its June 17, 2016 proposed rule on indoor air quality in manufactured homes. See, Attachment 3, hereto

[6] See e.g., 42 U.S.C. 5401(a) "Congress finds that -- (1) manufactured housing plays a vital role in meeting the housing needs of the nation; and (2) manufactured homes provide a significant resource for affordable homeownership and rental housing accessible to all Americans."

> competition -- with corresponding retail price increases -- in an industry already verging on de facto monopolization. Not one of these consumer, industry and societal costs, however – or a multitude of other relevant and significant cost factors – are addressed in DOE's fatally defective and deceptive "cost-benefit analysis," in direct violation of [the Energy Independence and Security Act of 2007 (EISA)]."[7]

(Emphasis added). (Internal citations omitted).

To the extent that MHARR's previously-submitted comments establish that DOE's proposed manufactured housing energy standards rule, based on a fundamentally and fatally-flawed cost-benefit analysis, would impose significant and unnecessary costs on the mostly lower and moderate-income Americans who rely on manufactured homes as an affordable source of housing and homeownership the most, and would simultaneously devastate the industry, with corresponding losses in manufacturing employment and job creation across the heartland of the nation – all in direct violation of the specific mandates of EO 13777 -- MHARR will not restate those points and authorities in this document but, rather, refers DOE and its Regulatory Reform Task Force to those comments.[8] Subsequent to the submission of MHARR's August 8, 2016 comments, however, other actions have been taken by the Trump Administration which have a direct bearing on this proceeding and provide independent and sufficient bases – in themselves – for the rejection or withdrawal of the June 17, 2016 DOE proposed rule. Those actions are addressed in detail below.

### B. The Withdrawal and Retraction of the "Social Cost of Carbon" Construct Further Undermines an Already Fatally-Flawed Cost-Benefit Analysis

As was noted by MHARR in an April 26, 2017 communication to DOE Secretary Rick Perry,[9] DOE's statutorily-mandated cost-benefit analysis, nominally in support of the June 17, 2016 proposed rule, relied, in substantial-part, on the non-transparent "Social Cost of Carbon" (SCC) construct developed by an Obama White House "Inter-Agency Task Force." In its initial August 8, 2016 written comments, MHARR specifically objected to DOE's use of the Obama Administration's SCC construct to derive alleged national-level "environmental benefits" flowing from the proposed rule as a result of supposedly "reduced emissions of air pollutants and greenhouse gasses associated with electricity production."[10] In relevant part, MHARR stated:

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[7] See, Attachment 2, hereto at p. 3. Nor do these fatal defects even begin to address the fundamentally tainted and scandalous process which led to the proposed rule, as is fully set forth in MHARR's written comments and – in and of itself – represents an independent and fully sufficient reason for the rejection or withdrawal of the June 17, 2016 proposed rule.

[8] In addition August 16, 2016 comments submitted by The George Washington University Regulatory Studies Center (see, Attachment 4, hereto), demonstrate that the DOE proposed rule, for much of the overall manufactured housing market, would impose direct costs that would exceed benefits, again in direct violation of EO 13777. Those comments state, in relevant part: "DOE may be overestimating the benefits of its proposal by disregarding average MH tenant occupancy and resale market obstacles that prevent MH owners from recouping higher upfront costs from increased [energy] efficiency. Taking these factors into account suggests that a significant portion of the purchasers of single-section and multi-section manufactured homes will bear net costs instead of benefits." (Emphasis added).

[9] See, Attachment 5 hereto.

[10] See, 81 Federal Register, No. 117, supra at pp. 39790-39792.

> "DOE admits that alleged SCC benefits are 'uncertain' and 'should be treated as revisable.' Thus DOE attributes 'benefits' to the proposed rule based on metrics acknowledged to be 'uncertain,' while it totally ignores predictable consumer, industry and national level costs of the proposed rule ... thus over-inflating the alleged benefits of the proposed rule with junk science while significantly understating its costs. Indeed, while DOE exhibits great concern over the global 'social costs' of carbon, it apparently could care less about the domestic social cost of millions of Americans who would be excluded from the benefits of homeownership under its rule, as it makes no effort whatsoever to quantify or consider those costs, which would be enormous. *** Given each of these fatal defects in the utilization of arbitrary and speculative SCC values – and the other fundamental analytical and data failures of the June 17, 2016 DOE cost-benefit analysis, that 'analysis' is factually worthless and insufficient to meet the substantive requirements of EISA section 413 and the [Administrative Procedure Act]."

(Footnotes omitted).[11]

Now, though, beyond these multiple fatal defects, Section 5 of Executive Order 13783, "Promoting Energy Independence and Economic Growth," signed by President Trump on March 28, 2017,[12] expressly states that the November 2013 SCC Technical Update relied-upon by DOE in support of the June 17, 2016 proposed manufactured housing rule,[13]is "withdrawn as no longer representative of [federal] government policy." (Emphasis added). In addition, EO 13783 expressly disbands the "inter-agency working group" that developed the SCC and its various updates and iterations.

Insofar as DOE concluded – incorrectly – based on the now-invalidated SCC construct, that national-level environmental and related economic benefits would accrue under the proposed rule, leading, in substantial part, to its broader conclusion that alleged benefits of the proposed rule would exceed its alleged costs, its purported cost-benefit analysis (as affirmatively required by EISA) has been fundamentally undermined and invalidated. For this reason, as well as the other

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[11] See, Attachment 2 hereto at pp. 32-33.

[12] See, Attachment 6, hereto.

[13] See, 81 Federal Register, No. 117, supra at p. 39791 at n. 14.

and additional reasons set forth in MHARR's August 8, 2016 written comments, DOE's June 17, 2016 proposed rule should be targeted for rejection or withdrawal pursuant to EO 13771 and EO 13777, as lacking in any substantive basis, or demonstrable benefits exceeding its significant known and predictable costs.

### C. The Trump Administration's Rejection of the Paris Climate Accord Invalidates the DOE Proposed Rule Developed to Implement that Accord

The *specific* proposed manufactured housing energy standards rule published by DOE on June 17, 2016, was developed and proposed as an integral part of the Obama Administration's 2013 "Climate Action Plan" and implementation of the so-called Paris Climate Accord.[14] Insofar as United States participation in that accord has been terminated by President Trump – and the Obama Climate Action Plan rescinded -- the DOE rule, as published, "derive[s] from or implement[s] Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified." Accordingly, the proposed rule should either be rejected by DOE or withdrawn.

Pursuant to Article 4, paragraph 2, of the Paris Climate Accord,[15] each signatory party is required to prepare and submit "Nationally Determined Contributions," identifying specific measures to implement the terms and provisions of the accord. As stated by the United Nations Framework Convention on Climate Change (UNFCCC): "According to ... the Paris Agreement, each Party shall prepare, communicate and maintain successive nationally determined contributions (NDCs) that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions." (Emphasis added).

The United States, as part of the Obama Administration's implementation of the Paris Accord, submitted its first Nationally Determined Contribution document to the United Nations Secretariat on March 9, 2016.[16] That document – a "Presidential Directive" – derived solely from the president's executive authority, pursuant to an agreement entered-into pursuant to purely executive authority[17] -- makes it quite clear that the DOE proposed rule was and is an element of that Administration's regulatory activity to domestically implement the provisions of the Paris Accord. In relevant part, the NDC states:

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[14] While authority and a corresponding directive for the development of *a* manufactured housing energy standards rule was included in section 413 of the Energy Security and Independence Act of 2007, the *specific* proposed rule published by DOE in the Federal Register on June 17, 2016 – which remains pending – was developed and proposed as an integral element of, and incident to, both the Obama Administration's 2013 Climate Action Plan and the Obama Administration's implementation of the Paris Climate Accord via its 2016 Nationally Determined Contribution (NDC) as explained herein.

[15] The Paris Accord, according to UNFCCC, became effective on November 4, 2016.

[16] See, Attachment 7, hereto.

[17] While in all relevant respects an international "treaty" subject to Senate approval under Article II, Section 2 of the United States Constitution, the Paris Accord was entered-into without Senate ratification as an alleged exercise of Executive Branch power. As such, any and all federal government activity to implement the Paris Accord necessarily derives from that Executive Branch power and from "Presidential Directives," including the NDC, which itself is properly construed and characterized as a "Presidential Directive."

> "Domestic laws, regulations, and measures relevant to implementation: Several U.S. laws as well as existing and proposed regulations thereunder are relevant to the implementation of the U.S. target. *** At this time ... under the ... Energy Security and Independence Act [of 2007], the United States Department of Energy is continuing to reduce building sector emissions by promulgating energy conservation standards for a broad range of appliances and equipment, as well as building code determinations for residential buildings.[18]

(Emphasis added).

And, lest there be any doubt that the "energy conservation standards" and regulatory "building code determinations for residential buildings" referred to in the Obama Administration NDC include the rule developed by DOE pursuant to EISA to establish "Energy Conservation Standards for Manufactured Housing," other official federal government documents make that connection explicit. For example, an August 6, 2013 report of the so-called United States Congress Bicameral Task Force on Climate Change – "Implementing the President's Climate Change Action Plan: Actions the Department of Energy Should Take to Address Climate Change,"[19] states:

> "This report recommends 20 concrete steps that DOE should take in carrying out the President's Climate Action Plan. *** New and updated energy efficiency standards are a key part of the President's plan, which includes a goal of reducing carbon pollution by at least 3 billion metric tons cumulatively by 2030 through improved efficiency standards. *** DOE should resolve the outstanding issues with its draft manufactured housing [energy] efficiency standards and issue final standards within a year."

(Emphasis added).[20]

In his official June 1, 2016 statement, however, announcing the United States' withdrawal from the Paris Climate Accord, President Trump specifically stated: "... [A]s of today, the United States will cease all implementation of the non-binding Paris Accord and the draconian financial and economic burdens the agreement imposes on our country. This includes ending the implementation of the Nationally Determined Contribution...." To the extent, therefore, that *the specific* June 17, 2017 proposed manufactured housing energy rule developed by DOE was part of, derived from, and incident to the 2016 NDC, which has been rescinded by President Trump, that proposed rule should either be rejected or withdrawn by DOE pursuant to EO 13777.

Further, to the extent that the June 17, 2016 DOE proposed rule was developed as an integral element of – and pursuant to -- President Obama's 2013 Climate Action Plan, it also

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[18] See, U.S. NDC, Attachment 7 hereto at p. 5.

[19] This "task force," while "bicameral," does not appear to have been bipartisan, as reflected by its co-chairmen, Sen. Sheldon Whitehouse (D-RI), Sen. Ben Cardin (D-MD), Sen. Edward Markey (D-MA), Rep. Henry Waxman (D-CA), Rep. Bobby Rush (D-IL) and Rep Earl Blumenauer (D-OR)

[20] See United States Congress Bicameral Task Force on Climate Change report at pp. 1, 10. This report also confirms the DOE rule to be part of the Obama Administration's 2013 Climate Action Plan.

derives from a "directive" that has subsequently been rescinded by President Trump. In relevant part, Executive Order 13783[21] states:

> "Sec. 3. Rescission of Certain Energy and Climate-Related Presidential and Regulatory Actions. *** (b) The following reports shall be rescinded: (i) The Report of the Executive Office of the President of June 2013 (The President's Climate Action Plan). *** (d) The heads of all agencies shall identify existing agency actions related to or arising from the ... reports listed in subsection (b) of this section.... Each agency shall, as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding any such actions...."

(Emphasis added). In accordance with the express directive of EO 13783, therefore, the June 17, 2016 DOE proposed rule must be either rejected or withdrawn.

## III. CONCLUSION

For all of the foregoing reasons and those set forth more specifically in the attachments hereto and documents incorporated herein by reference, DOE's June 17, 2016 proposed rule on manufactured housing energy standards should be targeted for rejection or withdrawal pursuant to Executive Orders 13771 and 13777.

Sincerely,

Mark Weiss
President and CEO

cc: Hon. Rick Perry
Hon. Benjamin Carson
Hon. Mick Mulvaney
Hon. Lisa Murkowski
Hon. Maria Cantwell
Hon. Greg Walden
Hon. Frank Pallone
Hon. Gary Cohn
Mr. Rick Dearborn
Manufactured Housing Industry Manufacturers, Retailers and Communities

[21] See, Attachment 6, supra at pp. 4-5.

U.S. SMALL BUSINESS ADMINISTRATION
**OFFICE OF ADVOCACY**
REGULATION • RESEARCH • OUTREACH

August 16, 2016

*Via regulations.gov*

The Honorable Ernest Moniz, Secretary
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

**Re: Comments on Proposed Energy Conservation Standards for Manufactured Housing; 81 *Fed. Reg.* 39756 (June 17, 2016).**

Dear Secretary Moniz,

The U.S. Small Business Administration's Office of Advocacy (Advocacy) submits the following comments in response to the Department of Energy's (DOE) June 17, 2016 notice of proposed rulemaking on "Energy Conservation Standards for Manufactured Housing." After conducting outreach with small business stakeholders, Advocacy has concerns that DOE's proposal will have a disproportionate impact on small manufacturers of manufactured homes. Advocacy recommends that DOE present and analyze significant alternatives, and adopt a regulatory alternative to the proposed standard that will minimize the economic impact to small manufacturers.

**About the Office of Advocacy**

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), gives small entities a voice in the Federal rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy. The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that

the public interest is not served by doing so.

**Background**

DOE recently published a proposed rule seeking to implement the Energy Independence and Security Act of 2007 (EISA).[1] EISA requires DOE to establish energy conservation standards for manufactured housing based on the most recent version of the International Energy Conservation Code (IECC) "except where DOE finds that the IECC is not cost-effective or where a more stringent standard would be more cost-effective, based on the impact of the IECC on the purchase price of manufactured housing and on total lifecycle construction and operating costs."[2] The proposed standards would impact, *inter alia*, factory design, construction techniques, and current construction and safety standards.[3] The proposed rule was the subject of a negotiated rulemaking that involved consensus recommendations from a 22-member Manufactured Housing working group (MH working group).[4] The MH working group included a trade association whose membership is comprised exclusively of small businesses; however, no small businesses were directly included in the working group.

DOE published an Initial Regulatory Flexibility Analysis (IRFA) with its proposed rule, but it did not comply with the RFA's requirement to quantify or describe the economic impact that its proposed regulation might have on small entities. Small manufacturers of manufactured housing and their representatives have expressed concerns to Advocacy that the proposed regulations will have a disproportionate impact on their business. Small manufacturers have described ever increasing compliance burdens, crippling conversion costs, and concerns with their ability to stay competitive in an industry already dominated by big business.

**Advocacy's Comments**

DOE's proposed rule would have significantly disproportionate economic impacts on small manufactured home manufacturers if finalized. The RFA requires DOE to show that it has analyzed the impact of the proposed rules on small manufacturers, and properly considered regulatory alternatives to minimize that impact. Advocacy recommends that DOE adopt a regulatory alternative that will minimize the disproportionate impact of its proposal on small manufacturers.

***DOE Should Describe or Quantify the Economic Impact of its Rule on Small Entities***

The RFA requires agencies to provide an IRFA so that the agency and the public can know with certainty how the regulation will affect small businesses. DOE has not quantified nor described the economic impact of its proposed rule on small manufacturers. In its IRFA, DOE estimates that "the proposed rule would reduce Industry Net Present Value (INPV) by 0.4 to 5.1 percent" and that "DOE did not receive sufficient qualitative data to conclude that small manufacturer(s) would experience impacts that are substantially different than the industry at large."[5] It does not appear that DOE grasps the unique challenges that small manufacturers encounter. Conversion

[1] 42 U.S.C §17381

[2] Proposed Energy Conservation Standards for Manufactured Housing; 81 *Fed. Reg.* 39756 (June 17, 2016); *See also* 42 U.S.C. §17071.

[3] *Id.*

[4] Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC) - Manufactured Housing Working Group; 79 *Fed. Reg.* 48097 (August 15, 2014).

[5] *See supra* note 2.

costs, for example, tend to be fixed and do not scale with sales volume. Small businesses must make redesign investments that are similar to their larger competitors, but because small manufacturer costs are spread over a lower volume of units, it takes longer for small manufacturers to recover from their investments.

Compliance with the proposed rule would be a massive undertaking, and small manufacturers and Advocacy are concerned that DOE has chosen to exclude compliance and enforcement provisions from the proposed rule. Compliance and enforcement costs are major costs to small manufacturers, and should be included and analyzed in the proposed rule. Redesign costs, plant modifications, recosting and sourcing new materials, inspections, approvals, consulting fees, and employee training are additional costs DOE must analyze to determine the effect of the proposed rule. To comply with the RFA, DOE must acknowledge and analyze these foreseeable economic impacts to small manufacturers.

Another concern of small manufacturers is the domino effect that a higher cost home would have on their segment of the manufactured housing market. DOE estimates the proposed rule would drive up the cost of single-section and multi-section manufactured homes as much as $2,423 and $3,745 respectively.[6] Small businesses believe this estimate is extremely low and does not accurately reflect either the baseline cost, or the dealer and retail markups.[7] Even assuming that DOE's estimates are accurate, a several thousand dollar increase would result in a reduction of affordability at the lower end of the price-point spectrum, and less energy conservation will be realized because those consumers will be priced out of the market.

Manufactured home purchasers tend to have lower incomes; the median income for manufactured homeowners is about $26,000 a year.[8] Small manufacturers have expressed to Advocacy that even a modest increase in the price of manufactured housing will prevent many of their potential customers from obtaining financing, eliminating those purchasers from the market entirely, which would in turn severely impact small manufacturers' consumer base. Approximately 75% of manufactured housing purchasers with purchase financing take out a chattel loan.[9] Chattel loans differ from traditional mortgage financing in that chattel loans can be priced between 50 to 500 basis points higher, and the loan terms are generally shorter, which affect the monthly cost.[10]

Further, the dominant business in the manufactured home industry can sell its manufactured homes at cost, or offer energy rebates to its consumers to offset the increased price of energy efficient homes. This is because it has the ability to remain profitable through the loans and insurance sold with the housing.[11] Small businesses cannot absorb the added cost to comply with

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[6] 81 *Fed. Reg.* at 39757.

[7] *See e.g.,* Comments of the Manufactured Housing Association for Regulatory Reform (MHARR), Docket no. EERE-2009-BT-BC-0021-0154 (filed August 11, 2016) at Attachment 18 (calculating the bill of material increase, selling price, and retail markup to total $4,601 for a single-wide, and $5825 for a double wide. MHARR believes the DOE's cost calculations are skewed because they are based on costs to larger manufacturers that have the advantage of paying lower supply costs based on volume due to superior bargaining strength within the supply market).

[8] *See* "Manufactured-housing consumer finance in the United States" at 17 (September 2014). Retrieved from the Consumer Finance Protection Bureau http://files.consumerfinance.gov/f/201409_cfpb_report_manufactured-housing.pdf.

[9] *Id.* at 24 (Manufactured homes may be titled as real property and obtain a traditional mortgage if the home is a real estate fixture, *i.e.*, the homeowner must own the land and permanently affix the manufactured home thereon).

[10] *Id.*

[11] *See e.g.,* MHARR comments, *supra* note 7 at Attachment 26.

the proposed regulation and remain competitive in the manufactured housing market.

***DOE Must Provide an Analysis of Significant Alternatives***

Section 603 of the RFA requires that agencies include "a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities."[12] DOE's IRFA does not contain any discussion of alternatives. Advocacy urges DOE to present and discuss regulatory alternatives in their Final Regulatory Flexibility Analysis (FRFA) and explain its reasoning for adopting or declining to adopt each alternative.

***DOE Should Adopt a Standard that is Economically Feasible for Small Manufacturers***

Adopting energy conservation standards that impede the ability of small manufacturers to remain in the market is harmful from both an economic and energy conservation standpoint. Small businesses make up 99.7 percent of U.S. employers, and 63 percent of net new private-sector jobs.[13] Maintaining a small business presence in any industry is important not only for the economy, but also promotes competition, which leads to development, innovation and growth.

Complying with the proposed rule will be significantly more difficult for small manufacturers. At a minimum, Advocacy recommends that DOE adopt delayed compliance schedules for small manufacturers, as providing them more time to comply with DOE's rules will allow them to spread costs and manage their limited resources in a way that will minimize the economic impact to their business. Advocacy also supports waivers and exemptions for small manufacturers wherever possible.

**Conclusion**

Advocacy appreciates this opportunity to communicate the concerns of small businesses and advocate for regulatory flexibility on their behalf. DOE should analyze the impact of its proposed regulations on small entities, as well as alternatives that would minimize those impacts. Given the significant and disproportionate impact that this proposed rule would have on small manufacturers of manufactured housing, Advocacy encourages DOE to adopt a standard that will achieve energy savings without imposing serious harm on small business manufacturing. Please do not hesitate to contact me or Assistant Chief Counsel Rosalyn Steward at 202-205-7013 if you have any questions.

Sincerely,

Darryl L. DePriest

The Honorable Darryl L. DePriest
Chief Counsel
Office of Advocacy
U.S. Small Business Administration

[12] 5 U.S.C. § 603(c).

[13] *See* "Frequently Asked Questions" (September 2012). Retrieved from the U.S. Small Business Administration Office of Advocacy https://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf.

Rosalyn C. Steward
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

cc: The Honorable Howard Shelanski
Administrator, Office of Information and Regulatory Affairs,
Office of Management & Budget

**Manufactured Housing Association for Regulatory Reform**

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August 8, 2016

VIA FEDERAL EXPRESS AND ELECTRONIC SUBMISSION

Mr. Joseph Hagerman
U.S. Department of Energy
Building Technologies Office
Mailstop EE-5B
1000 Independence Avenue, S.W.
Washington, D.C. 20585-0121

Re: Energy Efficiency Standards for Manufactured Housing
Docket No. EERE-2009-BT-BC-0021 – RIN 1904-AC11

Dear Mr. Hagerman:

The following comments are submitted on behalf of the Manufactured Housing Association for Regulatory Reform (MHARR). MHARR is a Washington, D.C.-based national trade association representing the views and interests of producers of manufactured housing regulated by the U.S. Department of Housing and Urban Development (HUD) pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5401, et seq.) (1974 Act) as amended by the Manufactured Housing Improvement Act of 2000 (2000 Reform Law). MHARR was founded in 1985. Its members include independent manufactured housing producers from all regions of the United States.[1]

## I. INTRODUCTION

On June 17, 2016, the U.S. Department of Energy (DOE) published a proposed rule in the Federal Register to establish "Energy Conservation Standards for Manufactured Housing," pursuant to section 413 of the Energy Independence and Security Act of 2007 (EISA). (See, 81 Federal Register, No. 117 at p. 39756, et seq.). EISA section 413 -- in derogation of the comprehensive federal regulatory jurisdiction over manufactured housing[2] construction and safety

[1] All of MHARR's member manufacturers are "small businesses," as defined by the U.S. Small Business Administration (SBA) and "small entities" for purposes of the Regulatory Flexibility Act (5 U.S.C. 601, et seq.).

[2] The 1974 Act defines a "manufactured home" as "a structure, transportable in one or more sections, which, in traveling mode, is eight body feet or more in width or forty body feet or more in length, or, when erected on site, is three hundred twenty or more square feet, and which is built on a permanent chassis and designed to be used as a

delegated to HUD under the National Manufactured Housing Construction and Safety Standards Act of 1974 (as amended)[3] -- directs DOE to establish "energy efficiency" standards for manufactured housing "based on the most recent version of the International Energy Conservation Code (including supplements), except in cases in which the Secretary finds that the code is not cost effective or a more stringent standard would be more cost effective, based on the impact of the code on the purchase price of manufactured housing and on the total life-cycle construction and operating costs." (Emphasis added). EISA further directs DOE to establish those standards pursuant to: (1) public notice and comment; and (2) "consultation with the Secretary of Housing and Urban Development, who may seek further counsel from the Manufactured Housing Consensus Committee" (MHCC) established pursuant to the Manufactured Housing Improvement Act of 2000.

For the reasons set forth below, MHARR strenuously opposes the proposed rule as an unjustified, destructive and ultimately useless burden on both consumers and the industry including, most particularly, its smaller businesses.

The June 17, 2016 proposed rule is the product of a tainted, non-transparent and fatally defective DOE rulemaking process[4] that will needlessly undermine the availability of affordable manufactured housing contrary to existing law, exclude millions of lower and moderate-income Americans from homeownership altogether, and stifle free-market competition within the manufactured housing industry -- to the detriment of those same consumers -- by disproportionately harming smaller industry businesses. Insofar as the proposed rule is premised on a factually worthless, incomplete and affirmatively misleading "cost-benefit analysis," a sham standards-development process, non-transparent information inputs on key issues, and violations of the EISA section 413 "consultation" mandate (by both DOE and HUD), any final rule implementing (or derived from) the June 17, 2016 DOE proposed rule would: (1) violate the 1974 Act (as amended); (2) violate the "arbitrary, capricious [or] abuse of discretion" standard of the Administrative Procedure Act ("APA") (5 U.S.C. 706(2)(A)); (3) violate the Negotiated Rulemaking Act (5 U.S.C. 561, et seq.); (4) violate the EISA statute itself; and (5) violate other applicable requirements of law. MHARR, accordingly, seeks the withdrawal of the June 17, 2016 proposed rule and the commencement of an entirely new, legitimate rulemaking process for appropriate manufactured housing energy standards. Absent such action by DOE, MHARR will pursue all available legal remedies to enjoin and/or invalidate any resulting final rule.

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dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air conditioning, and electrical systems contained therein...."

[3] HUD's comprehensive federal regulatory jurisdiction over manufactured housing construction and safety already includes – and has included at all times relevant to this matter -- energy standards as codified in Subpart F ("Thermal Protection") of the HUD Manufactured Housing Construction and Safety Standards (24 C.F.R. 3280.501, et seq.)

[4] MHARR hereby incorporates by reference herein: (1) its March 5, 2010 comments in response to DOE's February 22, 2010 Advance Notice of Proposed Rulemaking in this docket (see, 75 Federal Register, No. 34 at p. 7556, et seq.) (Attachment 1, hereto); (2) its July 24, 2013 comments in response to DOE's June 25, 2013 Request for Information in this docket (see, 78 Federal Register, No. 122 at p. 37995, et seq.) (2013 RFI) (Attachment 2, hereto); and (3) its March 13, 2015 comments in response to DOE's February 11, 2015 Request for Information in this docket (see, 80 Federal Register, No. 28 at p.7550, et seq.) (Attachment 3, hereto).

## II. BACKGROUND AND PROCEDURAL HISTORY

With public opinion surveys showing public trust in the federal government at an all-time low,[5] the June 17, 2016 DOE proposed rule is a textbook illustration of why a majority of Americans have lost faith and confidence in the federal government generally and in federal agencies, such as DOE and HUD, specifically. Purporting to address a "problem" that does not exist,[6] the DOE proposed rule is a paradigm of over-reaching, oppressive and costly "big government" regulation, that will disproportionately harm lower-income Americans (contrary to stated Obama Administration policy) and crush smaller industry businesses, leading to a further decrease in homeownership (already at record low levels),[7] higher levels of homelessness,[8] and an emasculation of free-market competition -- with corresponding retail price increases -- in an industry already verging on de facto monopolization.[9] Not one of these consumer, industry and societal costs, however – or a multitude of other relevant and significant cost factors – are addressed in DOE's fatally defective and deceptive "cost-benefit analysis," in direct violation of an integral, substantive requirement of EISA section 413.[10]

Significantly, DOE's June 17, 2016 Notice of Proposed Rulemaking (NOPR), by ignoring, disregarding and omitting key facts and material information, continues an Agency whitewash of a tortured, corrupted and irretrievably tainted standards-development process for the June 17, 2016 proposed rule. Those key omitted facts – with citations to supporting documents and information -- are set forth below.

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[5] See, e.g., Gallup, Inc., "Trust in Government" (September 2015) at p.2, showing 61% of respondents having little or no trust or confidence in federal government handling of "domestic issues," the highest such figure since polling began in 1972. See also, Gallup, Inc., "Americans Losing Confidence in All Branches of U.S. Government," (June 30, 2014) showing confidence ratings "for all three branches" of the federal government "are at or near their lowest points to date."

[6] See, detailed discussion at section III A, pp. 22-24, infra, regarding U.S. Census Bureau data showing – contrary to claims by DOE -- that current-production manufactured homes are already energy-efficient, with median monthly energy costs for fuel oil and natural gas lower than the monthly median for site-built homes and electricity costs closely comparable to the median monthly electricity cost for a site-built home.

[7] See, e.g., Money Magazine, "Homeownership Hits Another Record Low," (June 24, 2015).

[8] Ironically, publication of the DOE proposed rule -- which, if adopted as a final rule, will exclude millions of lower and moderate income Americans from the benefits and advantages of home ownership (see, detailed discussion and supporting data at sections III B, pp. 25-26 and III C 2, pp. 28-31, infra) – corresponds with HUD's declaration of June 2016 as "National Homeownership Month." In a June 1, 2016 press release, HUD states: "This week, the U.S. Department of Housing and Urban Development kicks off National Homeownership Month by recognizing how homeownership enhances lives and contributes to thriving communities ... [and] that owning a home remains one of the cornerstones of the American Dream." (Emphasis added). For millions of Americans, however, the DOE rule, if adopted, will mean exclusion from homeownership and the American Dream and, potentially, homelessness, for no valid, legitimate or necessary reason.

[9] See, e.g., American Banker, "Time to End the Monopoly Over Manufactured Housing" (February 23, 2016) referring to "an uncompetitive market, dominated by Clayton Homes, [Inc.] [Clayton]." Clayton could control 50% or more of the national manufactured housing market in 2016, based on 2015 HUD production statistics and subsequent acquisitions of competing manufacturers in 2016.

[10] Pursuant to the express mandate of EISA section 413(b)(1), the Secretary of DOE is required to make a separate, affirmative finding that each element of the manufactured housing energy standards adopted under section 413(a) is "cost-effective."

## A. Initial Development and Selective Leak of the DOE Manufactured Housing Rule

Following the enactment of EISA, DOE initiated a conventional rulemaking proceeding to develop energy standards for manufactured homes. On February 10, 2010, DOE published an Advance Notice of Proposed Rulemaking (ANPR) in the Federal Register (see, 75 Federal Register, No. 34 at pp. 7556-7557) seeking public comment on thirteen general issues. MHARR submitted written ANPR comments to DOE on March 10, 2010.

In its ANPR comments, MHARR urged DOE, in light of the drastic decline of the manufactured housing market to historically low production levels after the enactment of EISA,[11] to "delay the development, implementation and enforcement of any new manufactured home energy conservation standards that are not identical to the existing HUD Code energy standards until such time as industry production levels and the availability of affordable, non-subsidized manufactured housing for lower and moderate-income consumers return to pre-2007 levels." In addition, MHARR raised three separate issues related to the substance of any DOE manufactured housing energy standards that could further undermine the affordability and availability of manufactured homes, with little or no corresponding benefit to consumers. In relevant part, MHARR stated:

(1) "...manufactured homes are already subject to HUD energy conservation standards that result in a relatively tight thermal envelope, consistent with overall affordability and are carefully balanced against concerns related to air exchange and condensation within the home living space. Any change to the standards could upset that balance with ... negative consequences."

(2) "With ... manufactured housing consumers unable to obtain or qualify for financing now, matters would be much worse if the purchase price of manufactured homes were unnecessarily increased ... due to DOE energy regulations."

(3) "...the federal government should not impose costly new energy mandates combined with a totally new DOE enforcement system that would parallel the existing HUD system." "...HUD ... is best suited to fully assess and ensure the affordability aspects of energy regulation within the context of the HUD Code and maintain the delicate balance between regulation and affordability that is embedded in relevant federal law."

Subsequent to publication of the ANPR – and without addressing or resolving any of the substantive issues identified by MHARR -- DOE developed a "draft proposed rule" for manufactured housing energy standards (2011 draft proposed rule). That "draft proposed rule" was then selectively leaked to interested parties, including the Manufactured Housing Institute (MHI) -- a Washington, D.C. organization representing the manufactured housing industry's largest businesses (and later a participant in the DOE "negotiated rulemaking" Manufactured Housing

[11] After reaching a modern production record of 374,143 homes in 1998, total industry production of HUD-regulated manufactured homes (as calculated and reported by HUD) fell to a record low of 49,683 homes in 2009, following the enactment of EISA, and has only recovered at a modest pace since that time, reaching 70,544 homes in 2015.

Working Group) -- as indicated by published May 29, 2012 correspondence from MHI to DOE referring to specific requirements and provisions of a "draft proposed DOE rule" and "draft DOE standards" that were not included in the 2010 ANPR, had not been published as a proposed rule, and had not otherwise been made public.[12]

In a July 20, 2012 communication to DOE, MHARR called for a DOE/HUD investigation of the selective leak of the 2011 "draft proposed" DOE energy rule to MHI and other parties in interest, to determine, among other things: (1) how the proposed rule was selectively leaked; (2) who was responsible for that selective leak; and (3) what other parties in interest, if any, were provided inside information concerning this significant rulemaking.[13] MHARR was subsequently contacted by a DOE official, Michael Erbesfeld,[14] who verbally denied any leak.

Subsequent admissions by DOE, however, as well as documents produced by DOE pursuant to MHARR Freedom of Information Act (FOIA) requests, show: (1) that this official denial by DOE was false; (2) that a selective leak of a "draft proposed" DOE manufactured housing energy rule to interested parties did, in fact, occur;[15] and (3) that selective leaks of that "draft proposed rule" were made to multiple subsequent members of the DOE "negotiated rulemaking" Manufactured Housing Working Group (MHWG)[16] which – together with other continuing, undisclosed contacts and coordination between such recipients and DOE[17] – fundamentally tainted that entire process.

### B. OMB/OIRA Rejection of DOE "Draft Proposed Rule" and "Start Over" Directive

On June 25, 2013, DOE abruptly published a Request for Information (2013 RFI) concerning manufactured housing energy standards, focusing specifically on the three issues (above) that MHARR had identified in its ANPR comments (i.e., air exchange and condensation, the availability of consumer financing and the enforcement structure and authority for the rule). (See, 78 Federal Register, No. 122 at p. 37995, et seq.). MHARR, in its RFI comments, stressed that the 2013 RFI – seeking information on key aspects of any manufactured housing energy rule – had obviously been prepared and issued after the development of the 2011 "draft proposed rule." As a result, MHARR asserted that the 2011 DOE "draft proposed rule" had necessarily been developed without full and complete information as required by the APA and EISA section 413, itself, and amounted to a predetermined regulatory fait accompli, based on undisclosed

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[12] See, Attachment 4, hereto. That MHI correspondence states, in part, that "the draft DOE standards requires (sic) homes to be tested in the factory" and that "separate testing is required for to measure duct leakage, whole house (building shell) tightness and air infiltration rates for each window." No such details were included in the 2010 ANPR or otherwise published or disclosed to the public. Similarly, the May 29, 2012 MHI correspondence refers to a DOE estimate of a "total cost burden to the industry [of] $4.5 million over four years." Again, no such information was provided in the 2010 ANPR or otherwise disclosed to the public. Indeed, the 2010 ANPR specifically acknowledged that it contained no regulatory impact analysis (RIA), stating: "DOE intends to develop a regulatory impact analysis ... as this rulemaking process proceeds."

[13] See, Attachment 5, hereto.

[14] See, Attachment 6, hereto, produced by DOE pursuant to a May 5, 2015 MHARR FOIA request, indicating that as of August 24, 2011, Mr. Erbesfeld was the "new project manager on (sic) the DOE manufactured housing standards."

[15] See, discussion at section II C, p. 10, infra.

[16] Id.

[17] See, detailed discussion at section II C, pp. 8-14, infra.

communications and input from select, "insider" parties in interest, including MHI and the industry's largest corporate conglomerates, among others.[18] MHARR's comments thus concluded: (1) that the entire manufactured housing rulemaking had been irretrievably tainted by the selective leak of the 2011 DOE "draft proposed rule" to parties in interest; (2) that DOE, therefore, was required to "discard" that "draft proposed rule" in its entirety; and (3) that DOE had to "begin anew its entire process for the development" of that rule. In part, MHARR stated:

> "Now, after the preparation and selective disclosure of a 'draft proposed rule,' complete with a regulatory (cost) impact analysis, DOE, through its June 25, 2013 'Request for Information,' is seeking information concerning the three issues initially raised by MHARR in 2010.... While MHARR commends [DOE] for finally seeking information and data concerning these crucial issues for both the industry and consumers, [DOE's] request for such information after the preparation of a draft proposed rule turns the regulatory process on its head and raises serious issues regarding the legitimacy and integrity of this entire proceeding.... Accordingly, DOE ... should ... begin anew its entire process for the development of this rule from the start, based, this time, on a proper review and consideration of all ... relevant information.[19]

(Emphasis added and in original).

Unbeknownst to MHARR at the time of the 2013 RFI and its comments calling for the DOE rulemaking process to be started "anew" – and not publicly disclosed by DOE until after the inception of its sham "negotiated rulemaking" process -- the DOE 2011 "draft proposed rule" had been forwarded to the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) on October 14, 2011 for review pursuant to Executive Order 12866,[20] and had been rejected by OMB/OIRA with specific instructions to DOE to "begin the [rulemaking] process anew," as had been sought by MHARR in its 2013 RFI comments.[21]

Contemporaneously -- and consistent with its pervasive pattern of obfuscation and deception concerning this rulemaking -- DOE first attempted to obstruct and then falsely denied the existence of documents responsive to an October 22, 2013 MHARR Freedom of Information Act request seeking, among other things, the production of "any and all correspondence or other communications received by DOE regarding [the 2011 manufactured housing] 'proposed rule' including, but not limited to, communications from any party to whom the said 'draft proposed rule' had been provided."[22] After initially quoting a clearly excessive fee to process MHARR's request (in order to discourage MHARR from proceeding), DOE, on February 18, 2014, denied that it possessed any "responsive" materials.[23] DOE, however, responding to MHARR FOIA

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[18] See, section II D, pp. 14-18, infra, regarding DOE's manipulation of supposed "research" contracts to, among other things, "partner" with the manufactured housing industry's largest manufacturers – characterized as "progressive plants" -- to "drive the adoption" of extreme, unnecessary and costly DOE standards.

[19] See, Attachment 2, hereto at pp. 3-4.

[20] See, Attachment 7, hereto, produced by DOE pursuant to MHARR's May 5, 2015 FOIA request, confirming submission of the "draft proposed" manufactured housing energy rule to OIRA on October 14, 2011.

[21] See, detailed discussion at section II C, pp. 10-11, infra and Attachment 16, infra.

[22] See, Attachment 8, hereto.

[23] See, Attachment 9, hereto, at p. 2.

requests filed after the conclusion of its sham "negotiated rulemaking" process, has produced multiple documents that would have been responsive to this request including, but not limited to, an email communication dated March 14, 2012 from MHI's Vice President for Regulatory Affairs (and a subsequent MHWG member), to DOE attorneys referencing a "meeting with OMB last week" on the DOE 2011 "draft proposed" manufactured housing rule and a follow-up ex parte DOE tour of an MHI-member manufacturing facility,[24] as well as an email communication from subsequent MHWG member Michael Lubliner to DOE stating, in part, "I have attached a document from MHI to DOE. Does MHI have access to draft rules (maybe from OMB) that many other stakeholders have not seen?" (Emphasis added).[25]

The proper and timely disclosure of these documents – and others -- prior to the inception of "negotiated rulemaking," would have: (1) confirmed the selective leak of the 2011 DOE "draft proposed rule" during the 2011-2012 timeframe; (2) exposed ongoing insider contacts between MHI (and other parties in interest) and DOE officials regarding the 2011 DOE "draft proposed rule;" and (3) would have ultimately alerted MHARR (and others) to DOE-"insider" coordination regarding the referral of this matter to "negotiated rulemaking" in sufficient time to object to – and seek to enjoin – any such referral or continuation of the pending manufactured housing rulemaking process. DOE's false denial of the selective leak of the 2011 "draft proposed rule" and MHARR's July 20, 2012 request for a DOE investigation, and its February 18, 2014 denial of the existence of responsive documents pursuant to MHARR's October 22, 2013 FOIA request, have materially prejudiced MHARR's rights -- and the rights of other opponents of the June 17, 2016 proposed rule -- in ways that, in and of themselves, would warrant judicial relief in the event that DOE proceeds with a final rule based on that proposal.

More importantly, though, the selective leak of the 2011 DOE "draft proposed rule" to MHI and others has irretrievably tainted this rulemaking, insofar as it: (1) provided the industry's largest corporate conglomerates – interested parties in this rulemaking – with "insider" information not available to other stakeholders regarding the approach, the substance, the expected enforcement mechanisms and the expected costs of DOE standards for manufactured housing pursuant to EISA section 413,[26] with no evidence whatsoever, to show that the 2011 DOE "draft proposed rule" differs materially from the 2016 proposed rule; and (2) even more significantly, provided the select recipients of that "impermissibly disclosed" draft proposed rule with a fundamentally biased and discriminatory opportunity – not offered to other affected stakeholders – to provide input to DOE and to influence and impact the content of that rule with, again, no

[24] See, Attachment 10, hereto.

[25] See, Attachment 11, hereto, at p. 2.

[26] Attachment 4, hereto, supra, makes it clear that MHI had been provided access to cost-benefit calculations for the 2011 DOE "draft proposed rule." Moreover, a copy of the table of contents for the DOE 2011 "draft proposed rule" (see, Attachment 12 hereto) -- provided to MHARR in 2012 by an MHI-affiliated recipient of the selectively leaked draft proposed rule -- includes "Compliance and Enforcement" provisions ("Subpart E"), the substance of which was obviously disclosed to the select recipients of that draft rule. Because DOE has yet to publicly propose compliance and enforcement regulations in connection with its 2016 proposed rule, and specifically excluded compliance and enforcement from the "negotiated rulemaking" conducted through the MHWG, it is entirely conceivable that there will be no difference between the 2011 compliance and enforcement provisions and the compliance and enforcement provisions ultimately proposed for the 2016 rule, exposing again, the insidious, discriminatory and unlawful continuing advantage conferred by DOE on the select recipients of the "impermissibly disclosed 2011 "draft proposed rule" at the expense of all other interested parties in this rulemaking. See also, note 31, infra.

evidence whatsoever, to show that the 2011 DOE "draft proposed standard" differs from the 2016 proposed rule in any material respect. The full extent of this illegitimate, biased and discriminatory activity, moreover – and its impact on the current pending DOE manufactured housing energy standards rule – remains the subject of an ongoing cover-up by DOE, which has refused to release either the text of the 2011 "draft proposed rule," or cost-benefit analyses of that rule provided to the select leak recipients and OMB/OIRA.[27]

### C. Referral to Sham "Negotiated Rulemaking"

No subsequent public activity on the DOE manufactured housing rule occurred until June 6, 2014, when DOE's obscure Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC) voted – with no advance public explanation -- to establish a "negotiated rulemaking" process with interested parties (i.e., the "Manufactured Housing Working Group") to develop EISA section 413 manufactured housing standards under a two-month completion deadline that was clearly inadequate to achieve the "fresh start" directed by OMB/OIRA on a complex, "significant" federal regulation.[28] The OMB/OIRA "fresh start" directive, however, had not been publicly disclosed by DOE prior to – or at the time of – the ASRAC vote to impose this truncated, impossibly brief deadline.

Multiple documents produced by DOE after-the-fact, however (as well as subsequent DOE admissions), prove that this seemingly random, "out-of-the-blue" ASRAC action resulted from specific non-transparent ex parte coordination between DOE, MHI and other "insider" recipients of the selectively leaked 2011 DOE "draft proposed rule:" (1) to effectively circumvent and negate OMB/OIRA's directive to DOE to start-over the manufactured housing rulemaking process from the beginning; (2) to establish a sham "negotiated rulemaking" process dominated by DOE-favored "insider" recipients of the selectively leaked 2011 "draft proposed rule;" and (3) to produce a pre-ordained regulatory result.

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[27] See, text at pp. 11-12, infra, regarding DOE's refusal to release the 2011 "draft proposed rule" during the MHWG "negotiated rulemaking" process. DOE has also refused to produce either the 2011 "draft proposed rule," or cost-benefit information developed for that rule in response to multiple MHARR FOIA requests, asserting that those documents are "pre-decisional" in their entirety and, therefore, exempt from disclosure under FOIA. DOE, moreover, has refused to exercise its discretion to waive that privilege, notwithstanding direct guidance from the Attorney General "strongly encourag[ing] agencies to make discretionary disclosures of [otherwise exempt] information," i.e., to voluntarily waive otherwise applicable FOIA exemptions. See, Department of Justice Guide to the Freedom of Information Act – Discretionary Disclosure and Waiver at p. 685, note 2.

[28] Pursuant to Executive Order 12866, OIRA is responsible for determining which agency regulatory actions are "significant." Significant regulatory actions are defined in the Executive Order as those that, inter alia, "have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities...." OIRA would not have reviewed the 2011 DOE "draft proposed" manufactured housing rule, had it not found that rule to be a "significant" rule.

Specifically, a February 17, 2014 email to Roland Risser, Director of the Building Technologies Office (BTO)[29] in DOE's Office of Energy Efficiency and Renewable Energy (EERE) -- the DOE office with responsibility for this rulemaking – from Robin Roy, Director of the Natural Resources Defense Council's (NRDC) Building Energy Efficiency and Clean Energy Strategy Program[30] (and subsequent MHWG member) on behalf of the aforesaid "insiders," demonstrates the coordination between DOE officials and those same "insiders" to use a truncated, tightly-controlled and pre-scripted ASRAC/MHWG process to effectively validate and legitimize the OMB/OIRA-rejected 2011 "draft proposed rule." In relevant part, that previously undisclosed, ex parte email states:

> "Hi Roland,
>
> After talking to several interested parties including other efficiency advocates and industry leaders, I find general support and no opposition to using ASRAC to inform the manufactured housing standards process under conditions like these:
>
> - DOE uses the process for effective communication and data gathering, rather than for seeking unanimous consent…;
>
> - DOE commits to a tight schedule (e.g., 2 2-day meetings within 4 months of ASRAC authorization, and perhaps tables the draft NOPR and TSD[31] for initial discussion at the first meeting, possibly with some redaction of elements they consider grossly inadequate or distracting);
>
> - Any additional meetings would only be proposed with the approval of ASRAC…."

(Emphasis added).

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[29] See, section II D, infra, at pp. 14-18, detailing BTO's manipulation and abuse of DOE "research" contracts to improperly influence the ASRAC manufactured housing "negotiated rulemaking" process through a financial conflict of interest.

[30] The selection of Robin Roy to coordinate with DOE on behalf of the DOE-favored "insiders" was not coincidental. Robin Roy, at all times relevant to this proceeding, was the husband of Ms. Cathy Zoi (Zoi), the Assistant Secretary for Energy Efficiency and Renewable Energy at DOE until March 10, 2011. See, "Obama Official Leaves Energy Department for Soros-Backed Cleantech Fund," CNBC (February 24, 2011) ("Zoi, who joined the Obama Administration in 2009, became controversial during early 2010, after it was realized she had a financial interest in two companies that were poised to profit from government spending that promoted energy efficiency.") Following completion of the DOE "negotiated rulemaking" process, in January 2015, Mr. Roy -- with no other apparent background related to manufactured housing -- was appointed by HUD to the Manufactured Housing Consensus Committee notwithstanding the mandate of section 604(a)(3)(B)(i) of the 2000 reform law, that MHCC appointees be "qualified by background and experience to participate in the work of the consensus committee." See, 42 U.S.C. 5403(a)(3)(B)(i). Under EISA section 413, DOE is required to "consult" with the Secretary of HUD regarding manufactured housing standards and the Secretary of HUD, in turn, is authorized to "seek further counsel" from the MHCC.

[31] The existence of a Technical Support Document (TSD) for the 2011 DOE "draft proposed rule" is not mentioned in any other document provided to MHARR. The reference to a TSD in this ex parte, "insider" communication is thus a further indication of undisclosed coordination between DOE and the DOE-favored "insider" group.

This exchange demonstrates: (1) communication and coordination between DOE officials and the DOE-favored "insider" group on a non-transparent, ex parte basis; (2) to create the structure for a sham "negotiated rulemaking" through ASRAC; (3) that was designed to be controlled by DOE and those same DOE-favored "insiders;" (4) that was designed to suppress the effective participation of non-"insiders;" (5) within a clearly inadequate time-frame for a fresh start as mandated by OMB/OIRA; (6) using the 2011 DOE "draft proposed rule" (i.e., "NOPR") and undisclosed Technical Support Document (i.e., "TSD") for that 2011 "draft proposed rule" as the undisclosed basis for the activity of the "working group;"[32] (7) subject to undisclosed "redactions" by DOE.

The same type of ex parte coordination between DOE and the DOE-favored "insider" group to establish a severely-truncated MHWG timeframe and schedule clearly inadequate to legitimately achieve the "fresh start" mandated by OMB/OIRA for a "significant" rule, is reflected in a previously undisclosed May 21, 2014 email exchange between Robin Roy and John Cymbalski, the DOE Designated Federal Official (DFO) for ASRAC:

> "[Roy]: Hi John. In your role as ASRAC DFO, can I send you a letter … in support of an ASRAC working group on manufactured housing, with diverse signers from our regular MH discussion group…?
>
> [Cymbalski]: That would be great to have sooner than later.
>
> [Roy]: Super, I've asked my group to sign on by COB Tuesday, so aim to send on Wednesday, May 28 [2014].
>
> [Cymbalski]: How much time do you anticipate asking for in terms of negotiating a NOPR [i.e., Notice of Proposed Rulemaking]?
>
> [Roy]: Short. 2 meetings would be great. But we won't be specific in the letter."

(Emphasis added).[33]

Subsequently, and in accordance with the February 17, 2014 and May 21, 2014 email exchanges above, MHI, NRDC and other interested parties later appointed by DOE as voting members of the "negotiated rulemaking" MHWG, submitted a joint written request to ASRAC on May 28, 2014 for "negotiated rulemaking" on manufactured housing energy standards utilizing a working group under ASRAC-auspices, to be held "to a tight meeting schedule with a minimum number of meetings, e.g., 2 two-day meetings to be concluded by September [2014]" – i.e., within less than two months of the first meeting of the MHWG on August 5, 2014. (Emphasis added).[34]

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[32] Absent full and complete disclosure by DOE – which, as demonstrated infra, did not occur -- only insiders would know if any document or proposal presented to the MHWG was, either in whole or in part, the 2011 DOE "draft proposed rule."

[33] See, Attachment 13, hereto, produced by DOE pursuant to MHARR's May 5, 2015 FOIA request.

[34] See, Attachment 14, hereto, produced by DOE pursuant to MHARR's May 5, 2015 FOIA request. MHI also submitted a separate request to DOE for "negotiated rulemaking" through ASRAC on March 14, 2014. This separate request incorporates the same restrictive elements as the Robin Roy Communication with Roland Risser and the

With this clearly inadequate timeframe and sham structure/process established, DOE proceeded to appoint a "Working Group" dominated by the same DOE-favored insiders that – with the exception of MHARR -- had been recipients of the selectively leaked 2011 "draft proposed rule" and had coordinated internally and with DOE to seek and advance the sham, truncated, "negotiated rulemaking." The MHWG thus included five representatives of energy special interest groups and nine MHI officers, member companies and/or affiliates (including representatives of two of the industry's three largest manufacturers) out of 20 non-DOE/non-ASRAC appointees.[35]

At the initial meeting of the manufactured housing negotiated rulemaking "Working Group" (August 5, 2014), MHARR requested full disclosure of the selectively leaked DOE 2011 "draft proposed" manufactured housing energy standards rule, as well as any factual analyses related to that "draft proposed" rule, to determine whether the MHWG, working under an impossibly constrained timeframe was, in fact, "starting over" as mandated by OMB/OIRA, or was established instead to circumvent that directive and function as a fig leaf to re-process and legitimize the substance of the selectively leaked DOE 2011 "draft proposed rule."[36] Once again, consistent with DOE's overall pattern of obfuscation and non-transparency concerning this rulemaking, that request was denied by DOE as reflected by the meeting transcript:[37]

> "Mr. Weiss [MHARR]: What I'm referring to is … the draft proposed [2011] rule developed by DOE and –
>
> Mr. Cymbalski [DOE]: Yeah, we are not going to hand out anything.
>
> Mr. Weiss [MHARR]: And any – well, let me just finish – any related analysis.
>
> Mr. Cymbalski [DOE]: Right, we're not going to -- we're not – we've moved past that, right, so we're going to have all new data, all new numbers, and we will provide that as a basis to talk about.
>
> ***
>
> Mr. Weiss [MHARR]: Well … [y]ou say its history and that's fine, but I don't know if its history or not, okay, I don't know – I don't know what it was and how it might relate to where we start from here. So I understand you're saying its history but I don't know one way or the other. And I think to have a clear record in this

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subsequent May 28, 2014 joint request letter, including "a tight time schedule with a minimum of meetings." See, Attachment 15, hereto.

[35] See, "Notice of Membership of the Working Group for Manufactured Housing," 79 Federal Register, No. 136 (July 16, 2014) at p. 41457, col. 1. The only "no" vote against the MHWG "Term Sheet" underlying the proposed rule was cast by MHARR's representative.

[36] A copy of the table of contents for the DOE 2011 "draft proposed rule" (see, Attachment 12 hereto, supra), when compared to the table of contents for the June 17, 2016 DOE proposed rule, shows that eight of ten substantive headings (not including enforcement and compliance-related headings in the 2011 "draft proposed rule," insofar as enforcement and compliance matters have been excluded from the June 17, 2016 NOPR by DOE fiat) are either identical or nearly identical. Such direct overlaps include, "climate zones;" "building thermal envelope requirements," "building thermal envelope air leakage," "duct systems," service water heating" and "ventilation," among others.

[37] See, Attachment 16, hereto, MHWG August 5, 2014 meeting partial transcript.

proceeding, given the fact that DOE spent some time working on this prior to this proceeding and then we're only talking about two months here potentially, I think we need to see where you were before and where we're going in relation to that.

(Emphasis added).

An attorney from DOE's Office of General Counsel (OGC) subsequently made key admissions concerning previously undisclosed information relating to the selective leak of the DOE 2011 "draft proposed rule," OMB/OIRA's "start over" directive, and the subsequent referral of this matter to "negotiated rulemaking:"

> Mr. Jensen [DOE]: [T]his is Mike Jensen from DOE GC [Office of General Counsel]. *** As far as we're concerned, the document that was sent to OIRA in October 2011 is still a pre-decisional document. I understand that it was impermissibly distributed to many people in this [MHWG] room. But as far as we're concerned, that that's history. We're starting – we're hitting the reset button and we're beginning negotiations again today. That information, the proposed rule and the accompanying documents are still pre-decisional at this point, will not be distributed outside of DOE.[38]
>
> ***
>
> Mr. Jensen [DOE]: In October of 2011, DOE transmitted our pre-decisional draft of the rulemaking at that time to the Office of Management and Budget. There's a section in OMB, the Office of Information and Regulatory Affairs, which is OIRA. That document was never intended to be released to the public and was for OMB's review. That document has since been kicked back to DOE to – with the instructions to begin the process anew, so that's why we're here today."

(Emphasis added).

These admissions, and the attachments hereto, establish the following – none of which is reflected in the DOE June 17, 2016 NOPR:

> 1. The unlawful, biased and discriminatory "impermissible distribution" of the 2011 DOE "draft proposed" manufactured housing energy standards rule to selected parties in interest;
>
> 2. DOE's false denial of that "impermissible distribution" and disclosure to select "insiders" in response to MHARR's July 20, 2012 inquiry to DOE and call for an investigation;
>
> 3. DOE's false denial that it possessed documents responsive to MHARR's October 22, 2013 FOIA request;

[38] DOE, accordingly, has refused to release publicly – or to parties with a specific interest in the credibility and legitimacy this matter, such as MHARR – a critical document that was selectively and by DOE's own admission, "impermissibly" disclosed previously to DOE-favored "insiders."

4. DOE's deceitful failure to admit or acknowledge the "impermissible distribution" of the draft rule to selected parties in interest, including MHWG member organizations, until after ASRAC authorization of negotiated rulemaking and creation of the Working Group;

5. Undisclosed, non-transparent ex parte DOE contacts with select recipients of the "impermissibly distributed" 2011 DOE "draft proposed rule" regarding negotiated rulemaking and the parameters of negotiated rulemaking regarding a manufactured housing energy standards rule;

6. Failure to specifically identify recipients of the 2011 DOE "draft proposed rule;"

7. Failure to disclose any information, materials, comments or input (either written or verbal) received by DOE from these unidentified recipients of the DOE 2011 "draft proposed rule;"

6. Failure to disclose until after ASRAC authorization of negotiated rulemaking and creation of the MHWG, that the May 28, 2014 communication which triggered ASRAC consideration and approval of negotiated rulemaking and creation of the Working Group – and related communications -- was submitted either wholly or in substantial part by select recipients of the "impermissibly distributed" 2011 DOE "draft proposed rule;"

7. Failure to disclose in advance the appointment of recipients (or parties affiliated with recipients) of the "impermissibly distributed" 2011 DOE draft rule as voting members of the MHWG;

8. Failure to disclose OMB/OIRA's rejection of the DOE draft rule and directive to DOE to "begin the [rulemaking] process anew" until after ASRAC authorization of negotiated rulemaking and formation of the MHWG under a two-month deadline;

9. Failure to disclose the specific basis for OMB/OIRA's rejection of the draft rule and directive to start over;

10. DOE's continuing failure to disclose the DOE 2011 "draft proposed rule" itself and related cost information; and

11. DOE's failure to disclose or explain how a negotiated rulemaking process with "2" meetings -- as coordinated by DOE and parties in interest in undisclosed, ex parte communications -- could be consistent with OMB/OIRA's "start over" directive regarding a rule that had been under development at DOE for seven years --

--among other things.

Indeed, despite repeated FOIA requests by MHARR, DOE has failed to disclose the specific content of multiple ex parte communications that it clearly had with MHI and other select

recipients of the "impermissibly disclosed" 2011 DOE "draft proposed rule" regarding the substance of that proposal, or any input or information that it received from or on behalf of those same parties regarding the draft proposed rule. Thus, while the underlying selective leak of the 2011 DOE "draft proposed rule" has been documented and confirmed, together with the coordinated and contrived nature of the referral of this matter to a sham "negotiated rulemaking" process dominated by the same DOE-favored "insiders" in order to circumvent OMB/OIRA's "start over" directive and railroad a manufactured housing standard through a DOE "appliance" standards committee, DOE has never disclosed – and continues to cover-up: (1) when the "proposed draft rule" was selectively leaked to MHI and other parties in interest; (2) if the 2011 "proposed draft rule" was developed in the first instance based on undisclosed input from selective leak recipients; (3) whether the 2011 "proposed draft rule" was revised after DOE receipt of undisclosed input from selective leak recipients – and, if so, how; (4) what the substance of that input was; (5) the specific provisions and text of the 2011 "draft proposed rule;" and (6) how those provisions (and the TSD and cost-benefit analysis for that "draft proposed rule") relate to or correspond with the June 17, 2016 DOE proposed rule.

In each such instance – and cumulatively – DOE's failure to disclose relevant facts concerning this proceeding, ultimately leading to the June 17, 2016 DOE proposed rule, has materially prejudiced the rights of MHARR, its members, other manufactured housing industry members and consumers, and other actual and potential opponents of DOE manufactured housing energy regulation, to object and seek judicial relief regarding a contrived, manipulated and scandalous standards development process. At the same time, ex parte contacts, communications and coordination between DOE, MHI and other select DOE-favored "insiders" – including the manufactured housing industry's largest corporate conglomerates – have given those parties an improper advantage, undue influence, and an "inside track" regarding the development of the June 17, 2016 proposed rule. This fundamentally tainted process – cited, in part, by MHARR's MHWG representative in casting the lone "no" vote against the MHWG Term Sheet -- necessarily invalidates this proceeding.

### D. MHWG Financial Conflicts of Interest – DOE Contract Manipulation

In conjunction with DOE's referral of this matter to a contrived, sham "negotiated rulemaking" process – with an ongoing DOE cover-up of the selectively leaked 2011 rule and related cost-benefit analysis – DOE also coordinated, via supposed "research" contracts with MHI-affiliated and/or linked organizations, to covertly influence the MHWG "negotiated rulemaking" process. These contracts, which were never disclosed by DOE to non-"insider" MHWG participants or other stakeholders in the DOE manufactured housing energy rulemaking, have produced a financial conflict of interest that fatally infects the entire "negotiated rulemaking" process and, as a result, all aspects of this rulemaking.

The June 17, 2016 NOPR expressly states that the DOE proposed rule is "based on the negotiated consensus recommendations of the [MHWG]."[39] Those recommendations, however, and the MHWG "Term Sheet" that became the basis for the June 17, 2016 proposed rule, resulted from specific technical and "cost" inputs provided by the Systems Building Research Alliance

[39] See, 81 Federal Register, No. 117 at p. 39756, col. 1.

(SBRA) – an MHI "research" affiliate and MHWG member. SBRA, however, at all times relevant to this rulemaking, shared an interlocking employee/corporate officer structure with "The Levy Partnership" (TLP), a paid DOE subcontractor[40] and grant beneficiary.[41]

As an initial matter, the cost data underlying the MHWG "Term Sheet" and the June 17, 2016 proposed rule – provided to the MHWG by SBRA and MHI during the supposed "negotiated rulemaking" process, has been – and remains, an entirely non-transparent critical data input in this rulemaking. Specifically, the source(s) of the cost data offered by SBRA and MHI – involving alleged costs to manufacturers to implement energy efficiency measures mandated by the MHWG Term Sheet recommendations – has never been disclosed. Disclosure of the source(s) of that "data," as requested by MHARR during the MHWG process, was refused and has never been provided to date – either directly by SBRA/MHI or by DOE. This critical non-transparent data input raises two related issues.

First, given the direct and ongoing financial conflict of interest between DOE and TLP/SBRA, the credibility of any such data – at a minimum – is open to question. Second, even if that data exists and has not been altered or modified in some manner, it has never been tested or verified by any other interested or independent party, or – based on the June 17, 2016 NOPR -- by DOE, to determine its accuracy, veracity, and/or relevance, i.e., whether it reflects representative costs for all manufacturers, regardless of size and production, or whether it represents primarily – or only – costs relevant to larger manufacturers (represented by MHI) which pay lower supply costs based on volume discounts and superior bargaining strength within the supply market. Indeed, significantly higher cost impacts as calculated by MHARR,[42] would indicate that those alleged costs are, at best, materially skewed and cannot provide a reliable, legitimate and lawful basis for any of DOE's cost calculations that are necessary to fully comply with EISA section 413[43] and the APA. But full and complete disclosure regarding those key information inputs has never been provided by either DOE, MHI, or SBRA, and is not contained in the June 17, 2016 NOPR.

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[40] The Levy Partnership, Inc. is a California corporation, established in 1983. The Executive Director of SBRA is simultaneously publicly identified as President of TLP. Similarly, the publicly-identified Vice President of TLP is simultaneously identified as a "Senior Project Coordinator" for SBRA. (See, Attachment 17, hereto). MHARR research has disclosed at least three DOE-TLP subcontracts funneled through DOE's National Renewable Energy Laboratory (NREL), designated KNDJ-0-40347-00, KNDJ-0-40347-03 and KNDJ-0-40347-05. See also, note 45, infra.

[41] In addition to the contracts/subcontracts cited herein, TLP was also awarded part of a $4 million DOE grant announced on May 5, 2015 to "develop and demonstrate new energy efficient solutions for the nation's homes." See, DOE News Release, "Energy Department Invests $4 million to Strengthen Building America Industry Partnerships for High Performance Housing Innovation (May 5, 2015). Consequently, after coordinating with DOE to develop and advance extreme, high-cost energy mandates on the manufactured housing industry, SBRA's alter ego, TLP (with overlapping employees and corporate officials), was rewarded by DOE with a "research" grant to develop the systems and methodologies to comply with those (and similar) mandates. (MHARR also notes with interest that a portion of the same grant was awarded to Home Innovation Research Labs, Inc. (HIRL), the supposedly "independent" Administering Organization (AO) of the HUD Manufactured Housing Consensus Committee (MHCC)).

[42] See, Attachment 18, hereto, an MHARR calculation of basic retail-level manufactured housing price increases attributable to specific elements of the June 17, 2016 DOE proposed rule, showing a cost increase of $5,825.17 for a multi-section manufactured home and $4,601.94 for a single-section home.

[43] See, note 10, supra.

More importantly, a 2015 document issued through DOE's Office of Energy Efficiency and Renewable Energy (EERE) provides direct evidence of DOE's manipulation of supposed energy "research" awards, grants, contracts and other taxpayer-funded activities to "drive the adoption" of its extreme, unnecessary and ruinously costly proposed manufactured housing standards, and simultaneously undermine industry opposition to any such standards. That document, entitled "High Performance Factory Built Housing – 2015 Building Technologies Office Peer Review,"[44] details a complex DOE strategy to use paid manufactured housing energy "research" activities as a pretext to simultaneously drive and support the adoption of baseless, high-cost DOE manufactured housing energy standards through a process of "integration and collaboration" with the industry's largest businesses and MHI.[45]

Detailing just one DOE "research" contract (or subcontract) with The Levy Partnership, awarded since 2010,[46] the 2015 report documents nearly $2 million in actual and projected funds paid by DOE to TLP, to conduct manufactured housing energy "research" on behalf of EERE's Building Technologies Office (BTO)[47] and to "partner" with "progressive" manufactured housing "plants," "responsible for 80%+ of all new" manufactured homes – i.e., large manufacturers -- in order to:

- "Develop and implement [new DOE energy] codes and standards;"[48]
- "Participate in the ongoing [DOE] MH standards development process – informed by [contract] R&D work."[49]

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[44] See, Attachment 19, hereto. The author of this report, detailing DOE misuse of paid contracts to influence the ASRAC manufactured housing "negotiated rulemaking," acted simultaneously as Vice President of TLP and "Senior Project Coordinator" for SBRA.

[45] "Project Integration and Collaboration," as detailed in the 2015 report, including a targeted communications strategy within the manufactured housing industry that specifically identified "MHI Meetings," the MHI "Congress and Expo" and the MHI "MH NewsWire" publication as venues and devices for promoting DOE manufactured housing regulation. In apparent execution of this DOE-funded strategy, a presentation at the April 2015 MHI Congress and Expo by – among others – the TLP President/SBRA Executive Director and Robin Roy (NRDC) – touted the supposed benefits of MHWG-based DOE energy regulation for manufactured homes, while simultaneously promoting compliance technologies and methodologies developed by TLP/SBRA and its large manufacturer "partners" under DOE contracts/subcontracts. See, Attachment 20, hereto. Indeed, as recently as a July 27, 2016 email from MHI's Vice President for Regulatory Affairs to manufactured housing industry state association executives and others, MHI once again confirmed the existence and impact of the financial conflict of interest between DOE and TLP/SBRA stating: "MHI has been working with SBRA on a number of cost effective building methods to address the anticipated new standards, including new roof truss designs and building envelope techniques." See, Attachment 21, hereto. The email fails to mention or disclose that these methods and techniques to "address the anticipated new [DOE] standards," were developed by TLP/SBRA under DOE subcontracts, including DOE/NREL subcontract no. KNDJ-0-40347-05 "Field Evaluation of Four Novel Roof Designs for Energy Efficient Manufactured Homes" (December 15, 2015); DOE/NREL subcontract no. KNDJ-0-40347-00 "Expert Meeting Report: Advanced Envelope Research for Factory Built Housing" (April 2012); and DOE/NREL subcontract no. KNDJ-0-40347-04 "Advanced Envelope Research for Factory Built Housing Phase 3 – Whole House Prototyping" (April 2014).

[46] Coincidentally, 2010 is the same year that the manufactured housing energy rule ANPR was published by DOE.

[47] See, notes 29 and 30 and related text regarding "insider" coordination with Roland Risser, Director of BTO, to establish the sham MHWG "negotiated rulemaking" process.

[48] See, Attachment 19, hereto at p.3.

[49] Id.

- "Dovetail with the [DOE manufactured housing] code update process – hand-in-glove;"[50]
- "Drive the adoption" of new DOE energy standards, while "SBRA helps facilitate [their] adoption;"[51] and
- "Shift" an "industry mindset focused on 1st cost" (i.e., purchase price of a home to the consumer) -- seen by DOE as a "barrier" to its regulatory objectives -- to a focus on "total ownership costs,"[52] in order to achieve "market transformation."[53]

Based on these BTO "objectives," the 2015 report states that paid activity by TLP/SBRA under the contract had already "impacted the ASRAC process" for new manufactured housing energy standards -- referring directly to the sham MHWG "negotiated rulemaking" leading to the June 17, 2016 DOE proposed rule.[54]

Among the various TLP/SBRA contract "partners" in promoting DOE manufactured housing regulation -- listed in the 2015 EERE/BTO report -- are SBRA itself and four members of the SBRA Board of Directors, representing the industry's largest manufacturers.[55] SBRA's Board, in turn, includes six members of the DOE "negotiated rulemaking" MHWG, all of whom voted to support the excessive, unnecessary and unduly costly standards set forth in the June 17, 2016 DOE proposed rule.

The inherent and material financial conflict of interest created by SBRA and multiple SBRA Board members serving as voting MHWG members, as part of a supposedly arms-length "negotiated rulemaking," at the same time that TLP -- with an interlocking personnel relationship with SBRA -- was a paid DOE subcontractor tasked with: (1) supporting, advancing and promoting DOE manufactured housing energy regulation and regulatory objectives; while (2) conducting research to develop ostensible means and measures to comply with those standards (among other things), again, fundamentally and irretrievably taints this entire rulemaking and violates section 563(a)(3)(B) of the Negotiated Rulemaking Act, requiring the appointment of committee members "willing to negotiate in good faith." Further, DOE's failure to fully disclose this ongoing contractual relationship with TLP/SBRA -- with TLP/SBRA effectively functioning as DOE's paid agent (in cooperation with MHI and the industry's largest manufacturers) to improperly influence an MHWG "negotiated rulemaking" already dominated by DOE-favored "insiders" -- has materially prejudiced the rights of MHARR, its members, other manufactured housing industry members and consumers, and other actual and potential opponents of DOE manufactured housing energy regulation, to object to and seek judicial relief from a contrived, manipulated and corrupted standards development process at a meaningful stage of this proceeding.

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[50] Id. at p. 13.
[51] Id. at p. 7
[52] Id. at p. 4.
[53] Id. at p. 10.
[54] Id. at p. 26. All of this, moreover, is consistent with TLP's self-described role as "providing services to public agencies interested in developing" – i.e., mandating – "new technologies for housing and accelerating their adoption by industry." See, Attachment 17, supra, at p. 1. (Emphasis added).
[55] See, Attachment 22, hereto, from the SBRA internet website, listing members of SBRA's Board of Directors.

## E. Sham "Consultation" with HUD and the MHCC

Congress, being aware: (1) that EISA section 413 fundamentally conflicts with the purposes, objectives and specific terms of the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended by the Manufactured Housing Improvement Act of 2000; (2) that HUD (and the MHCC), under those laws is required, among other things, to "protect ... the affordability of manufactured homes" and "facilitate the availability of affordable manufactured homes and ... increase homeownership for all Americans; and (3) that the MHCC represents a legitimate, statutorily-balanced consensus forum for the consideration and recommendation of manufactured housing standards and regulations (among other functions) -- specifically provided in section 413(a)(2)(B) that DOE manufactured housing energy standards could be established only "after consultation with the Secretary of Housing and Urban Development," who, in turn, was authorized to "seek further counsel from the Manufactured Housing Consensus Committee." (Emphasis added). By the plain wording of this subsection, and for this consultation directive to have any meaning or positive effect, the required consultation would have had to occur during the formulation of the DOE standards – when it could have some conceivable impact – and not after the development and publication of a proposed rule, near the end of the rulemaking process, when it would be a meaningless afterthought.[56] Indeed, to construe section 413(a)(3)(B) to provide for or permit the required "consultation" after the issuance of the NOPR for this rule -- during and as part of the public comment period, when any member of the public can review and comment of the already-developed proposed rule – would effectively render that section meaningless, contrary to the established cannons of statutory construction.

While DOE claims in its June 17, 2016 NOPR that it "has consulted with HUD,"[57] it has never disclosed either the content of those alleged "consultations," the parties to the alleged "consultations," or when in the rulemaking process those alleged "consultations" occurred. Meanwhile, at the August 2015 and January 2016 MHCC meetings, the HUD manufactured housing program Administrator refused to disclose any information or documents regarding the occurrence, timing or content of any such "consultations." Accordingly, there is no independent evidence or verification of any such consultations with HUD, their substance, or whether they occurred at a meaningful stage in the development of the June 17, 2016 proposed rule, despite the fact that under EISA section 413, DOE bears the burden of establishing that the required consultations occurred as mandated by Congress. Furthermore, even if – and to the extent that – documents reflecting any such alleged "consultations" might nominally exempt from public disclosure, any such exemption could be waived by DOE and/or HUD, but has not.[58]

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[56] See, e.g., Rural Cellular Association v. Federal Communications Commission, 588 F.3d 1095, 1101 (D.C. Cir. 2009) (opportunity for comment must be a meaningful opportunity). See also, C. Coglianese, "Transparency and Public Participation in the Rulemaking Process," University of Pennsylvania School of Law (July 2008) at p. 6: "By the time that the Notice of Proposed Rulemaking (NPRM) is published and the comment period begins, the agency is highly unlikely to alter its policy significantly. Many internal deliberations and policy discussions occur before an agency issues its NPRM.... If public participation does not affect an agency's actual decision making process because it occurs after rules are already formulated, it is hard to see how it can significantly enhance either the quality or legitimacy of rulemaking." (Emphasis added).

[57] See, 81 Federal Register, No. 117, supra at pp. 39762-39763.

[58] See, note 27, supra.

DOE similarly maintains in its June 17, 2016 NOPR that it "attended three MHCC meetings where [it] gathered information from MHCC members." (Emphasis added). MHARR, however, having attended every MHCC meeting since its inception, is aware only of one-sided, summary DOE presentations to the MHCC regarding the manufactured housing rule that DOE has had under development for nine years, and no occasion, whatsoever, where the MHCC, having been provided information on the development and substance of a DOE manufactured housing – in advance – had an opportunity to provide either DOE or HUD with substantive consensus input regarding any aspect of the proposed rule that DOE has now committed-to and published.[59]

Indeed, rather than providing the MHCC with an opportunity to offer independent input on its unduly costly, extreme and unnecessary manufactured housing energy standards at a meaningful point, based on a statutorily-balanced membership and legitimate consensus of manufactured housing program stakeholders, DOE (facilitated by HUD) instead – and as explained above -- chose to "rig" this rulemaking, railroading it through a sham "negotiated rulemaking" conducted through an MHWG dominated and controlled by DOE and its supporters. DOE now touts this phony process and its outcome as a "consensus" result, while it has acted consistently – with the cooperation and assistance of HUD and the HUD manufactured housing program Administrator – to prevent any legitimate consensus consideration and input from the MHCC at a point when it would have mattered.

Indeed, HUD, apparently recognizing its failure to comply with the EISA section 413, on July 25, 2016 – more than four weeks after publication of the June 17, 2016 DOE proposed rule -- published notice in the Federal Register of an August 9, 2016 MHCC telephone conference meeting to "review" a "summary" of the DOE proposed rule and, according to the meeting agenda, consider "Committee recommendations on [the] proposed rule."[60]

Published at the very last minute – in fact, arguably after the last minute allowed by applicable Federal Advisory Committee Act (FACA) regulations requiring published notice "at least 15 calendar days prior to an advisory committee meeting" (emphasis added)[61] -- and scheduled for just days prior to the August 16, 2016 DOE comment deadline, this HUD action appears to be little more than window dressing to whitewash yet another violation of applicable law in a rulemaking process that has been "rigged" from the start. The MHCC, provided an impossibly brief and truncated timeframe to digest a complex, OMB/OIRA-designated "significant rule" (much like the MHWG), will apparently be asked if it wishes to provide comments to DOE that would need to be drafted and approved within less than one week, in order to be submitted prior to the August 16, 2016 public comment deadline. This not only violates the implicit command of section 413 that "consultation" occur at a meaningful time, but is a direct and flagrant insult to the MHCC (and the stakeholders that it represents), offering the Committee a nominal opportunity to "review" a rule that DOE – and HUD – have already committed-to, while

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[59] To the extent, however, that DOE may have solicited or obtained otherwise undisclosed "information," input or comments from any individual MHCC member(s) regarding its manufactured housing energy rule, any such interaction, outside of the MHCC consensus procedures established by the Committee and HUD pursuant to the Manufactured Housing Improvement Act of 2000, would be invalid, illegitimate and not a lawful action of the MHCC.

[60] See, 81 Federal Register, No. 142 at pp.48442-48443.

[61] The scheduled MHCC meeting date falls on the 15th calendar day after the July 25, 2016 meeting notice publication date. The notice, accordingly, does not provide "at least 15" calendar days' notice "prior" to the meeting, as required.

effectively negating any real impact from that review. Again, though, this cynical manipulation of the rulemaking process is entirely consistent with DOE's pervasive pattern of obfuscation and deception concerning this rulemaking.

### F. Procedural Summary

As the foregoing recitation of relevant facts selectively omitted from the DOE June 17, 2016 NOPR demonstrates, the DOE proposed rule -- separate and apart from its fatal substantive defects detailed below – is the product of a fundamentally tainted process that was fatally flawed from its earliest phase and has remained fatally flawed throughout, including, but not limited to:

- The selective, "impermissible" leak of the 2011 DOE "draft proposed" manufactured housing energy rule (DPR) to parties in interest, including the industry's largest manufacturers;
- Failure to disclose the existence or substance of ex parte input from recipients of the selectively leaked 2011 DOE draft proposed rule in either the development and/or modification of the 2011 DOE DPR or the DOE 2016 proposed rule;
- Development of the 2011 DPR without necessary and essential information, leading to the 2013 RFI, surreptitiously seeking such information after-the-fact without disclosing the previous development and existence of the 2011 DOE DPR or its rejection by OMB/OIRA;
- False denial of the selective leak of the 2011 DOE-DPR;
- Refusal to conduct an investigation or otherwise provide relevant details concerning the 2011 DOE-DPR selective leak;
- Failure to disclose responsive documents addressing these matters pursuant to MHARR FOIA requests;
- Failure to disclose the OMB/OIRA start-over directive;
- Failure to disclose ex parte coordination with selective leak recipients regarding the referral of manufactured home energy standards to "negotiated rulemaking;"
- Failure to disclose ex parte coordination with selective leak recipients to establish the parameters of that "negotiated rulemaking;"
- Ex parte coordination with selective leak recipients to establish an inadequate and unnecessarily truncated time-frame, schedule and deadline for the completion of that "negotiated rulemaking;"
- Ex parte coordination with selective leak recipients to establish a "negotiated rulemaking" MHWG dominated and controlled by "insider" selective leak recipients;
- Non-transparent and unverified data inputs to the MHWG on crucial rulemaking issues, including cost-benefit;
- Undisclosed MHWG conflicts of interest precluding "good faith" negotiation as required by applicable law;
- DOE manipulation of alleged "research" contracts to steer funds to one or more "insiders" (and MHWG members) to influence the "negotiated rulemaking" process;
- Refusal to disclose the 2011 DOE DPR for comparison to the 2016 DOE proposed rule;

- Refusal to disclose the 2011 DOE "draft" NOPR, TSD and cost-benefit analysis for comparison to the corresponding 2016 DOE rulemaking documents;
- Failure to provide evidence of "consultation" with HUD as required by EISA section 413, the time of that consultation (if any), the substance of any input received from HUD (if any), and any changes made to the June 17, 2016 proposed rule or NOPR as a result; and
- Failure to consult with the MHCC in a timely and legitimate manner as provided by EISA section 413.

In its entirety, this sham process has seriously prejudiced both the procedural and substantive rights of MHARR, its members and other affected stakeholders that were not party to – or part of – a consistent pattern of coordinated activity to benefit certain favored "insiders" at the expense of consumers, smaller industry businesses and other non-"insider" stakeholders. Those specific actions by DOE (and HUD) produced a phony "negotiated rulemaking" process, a phony MHWG, a phony alleged MHWG "consensus" and, ultimately, an illegitimate MHWG Term Sheet and illegitimate proposed rule. For these reasons alone, the DOE proposed rule should either be withdrawn, or – if implemented by DOE as a final rule – vacated upon judicial review. As is demonstrated below, however, the June 17, 2016 DOE proposed rule – beyond this fundamentally corrupted procedure -- is unsupported by factual cost-benefit data as required by EISA section 413 and is otherwise an agency action that is "arbitrary, capricious, or an abuse of discretion" in violation of the Administrative Procedure Act.

## III. COMMENTS

The manufactured housing energy standards proposed by DOE in this rulemaking are an appalling and indefensible exercise in federal government overreach and destructive, excessively costly regulatory intervention in the free market to the ultimate and profound detriment of the very consumers that the government -- and particularly the current Administration -- putatively seek to "protect." Even though manufactured homes – after reaching historic-low production levels in 2009 – represent only 7.4% of all housing placements[62] and only 5.9% of all occupied housing units,[63] DOE seeks to impose harsh, needless, discriminatory, excessive and unreasonably costly standards on the nation's most affordable housing and the mostly lower and moderate-income Americans who rely on that affordability to be homeowners instead of renters, government subsidized renters, or homeless altogether. These standards, if adopted, would far exceed in cost and substantive mandates, any requirements currently imposed on the more than 90% of other types of homes in the housing market, including even multi-million dollar site-built homes with far more affluent owners.[64] Instead of allowing consumers to exercise free-choice within a free-market, where HUD Code manufacturers already offer consumers an energy-efficient home and a wide range of enhanced energy features as purchase options, the proposed DOE rule would instead

[62] See, "Manufactured Homes: A Shrinking Source of Low Cost Housing," Fannie Mae Economic and Strategic Research (June 27, 2013). Reflecting 2012 data, down from 20.2% in 1998.

[63] Id. Reflecting 2011 data, down from 7.0% in 2000.

[64] As of May 2016, the International Code Council (ICC) reported that only six states had adopted the 2015 IECC – the basis for DOE's June 17, 2016 proposed standard. See, Attachment 23 hereto, "International Codes-Adoption by State," International Code Council (ICC) (May 2016).

force consumers to pay for energy features that they cannot afford or would not otherwise want through a one-size-fits-all big government mandate. To impose what is – at best – a regressive, de facto tax on American families already struggling to be and become homeowners, while excluding millions of others from the benefits of homeownership entirely, in order to advance an unrelated, controversial and unproven agenda, constitutes an abuse of power and an abuse of the public trust.

### A. HUD-Regulated Manufactured Homes are Already Energy-Efficient In a Manner Consistent with Law and Genuine Affordability

While totally ignored amidst the nearly-impenetrable jargon and disputed junk science that are the hallmark of DOE's June 17, 2016 NOPR, the fact is that HUD-regulated manufactured homes, as a result of the national housing policies and regulatory system established by the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended by the Manufactured Housing Improvement Act of 2000, are already energy efficient -- in a manner consistent with the over-riding purposes and objectives of those laws.

Unlike the "consumer products" (e.g., home appliances) that DOE regulates under the Energy Policy and Conservation Act of 1975 (42 U.S.C. 6291, et seq.),[65] manufactured housing – as a product and as an industry -- is unique, as recognized by Congress and as enshrined in federal law long before the adoption of EISA in 2007. As the nation's most affordable source of non-subsidized housing and homeownership -- as determined by HUD[66] and established by U.S. Census Bureau data[67]-- manufactured homes play a vital role in the American housing market and in American society, providing homeownership opportunities (and all of the attendant benefits of homeownership) for Americans, and particularly lower and moderate-income American families, that might not otherwise be able to afford a home of their own.

As a result, Congress made the continuing (purchase price) affordability of HUD-regulated manufactured homes a central objective of the National Manufactured Housing Construction and Safety Standards Act of 1974. Indeed, the purchase price affordability of manufactured homes is crucial to ensuring that the largest number of Americans possible – at every rung of the economic ladder -- can access and enjoy home ownership and all of its benefits. Congress, moreover, reaffirmed and expanded the law's emphasis on affordability when it amended the 1974 Act with the Manufactured Housing Improvement Act of 2000. The law as amended, therefore, addresses the need to preserve the inherent (purchase price) affordability of manufactured homes in at least four of its eight express "purposes," i.e.: "(1) to protect the quality, durability, safety and

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[65] See, e.g., DOE proposed rules for "residential conventional ovens," published at 80 Federal Register, No. 111 (June 10, 2015) at p. 33030, et seq.

[66] See, U.S. Department of Housing and Urban Development, "Is Manufactured Housing a Good Alternative for Low-Income Families? Evidence from the American Housing Survey" (December 2004). This HUD-sponsored study determined that, over an eight-year sample period, the mean monthly housing cost of consumer-owned manufactured homes was consistently and substantially less than the cost of ownership for other types of homes or even the cost of renting a home.

[67] See, U.S. Census Bureau, "Cost and Size Comparison: New Manufactured Homes and Single-Family Site Built Homes (2007-2014)," showing an average structural price of $65,300 ($45.41 per square foot) for HUD-regulated manufactured homes as compared with an average structural cost (i.e., excluding land) of $261,172 ($97.10 per square foot) for a site-built home.

affordability of manufactured homes; (2) to facilitate the availability of affordable manufactured homes and to increase homeownership for all Americans; *** (4) to encourage innovative and cost-effective construction techniques for manufactured homes; *** and (8) to ensure that the public interest in, and need for, affordable manufactured housing is duly considered in all determinations relating to the federal standards and their enforcement." (See, 42 U.S.C. 5401(b)). In addition, the Act requires that HUD (and the MHCC) "in establishing standards or regulations, or issuing interpretations" under the Act, "consider the probable effect of [that] standard on the cost of the manufactured home to the public...." (See, 42 U.S.C. 5403(e)(4)).

Thanks to this specific national housing policy that recognizes and seeks to preserve the purchase-price affordability of HUD Code manufactured homes, manufactured homes in 2011, according to U.S. Census Bureau data, accounted for 71% of all new homes sold for under $125,000, 50% of all new homes sold for under $150,000 and 30% of all new homes sold for under $200,000.

Manufactured homes, moreover, were already subject to HUD Code energy efficiency standards when EISA was enacted. Under those standards[68]developed and promulgated in accordance with the strict balance of consumer protection and purchase-price affordability mandated by the 1974 Act as amended, HUD Code homes were – and are[69] – required to meet criteria governing condensation control, air infiltration, thermal insulation, heat loss and heat gain and related certifications for heating and "comfort cooling." The HUD standards -- in accordance with the fundamental policy of the 1974 Act, as amended, to "establish," to "the maximum extent possible ... performance requirements,"[70]is designed to achieve certain specified Uo (coefficient of heat transmission) values within three defined geographical zones across the United States.

As a consequence of those pre-existing HUD energy standards, manufactured homes, as established by U.S. Census Bureau data, are already energy efficient, without regressive, high-cost DOE "energy" mandates. Specifically, data from the 2013 American Housing Survey shows that the median monthly housing cost for fuel oil was $92.00 for manufactured homes as compared to $267.00 for other types of housing. The median monthly cost for piped natural gas was $34.00 for manufactured homes as compared to $38.00 for other types of housing, and the median monthly cost for electricity was only slightly higher for manufactured homes (at $119.00) than other types of homes (at $105.00)[71] -- a difference of only $168.00 per year.

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[68] See, 24 C.F.R. 3280.501, et seq.

[69] Nothing in EISA section 413, or in EISA generally, would automatically invalidate or negate the existing HUD energy conservation standards upon the promulgation of any final DOE energy rule. Indeed, EISA section 3, "Relationship to Other Law," states: "Except to the extent expressly provided in this Act or an amendment made by this Act, nothing in this Act supersedes, limits the authority provided or responsibility conferred by, or authorizes any violation of any provision of law (including a regulation)...." (Emphasis added). Accordingly, as DOE concedes, any conflict between existing HUD energy standards and any final DOE standard would leave producers subject to potential enforcement activity by HUD, DOE, or both.

[70] See, 24 C.F.R. 3280.1 – "This standard seeks to the maximum extent possible to establish performance requirements." It is this performance-based nature of the HUD standards, together with their uniform application and enforcement, and effective federal preemption that ensure the fundamental (and unequalled) affordability of HUD Code manufactured homes.

[71] See, Attachment 24 hereto, U.S. Census Bureau, 2013 American Housing Survey, Table C-10AO (National), Housing Costs – All Occupied Units, at p.2.

Because of its broader, inherent and more consistent affordability, however, over a complete range of operating metrics, this minor additional energy cost for electricity is more than subsumed within the expansive operating efficiencies of HUD Code manufactured homes. Thus, U.S. Census Bureau data shows that the median total monthly operating cost for a current-day HUD Code manufactured home is $501.00 per month, as contrasted with $1,322.00 for other new residential structures -- a 164% cost advantage for manufactured home owners under the current HUD standards.[72] Moreover, manufactured housing producers already provide a wide range of enhanced energy packages (including EnergyStar packages), tailored to the specific needs and wants of consumers, on an optional basis. Thus, manufactured homebuyers currently have the freedom to choose whatever type of energy package they wish to purchase and have the financial ability to purchase, while those who wish to spend their money in other ways – or not at all – are free to do so. All this would change, however, under the regressive DOE standards, which would force those remaining in the market to spend money for energy features – without proven returns[73] -- that they otherwise would not purchase.

These indisputable facts, in conjunction with established law, have three major inter-related consequences for this rulemaking.[74] First, the cost-benefit language of EISA section 413, requiring that DOE manufactured housing standards be based on the most recent version of the International Energy Conservation Code, "except in cases in which the Secretary finds that the code (sic) is not cost-effective" (emphasis added), must be construed and applied consistently with the purposes, objectives and mandates of existing law – in this case, the 1974 Act as amended by the 2000 reform law.[75] Therefore, the "cost-effective" proviso of EISA section 413 must be construed and applied -- consistently with the 1974 Act, as amended -- to ensure that non-life-safety energy standards do not result in purchase price increases to manufactured homes that would significantly impair their affordability, availability and accessibility to all Americans, or otherwise decrease homeownership. (See, 42 U.S.C. 5401).

Second – and consistent with Black Letter cannons of statutory construction requiring that statutes be construed consistently to give meaning to all of their provisions -- the cost-benefit analysis required by EISA section 413 is an integral, substantive element of that law. Consequently, a valid, credible and legitimate cost-benefit analysis is a necessary predicate to the proposal and adoption of any standard under EISA section 413. Third – and consistent with all of the foregoing – that cost benefit analysis must definitively establish that the proposed standards do not violate section 413 (construed in accordance with the 1974 Act, as amended), by significantly impairing the purchase price affordability, availability and accessibility of manufactured homes "for all Americans." (See, 42 U.S.C. 5401(b)(2)).

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[72] Id. at p. 1.

[73] See, Section III C, pp. 26-33, infra, regarding DOE's wholly-deficient cost-benefit "analysis."

[74] This data demonstrates, moreover, that EISA section 413 proceeds from a fundamentally false premise and assumption, rooted in decades of official federal government discrimination against HUD-regulated manufactured housing – i.e., that manufactured homes are somehow "deficient" and in need of "improvement." Indeed, the "improvement" of manufactured housing was an initial statutory objective and purpose of the original 1974 federal manufactured housing Act, but was repealed by Congress through the 2000 reform law, in recognition of the equality of HUD-regulated manufactured with all other types of housing for all purposes.

[75] See e.g., "Statutory Interpretation, General Principles and Recent Trends," Congressional Research Service, (December 19, 2011) at p. 29. A court "must read two statutes to give effect to each if it can do so." Citing Watt v. Alaska, 451 U.S. 259 (1981).

As is demonstrated below, however, the cost-benefit analysis offered by DOE in its June 17, 2016 NOPR and related "Technical Support Document" (TSD), is wholly and fatally deficient, and cannot – and does not – support the adoption of the proposed June 17, 2016 DOE standards or their compliance with the "cost-effective" directive of EISA section 413. Insofar as DOE has the "affirmative burden of promulgating and explaining a non-arbitrary, non-capricious rule," see, e.g., Small Refiner Lead Phase-Down Task Force v. U.S. Environmental Protection Agency, 705 F.2d 506, 534-535 (D.C. Cir. 1983), its failure to properly consider all applicable and relevant aspects of the cost-benefit impact of the June 17, 2016 proposed rule necessarily means that the proposed rule fails to meet the applicable legal standards and cannot go forward.

### B. The Proposed Standards will Exclude Millions of Americans From Manufactured Housing and Home Ownership Entirely

DOE maintains in the June 17, 2016 NOPR that its proposed standards would add up to $2,422 to the retail price of a single-section manufactured home (with a national average of $2,226) and up to $3,748 to the cost of a new multi-section manufactured home (with a national average of $3,109) – for non-"life-safety" energy measures that are already available to homebuyers who want them as optional features.[76] These figures – as acknowledged by DOE[77] -- are based upon the non-transparent purchase price impact information provided to the "negotiated rulemaking" MHWG by SBRA and MHI.

Even if it were assumed that these amounts reflected the full and true final cost of the DOE proposed rule to consumers – which they do not -- they would have a disastrous impact on the affordability, availability and accessibility of manufactured housing for American families already facing unprecedented difficulty in obtaining consumer financing to purchase a manufactured home. According to a 2014 study by the National Association of Home Builders (NAHB), presented to the MHWG at its initial meeting (the only independent market-impact information or testimony presented to the MHWG as part of DOE's supposed "negotiated rulemaking"), a $1,000.00 increase in the purchase price of a new manufactured home excludes 347,901 households from the market for a single-section home, while the same $1,000.00 increase excludes 315,385 households from the market for a double-section home.[78] Extrapolating this data to the price increases projected by the NOPR shows that the pending DOE standards would exclude more than 1.1 million households from the single-section manufactured housing market and just over 1 million households from the double/multi-section market – extreme numbers considering that the entire industry, since 2006 has been producing fewer than 100,000 new homes a year.

Given the established status of manufactured homes as the nation's most affordable type of housing and homeownership, the exclusion of millions of Americans from the manufactured housing market would effectively mean the exclusion of millions of Americans from

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[76] See, 81 Federal Register, No. 117, supra at p. 39757.

[77] Id. at p. 39783: "These costs are based on estimates for the increased costs associated with more energy efficient components, as provided by the MH working group." The NOPR, moreover, provides no indication that DOE either developed or sought to develop its own independent cost information to compare with these critical unverified, unvetted and totally non-transparent cost inputs. See, discussion in section II D, supra, at pp. 15-16.

[78] See, public testimony of Donald Surrena, Program Manager, Energy Efficiency, NAHB.

homeownership altogether, in violation of the 1974 Act, as amended, and contrary to national housing policy to encourage and support homeownership.[79]

Significantly, though, the cost-benefit "analysis" presented in both the June 17, 2016 NOPR and TSD fails to reflect the full and true cost of the proposed rule. This means that the resulting exclusion of homebuyers from the manufactured housing market will be even greater than the figures extrapolated above and that the numbers of Americans excluded from homeownership altogether will be greater, yielding major individual and societal costs that are not reflected at all in the DOE cost-benefit "analysis." These and other material flaws in the cost-benefit "analysis, as detailed below, make it so deficient as to be worthless for regulatory purposes.

### C. DOE's Cost-Benefit "Analysis" is Necessarily Incomplete and Fails to Reflect the True or Complete Costs of the Proposed Rule

DOE's cost-benefit analysis for the June 17, 2016 proposed rule – a necessary and essential predicate for any proposed rule pursuant to EISA section 413, as demonstrated above – is fundamentally incomplete, arbitrary and fatally deficient, in that it does not include or otherwise fails to quantify and/or consider key cost impacts of the proposed standards.[80] This failure to adduce or properly consider all applicable cost elements and impacts of the proposed standards results in cost-benefit and "life-cycle cost" calculations that are factually baseless and therefore, "arbitrary and capricious" per se, in violation of EISA section 413 and the Administrative Procedure Act. (See, 5 U.S.C. 706).[81]

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[79] This regulatory-driven exclusion of millions of lower and moderate-income consumers from the housing market, moreover, would take place in the context of homeownership rates that have already fallen to their lowest levels in more than 50 years. See, e.g., Attachment 25, hereto, "Homeownership Rate in the U.S. Drops to Lowest Since 1965," Bloomberg News (July 28, 2016). Declining homeownership has particularly impacted minority communities according to a 2015 study by the Harvard University Joint Center for Housing Studies ("State of the Nation's Housing") noting that "African Americans [now] have the lowest rate of homeownership [at] 43.8%"

[80] Such defective cost-benefit analyses, moreover, are hardly unprecedented for DOE. In written comments filed on April 3, 2015, in connection with a DOE rulemaking to establish "Energy Conservation Standards for Hearth Products," the Mercatus Center of The George Mason University condemned DOE's supposed cost-benefit "analysis" for failing to include and consider significant cost factors. Among other things, the Center noted that DOE did "not measure the welfare loss from shutting down small businesses and the negative impact on a portion of the population working in this area who this regulation affects. *** This results in additional losses that DOE does not take into account. *** It seems the losers in this regulation lose more than the winners gain, meaning that there is a loss in social welfare that the net standard benefit calculation provided by DOE fails to take into account." The same type of serious, significant and highly relevant analytical defects characterize the supposed cost-benefit "analysis" in this rulemaking as well.

[81] See, e.g., Soler v. G&U, Inc., 833 F.2d 1104 (2d Cir. 1987) (Successful challenge to an agency's decision under the arbitrary and capricious standard must clearly demonstrate that the agency "relied on factors which Congress did not intend it to consider, entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency....") (Emphasis added).

## 1. DOE's Cost-Benefit "Analysis" is Fatally Defective in that it Fails To Quantify or Consider Testing, Enforcement and Regulatory Costs

DOE's June 17, 2016 NOPR states, in part: "DOE estimates that benefits to manufactured homeowners in terms of lifecycle cost (LCC) savings and energy cost savings under the proposed rule would outweigh the potential increase in purchase price for manufactured homes."[82] This claim, however, is necessarily false and the findings of DOE's lifecycle cost analysis are necessarily flawed, skewed and materially inaccurate, in that they do not reflect, consider or account for key cost information. As a result, the claimed benefits of the proposed rule are netted against incomplete and/or inaccurate cost data, thereby yielding alleged "payback" amounts and timeframes that are distorted and biased in favor of the proposed rule. This distortion includes several aspects, which are addressed in this and subsequent sections, below.

Most significantly, the DOE cost-benefit analysis fails to include or consider significant additional costs that will be incurred by manufacturers – and inevitably passed to consumers in the purchase price of new manufactured homes – for: (1) testing, certification, inspections and other related activities to ensure compliance with any new DOE standards (including new testing requirements not currently included in the HUD Code that could be particularly costly and onerous); (2) enforcement compliance and activity; and (3) ongoing regulatory compliance. Although such expenses are – and are recognized as -- an integral component of the ultimate consumer-level cost of any mandatory rule, they are totally excluded from DOE's cost-benefit and LCC analyses in this rulemaking. Those analyses, as a result, are skewed toward greater alleged benefits from the proposed rule and shorter consumer LCC "payback" times than would be the case if all applicable costs were included and considered. Indeed, as it stands now, under DOE's fundamentally flawed and incomplete LCC analysis, the projected consumer "payback" period – i.e. 7.1 years for a single-section home and 6.9 years for a multi-section home -- is already longer than many consumers will live in a new manufactured home. The addition of testing, enforcement and regulatory compliance costs (and other additional un-captured costs set forth below), would extend that payback period even longer, meaning that even fewer homebuyers will ever recapture purchase price increases attributable to the proposed rule.[83]

This deceitful bifurcation of direct standards-generated costs on the one hand and testing, enforcement and regulatory compliance costs on the other – notwithstanding the fact that all such costs, as well as additional costs for compliance with existing HUD Procedural and Enforcement Regulations,[84] will represent additional consumer-level costs under any final DOE rule – began

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[82] See, 81 Federal Register, No. 117, supra at p. 39757.

[83] See, "2012 Mobile Home Market Facts," Foremost Insurance Group, at p. 8, showing that 39% of survey respondents had purchased their manufactured home within the past six years (i.e., 2006-2012). See also, "Is Manufactured Housing a Good Alternative for Low Income Families?" U.S. Department of Housing and Urban Development (December 2004), at p. 44 (55.4% of manufactured home residents moved within 10-year study period, with a mean duration of 2.57 years).

[84] See, 24 C.F.R. 3282.1, et seq. describing HUD's manufactured housing inspection, monitoring and enforcement program. Regardless of whether energy standards developed by DOE pursuant to EISA section 413 are enforced by DOE or HUD, or some combination of both, the changes to HUD-regulated homes that will be required by the proposed DOE standards will result in separate and additional compliance costs under the Part 3282 regulations. These inevitable additional costs will include, but will not be limited to, costs for the re-design of homes; costs for the approval and certification of such new or modified designs; costs for new or additional materials needed to support

with the sham MHWG "negotiated rulemaking" process, where DOE, via its "Designated Federal Official," barred discussion or consideration of any aspect of enforcement or regulatory compliance, or their associated costs. The absurd and misleading bifurcation is continued in the June 17, 2016 DOE NOPR, which states: "DOE is not considering compliance and enforcement in this proposed rule.... As a result, the costs ... resulting from any compliance and enforcement mechanism are not included in the economic impact analysis that is included in this rulemaking."[85]This represents an admission by DOE that its cost-benefit analysis and LCC "calculations" are necessarily inaccurate, incomplete and not reflective of the true and complete costs of the proposed rule.

DOE's consumer-level cost-benefit analysis, therefore, compares "apples to oranges," netting out all conceivable "savings" against only part of the costs that will be added to the price of the home. As a result, there is no basis, whatsoever, for DOE to conclude – in connection with this rule -- that consumer benefits exceed costs, because the full costs of the proposed standards are not known and cannot be known until DOE, at a minimum, settles on a compliance and enforcement system, which – it admits – has not occurred. Nor can a cost-recovery period be accurately calculated because costs -- again – are not known and not fully quantified as of now, and cannot even be accurately estimated with so many unknowns. Indeed, the attempt to pass this off as any kind of legitimate cost-benefit analysis is itself disingenuous. Therefore, DOE's analyses are neither credible nor legitimate and, per se, cannot be – and are not – sufficient to satisfy the substantive cost-benefit directive of EISA section 413 or the "arbitrary, capricious or abuse of discretion" standard of the APA.

### 2. DOE's Cost-Benefit "Analysis" is Fatally Defective In that it Fails To Quantify or Consider the Cost of Exclusion From Homeownership As a Result of the Rule

In addition to its fatal failure to address or consider testing, enforcement and regulatory compliance cost-impacts at the consumer level, DOE's cost-benefit and LCC analyses are necessarily incomplete, defective and insufficient to meet the requirements of either EISA section 413 or the APA because they totally fail to consider the individual (and societal) cost impacts that will result from the exclusion of millions of Americans from attaining homeownership. This fundamental omission – while evident from the June 17, 2016 NOPR and related TSD – was confirmed by DOE (and its cost-benefit analysis contractor) at the July 13, 2016 DOE public meeting concerning the instant rulemaking.

Using DOE's own fundamentally understated consumer-level cost figures, the 2014 NAHB cost study, cited above, indicates that June 17, 2016 DOE proposed standard would result in the exclusion of more than 1.1 million households from the single-section manufactured housing

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the inclusion of energy efficiency measures required by the proposed rule; and costs related to the certification and approval of such materials, among others. Nor does DOE's analysis consider the cost impact of compliance with HUD's lifetime home recall provisions – Part 3282, Subpart I -- which would be significant, if HUD adopts the DOE standards as part of the HUD Code.

[85] See, 81 Federal Register, No. 117, supra at p. 39783.

market and just over 1 million households from the double/multi-section market[86]and, with that, exclusion from homeownership entirely. This market and homeownership exclusion, moreover, as a direct consequence of the non-life-safety DOE standards, would most severely and harshly impact lower-income purchasers, who comprise the vast majority of current manufactured home purchasers.[87]

For the millions of Americans who would be excluded from homeownership as a direct consequence of the significantly higher manufactured home purchase prices that will be driven by the proposed rule – if adopted – the DOE rule will have no consumer-level benefits. For those consumers, the rule will have only costs.[88] While those costs, axiomatically, will not be the specific "costs" of the rule itself – insofar as they will be excluded from the market – those consumers will nevertheless incur costs as a result of the rule, i.e., the cost of exclusion from homeownership and, in some cases, the cost of homelessness. The consumer-level DOE cost-benefit analysis, however, fails to quantify or account for these costs. Not are these costs reflected in DOE's "national" cost-benefit analysis.

By failing to reflect the impact of the proposed rule on millions of American consumers who would be excluded from the manufactured housing market and homeownership entirely – for whom there would be no "benefits," only "costs," the consumer and national-level DOE cost-benefit analyses are materially skewed, biased and not reflective of the full and true cost of the proposed rule.

Nor can DOE legitimately claim that consumer and national-level costs resulting from homeownership exclusion under the proposed rule are somehow difficult or "impossible" to quantify. If DOE can claim "benefits" for the proposed rule resulting from allegedly reduced carbon emissions, quantified via its "social cost of carbon methodology"[89] -- a global[90]calculation (in violation of OMB Circular A-4, Regulatory Analysis") based on Integrated Assessment Models

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[86] Using the higher cost figures derived by MHARR -- reflecting additional costs over and above costs for a current base-level HUD Code home (see, Attachment 8, supra) -- the number of households excluded from the manufactured housing market – and homeownership – approaches nearly 2 million (i.e., 1.6 million excluded from the single-section market and 1.83 million excluded from the double-section market). These exclusions, with the addition of other costs not captured by DOE's cost-benefit analysis, would easily exceed 2 million.

[87] According to U.S. Census Bureau data, the median household income for all occupied manufactured homes is $28,400. See, U.S. Census Bureau, 2013 American Housing Survey, Table C-09-AO (National), Income Characteristics – All Occupied Units, at p.1. See also, "2012 Mobile Home Market Facts," Foremost Insurance Group, at p. 2, 5 ("55% of [manufactured] home owners reported an annual household income [of] less than $30,000, representing a 16% increase from 2008"). Household income for manufactured housing residents, accordingly, is declining. This income level is only slightly higher than the current federal poverty level – i.e., $24, 250 – for a family of four. As a result, purchase price increases driven by the unnecessary energy efficiency measures of the DOE proposed rule will have a devastating impact on the lower and moderate-income consumers who rely on manufactured housing the most. It should also be noted that market exclusion resulting from the DOE rule would not only impact "homeownership," per se. Significant increases in the purchase price of manufactured homes acquired by manufactured housing communities for rent to lessees would also be passed through to occupants in the form of higher rent payments. Those higher rental payments, in turn, would result in the exclusion of additional households from the manufactured housing market.

[88] Put differently, for consumers excluded from manufactured home ownership by purchase prices driven to levels they simply cannot afford, there is no "life-cycle" – and therefore no possibility whatsoever of "life-cycle savings."

[89] See, 81 Federal Register, No. 117, supra at p. 39791.

[90] See, detailed discussion at section III C 5, pp. 32-33, infra,

incorporating "crucial flaws that make them close to useless as tools for policy analysis,"[91] then there is no reason that DOE cannot quantify and properly consider the costs of market exclusion and homelessness resulting from its proposed rule that will significantly increase the cost of the nation's most affordable housing. It could begin that analysis with the assertion of former HUD Secretary Shaun Donovan, that it costs taxpayers $40,000 per year for each homeless person in the United States.[92]

The proposed rule, accordingly, is, in reality, a tax -- a regressive, discriminatory tax on America's manufactured housing consumers that will fall the hardest on those at the lower end of the economic spectrum who rely on the affordability of manufactured housing the most, while forcing those remaining in the market to spend thousands of dollars for energy conservation features they would not otherwise purchase in a free market, as shown by decades of industry experience with optional enhanced energy packages.

### 3. DOE's Cost-Benefit "Analysis" is Fatally Defective in that it Fails To Quantify or Consider Larger Cost Impacts on Smaller Producers

The non-transparent "cost" figures provided to the MHWG by MHI/SBRA – upon which the MHWG "Term Sheet," the proposed rule and the DOE cost-benefit analysis are premised – undoubtedly were obtained primarily from larger manufacturers that MHI represents and that participated in the MHWG.[93] Based on calculations derived by MHARR, however, those figures significantly understate the cost of the proposed rule based on the supply costs paid by smaller independent manufacturers which still represent approximately 30% of the total domestic manufactured housing market.[94]

Based on those higher supply costs, MHARR calculations reflect price increases of up to $4,600.00 above current HUD Code performance standards for a single-section manufactured home and up to $5,825.00 for a double-section home.[95] These calculations were provided to DOE by MHARR in March 2015, but have not been included or otherwise addressed or accounted-for in the June 17, 2016 NOPR cost-benefit analysis.

Insofar as these higher supply costs, which will impact a significant portion of the manufactured housing market are not subsumed or reflected in the DOE cost-benefit analysis, that analysis, again: (1) is based on non-transparent, un-vetted crucial information inputs; (2) significantly understates costs attributable to the proposed rule; and (3) is wholly insufficient and inadequate to meet the substantive cost-benefit mandate of EISA section 413 and the "arbitrary, capricious, or abuse of discretion standard of the APA.

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[91] See, "Obama's Climate Action Plan Means Higher Electricity Prices for Business, Consumers," Washington Examiner (January 16, 2014) quoting Professor Robert Pindyck, Massachusetts Institute of Technology.

[92] See, "HUD Secretary Says a Homeless Person Costs Taxpayers $40,000 a Year," PolitiFact (March 12, 2012).

[93] This again demonstrates the material prejudice to MHARR and other stakeholders resulting from the sham DOE "negotiated rulemaking" process.

[94] See, note 107, infra.

[95] See, Attachment 18, hereto, supra

### 4. DOE's Cost-Benefit "Analysis" is Fatally Defective in that it Fails To Quantify or Consider the Cost Impact of Regular IECC Changes

Further, by requiring DOE to constantly update manufactured housing standards to keep pace with the "latest version" of the IECC – which is revised every two years without regard to cost-benefit, unlike the HUD Code standards -- EISA not only discriminates against manufactured homebuyers vis-à-vis other types of homes regulated under earlier, less stringent and less costly versions of the IECC,[96] but adds an element of ongoing regulatory uncertainty that will further increase manufacturer compliance costs and the cost of manufactured homes to potential consumers that are not captured within DOE's NOPR cost-benefit analysis.

The significant negative impact of ongoing regulatory uncertainty within regulated industries – and, in particular, on regulated industry participants, such as manufactured housing producers – has been addressed extensively by economists, with studies showing that regulatory uncertainty has a pronounced negative impact on investment, growth, and competitiveness, resulting in both consumer, industry and national-level costs that are not addressed, considered or reflected in DOE's cost-benefit analysis.[97]

These negative impacts, that are not addressed, considered, or accounted-for in the June 17, 2016 NOPR cost-benefit analysis, will not only increase the cost of manufactured housing beyond the amounts projected in the NOPR – thereby extending already lengthy LCC cost-payback timeframes that already exceed the period that significant numbers of manufactured homeowners will remain in their homes – they will also: (1) increase the numbers of lower and moderate-income Americans excluded from the manufactured housing market and homeownership altogether; and (2) reduce the availability of affordable manufactured housing, contrary to the mandate, purposes and objectives of existing federal manufactured housing law.

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[96] See, Attachment 23, supra. Two states have adopted the 2006 IECC on a statewide, unmodified basis, sixteen have adopted the unmodified 2009 IECC statewide, eleven have adopted the 2012 IECC, and just six have adopted the 2015 IECC on an unmodified statewide basis. Two states have not adopted any version of the IECC. The largest number of states that have adopted the IECC, therefore, are still enforcing codes dating back at least seven years.

[97] See, e.g., "The Impact of Regulation on Investment and the U.S. Economy," The Mercatus Center, The George Mason University, at pp. 3-4. ("[I]nvestment may be temporarily withheld when there is uncertainty about the size and scope of new regulatory initiatives. This is particularly true for investments that cannot be easily reversed -- i.e., reselling capital for its purchase price. Investment in new capital is inevitably accompanied by the hiring of new labor. For firms that must rely on a constant source of financial capital -- i.e., smaller firms, one current source of uncertainty is how the new financial rules will affect their abilities to borrow. About 1/3 of small firms rely on regular borrowing to finance capital. *** Two types of uncertainty can affect decisions by firms to invest: (a) uncertainty about demand for their products demand uncertainty and (b) uncertainty about factor costs -- labor and capital – [i.e.,] factor uncertainty. Major regulations—such as those recently authorized regarding financial services, health care, or greenhouse gas rules—can affect both demand and factor uncertainty. *** [O]ne key type of factor uncertainty is whether firms will have access to credit in the future. Uncertainty about access to credit has a greater impact on firms, small firms in particular, that need continuous access to credit in order to finance investments.")

## 5. DOE's Cost-Benefit "Analysis" is Fatally Defective in that Nets Global "Benefits" Against only Partial Domestic "Costs"

DOE's claim, moreover, that the proposed standards would result in "a net benefit to the nation as a whole,"[98] is riddled with even more gaping analytical flaws. DOE cites "environmental benefits" flowing from its proposed rule as a result of "reduced emissions of air pollutants and greenhouse gasses associated with electricity production."[99] As with all of DOE's "climate change" rules, however, that claim relies on a non-transparent pseudo-science/economic "model" developed behind closed doors by a federal "Interagency Working Group." This model, dubbed "SCC," or the "Social Costs of Carbon," purports to estimate the global "monetized damages associated with an incremental increase in carbon emissions within a given year," accounting, among other things, for "changes in net agricultural productivity, human health, property damages from increased flood risk and the value of ecosystem services."

Even assuming that this model were correct and accurate in identifying and quantifying alleged monetary benefits resulting from supposed reductions in carbon emissions properly attributable to a rule affecting less than 10% of the nation's housing, the model is methodologically and statistically invalid in that it compares "apples to oranges," netting the supposedly "global" benefits of the proposed rule against purely domestic costs concentrated (in this case) within a small market and small industry. And even this baseless calculation is further skewed by the fact that only an artificially limited and constrained portion of the total domestic costs of the proposed rule – not reflecting the full market costs detailed above -- is netted against supposedly "global" benefits. This conflation of supposed "global benefits" being netted against only partial domestic costs attributable to the proposed rule, is not only arbitrary and capricious and in violation of EISA section 413, but also violates the directive of OMB Circular A-4, "Regulatory Analysis," which provides that regulatory "analysis should focus on benefits and costs that accrue to citizens and residents of the United States," in that it gives short shrift to domestic costs – excluding significant cost factors – while netting those partial domestic costs against alleged worldwide benefits.[100]

Just as importantly, though, DOE admits that alleged SCC benefits are "uncertain" and "should be treated as revisable."[101] Thus DOE attributes "benefits" to the proposed rule based on metrics acknowledged to be "uncertain," while it totally ignores predictable consumer, industry and national level costs of the proposed rule, which it totally ignores, thus over-inflating the alleged benefits of the proposed rule with junk science while significantly understating its costs. Indeed, while DOE exhibits great concern over the global "social costs" of carbon, it apparently could care less about the domestic social cost of millions of Americans who would be excluded from the benefits of homeownership under its rule, as it makes no effort whatsoever to quantify or consider those costs, which would be enormous.

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[98] See, 81 Federal Register, No. 117, supra, at p. 39758.

[99] Id. at p. 39759.

[100] OMB Circular A-4 expressly states that if "a regulation ... is likely to have effects beyond the borders of the United States," those "effects should be reported separately," not netted against purely (and partial) domestic costs. (Emphasis added).)

[101] See, 81 Federal Register, No. 117, supra at p. 39791.

Beyond the DOE-acknowledged "uncertainty" of the SCC model, however, and the failure of the DOE cost-benefit analysis to correctly, validly and lawfully net costs versus benefits attributable to the proposed rule, independent analysis demonstrates that the SCC model is scientifically and economically invalid. For example, a 2014 report by the Institute for Energy Research states, in relevant part: "[T]he use of the SCC as an input into federal regulatory actions is totally inappropriate. *** [T]he SCC is an arbitrary output from very speculative computer models. *** [T]he SCC as implemented by federal agencies is completely arbitrary and without theoretical or experimental support, not to mention a lack of data supporting the [SCC] calculation." (Emphasis added).[102] Indeed, the most recent independent analysis of the SCC, issued in June 2016, indicates that not only does SCC modelling produce a social cost of carbon that is overstated, but that based on observed temperature changes – and not just climate models – the SCC may actually be negative (i.e., that alleged carbon reduction yields no benefits and in fact, results in societal costs).[103]

Given each of these fatal defects in the utilization of arbitrary and speculative SCC values – and the other fundamental analytical and data failures of the June 17, 2016 DOE cost-benefit analysis, that "analysis" is factually worthless and insufficient to meet the substantive requirements of EISA section 413 and the APA.

### D. The DOE Cost-Benefit Analysis Fails to Properly Consider The Impact of the Proposed Rule on Smaller Industry Businesses

While DOE acknowledges that its June 17, 2016 proposed rule would have a significant negative impact on the manufactured housing industry – an industry that has seen production contract by more than 81% since 1998, with corresponding reductions in the number of producers – its cost-benefit analysis fails to fully or properly quantify the likely anti-competitive effects of its proposed rule and the resulting highly-negative impacts on industry small businesses and consumers.

DOE admits in the June 17, 2016 NOPR that its proposed rule would result in a decline in "industry net present value" of $3.1 million to $36.8 million. (See, 81 Federal Register, No. 117, supra at p. 39788). This calculation, however, was derived in significant part from information contained in 10-K filings with the U.S. Securities and Exchange Commission (SEC) (Id. at pp. 39787, 39794) which undoubtedly were filed by the larger industry corporate conglomerates. By contrast, DOE interviewed just "two small manufacturers" regarding expected industry/manufacturer impacts of the proposed rule. As a result of this failure to fully and properly quantify the expected impacts of the proposed rule on smaller businesses, DOE, in its NOPR, concedes that, under the Regulatory Flexibility Act (5 U.S.C. 601, et seq.) "since the proposed standards could cause competitive concerns for small manufacturers, DOE cannot certify that the proposed standards would not have a significant impact on a substantial number of small businesses." (Id. at p. 39794) (Emphasis added).

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[102] See, "Comment on Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order No. 12866," Institute for Energy Research (February 24, 2014).

[103] See, "Empirically-Constrained Climate Sensitivity and the Social Cost of Carbon," Heritage Foundation (2016).

Insofar as DOE has the "affirmative burden of promulgating and explaining a non-arbitrary, non-capricious rule," see, Small Refiner Lead Phase-Down Task Force v. U.S. Environmental Protection Agency, supra – DOE's failure to fully quantify and certify the effect of its proposed rule on small industry manufacturers is, per se, a fatal defect that should invalidate the June 17, 2016 proposed rule.

And while it is not the burden of public commenters or stakeholders to quantify, justify, or disprove any proposed agency action or standard, the proposed rule would have a disproportionately and profoundly negative impact on smaller manufacturers and smaller industry businesses. As has been documented by the U.S. Small Business Administration (SBA), federal regulation generally has a disproportionately negative impact on smaller businesses in any industry.[104] As a matter of basic business economics, larger businesses can amortize regulation-driven price increases over a broader base of production than smaller businesses, resulting in a diminished overall and per-unit impact. Further, and more importantly, the industry's largest corporate conglomerate[105] with nearly 50% of the domestic HUD Code market, has already demonstrated that it has the resources and ability to offset – for its customers – purchase price increases of the magnitude that will be caused by the DOE proposed rule. Specifically, in June 2015, Clayton Homes, Inc. (Clayton) offered purchasers of upgraded "Energy Smart" Clayton homes a rebate of up to $3,000.00 on energy utility bills during the first year after purchase of the home.[106] Not coincidentally, this amount approximates the average retail manufactured home price increase information provided to the MHWG and DOE, and incorporated in the DOE June 17, 2016 NOPR. Consequently, there is already significant evidence that Clayton – having supported the DOE-proposed standard during the MHWG "negotiated rulemaking" process – will use its superior resources and market strength to cushion or offset DOE standards-driven purchase price increases for its customers, drawing potential homebuyers away from smaller producers.

Over time, this phenomenon will result in further consolidation within an industry that has already seen a substantial reduction in the number of producing companies and the emerging domination of the industry by three large corporate conglomerates[107]with a corresponding reduction in competition and – ultimately – higher prices and fewer choices for consumers.

Again, though, DOE's cost-benefit analysis fails to address, consider or account-for these negative impacts – and their related costs -- on consumers, the industry and the nation as a whole.

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[104] See, "The Impact of Regulatory Costs on Small Firms," U.S. Small Business Administration (September 2010).

[105] I.e., Clayton Homes, Inc., a corporate subsidiary of Berkshire Hathaway, Inc.

[106] See, Attachment 26, hereto.

[107] See, "2015 Home Buyers' Outlook," The Grissim Guides to Manufactured Homes and Land ("[T]the MH industry contraction during the recession brought with it a lot of bankruptcies, closures, mergers and acquisitions. As a consequence the industry landscape today is markedly different than it was as recently as January 2008 when more than 60 companies nationally were building homes in 195 production facilities around the country. Currently, only 46 active corporations remain, and the number of factory production lines has dropped to 125 (a loss of 70). One upshot of this shake-out is that roughly 68% of the MH industry is now dominated by three major producers and their subsidiaries: Clayton Homes, Inc. (with a market share of 41%), Champion Home Builders, Inc. (15%) and Cavco Industries (12%). Of these three ... Clayton Homes, Inc. is far and away the dominant player. Not only is its market share way more than its two nearest competitors combined, but the company also owns two major banks–Vanderbilt Mortgage and 21st. Century–that specialize in retail MH loans which together account for 35% of all MH home loans. In fact, annual combined profit from the two banks significantly exceeds that from the sale of homes from Clayton and its many subsidiary builders."

This type of extreme negative economic and societal impact was correctly explained in the DOE "hearth products" rule comments submitted by the Mercatus Center of The George Mason University: "[T]his regulation will disproportionately burden small businesses and benefit large manufacturers. This regulation will become an income transfer scheme as small businesses go out of business competing with large manufacturers, giving large manufacturers access to a larger consumer base and increasing their income. This is an income transfer scheme that will produce unintended consequences, including causing an industry to be dominated by a few large firms." Id. at p. 5.

Insofar as none of these significant cost impacts and factors are considered by DOE in its cost-benefit analysis for the June 17, 2016 proposed rule, that rule is fatally deficient, unsupported by proper and sufficient evidence and legally unsustainable.

## IV. CONCLUSION

From the start, this rulemaking has been fundamentally and irretrievably tainted. The entire process utilized by DOE to produce the current proposed standards has been ill-conceived, deceptive, non-transparent, biased and, ultimately, unlawful. Instead of engaging in a legitimate rulemaking process, designed to elicit relevant facts and considerations, and then proceed to a well-reasoned proposal, this process has been one of a costly, disruptive and draconian pre-ordained result seeking "cover" from self-interested and special interest supporters participating in a coordinated, sham proceeding. That phony proceeding has now led to a proposed rule based on a deceitful and fatally defective cost-benefit analysis that nets all conceivable (and entirely speculative) alleged benefits, on a "global" scale, against a blatantly incomplete and deficient assessment and analysis of corresponding consumer, industry and national costs.

For all of the foregoing reasons, as detailed herein, MHARR strenuously opposes the June 17, 2016 proposed rule both procedurally and substantively and calls on DOE: (1) to withdraw that proposed rule; (2) to establish a credible, legitimate and untainted rulemaking process to develop appropriate standards consistent with EISA section 413 and existing federal manufactured housing law from a "fresh start" as originally directed by OMB/OIRA; and (3) to develop credible, reasonable and cost-effective standards consistent with EISA section 413 that will not result in the exclusion of millions of lower and moderate-income Americans from the manufactured housing market or homeownership entirely.

Very truly yours,

Mark Weiss
President and CEO

cc: Hon. Ernest Moniz
Hon. Julian Castro
Chairman and Ranking Member, Senate Energy and Natural Resources Committee
Chairman and Ranking Member, House Energy and Commerce Committee
Chairman and Ranking Member, Senate Banking Housing and Urban Affairs Committee
Chairman and Ranking Member, House Financial Services Committee
Office of Advocacy, U.S. Small Business Administration

ATTACHMENT 3


# Manufactured Housing Association for Regulatory Reform

1331 Pennsylvania Avenue, NW • Suite 512 • Washington, DC 20004 • 202-783-4087 • Fax 202-783-4075 • mharrdg@aol.com


August 15, 2016

VIA FEDERAL EXPRESS AND ELECTRONIC SUBMISSION

Mr. Roak Parker
U.S. Department of Energy
15013 Denver West Parkway
Golden, Colorado 80401

Re: Manufactured Housing Energy Regulation
Draft Environmental Assessment
Request for Information on Impacts to Indoor Air Quality

Energy Efficiency Standards for Manufactured Housing
Docket No. EERE-2009-BT-BC-0021 – RIN 1904-AC11

Dear Mr. Parker:

The following comments are submitted on behalf of the Manufactured Housing Association for Regulatory Reform (MHARR). MHARR is a Washington, D.C.-based national trade association representing the views and interests of producers of manufactured housing regulated by the U.S. Department of Housing and Urban Development (HUD) pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5401, et seq.) (1974 Act) as amended by the Manufactured Housing Improvement Act of 2000 (2000 Reform Law). MHARR was founded in 1985. Its members include independent manufactured housing producers from all regions of the United States.[1]

## I. INTRODUCTION

On June 17, 2016, the U.S. Department of Energy (DOE) published a proposed rule in the Federal Register to establish "Energy Conservation Standards for Manufactured Housing," pursuant to section 413 of the Energy Independence and Security Act of 2007 (EISA). (See, 81 Federal Register, No. 117 at p. 39756, et seq.). Subsequently, on June 30, 2016, DOE published,

[1] All of MHARR's member manufacturers are "small businesses," as defined by the U.S. Small Business Administration (SBA) and "small entities" for purposes of the Regulatory Flexibility Act (5 U.S.C. 601, et seq.).

for public comment, a "Draft Environmental Assessment" (DEA) in connection with that proposed rule, together with a "Request for Information" (RFI) regarding potential impacts of the rule as proposed – and two alternative regulatory scenarios – on "indoor air quality." (See, 81 Federal Register, No. 126, at pp. 42576-42577). MHARR submitted written comments dated August 8, 2016 opposing the June 17, 2016 DOE proposed rule on multiple grounds including, but not limited to, an illegitimate and unlawful standards development process leading to the proposed rule, as well as irremediable, fatal flaws in DOE's purported cost-benefit analysis. It now submits these additional comments on DOE's "Draft Environmental Assessment" separately in this proceeding and as supplemental comments in the pending DOE June 17, 2016 Notice of Proposed Rulemaking (NOPR) docket.

## II. COMMENTS

For DOE to even propose a rule for manufactured energy standards without first considering the proposed rule's potential health impacts on manufactured housing residents and the implications of those impacts on the overall cost of the proposed rule -- during, and as part of the development process for the proposed rule – is fundamentally irresponsible and a violation of both section 413 of the Energy Independence and Security Act of 2007 (EISA)[2] and the "arbitrary, capricious and abuse of discretion" standard of the Administrative Procedure Act (APA) (5 U.S.C. 706).

DOE – within the specific context of its manufactured housing rulemaking docket -- has been aware of the potentially significant negative impacts of tighter thermal envelope requirements on indoor air quality (IAQ) in manufactured homes and the health of manufactured housing residents since at least 2010. In its March 5, 2010 comments in response to DOE's February 22, 2010 Advance Notice of Proposed Rulemaking (ANPR) concerning manufactured housing energy standards,[3] MHARR stated:

> "[M]anufactured homes are already subject to HUD energy conservation standards that result in a relatively tight thermal envelope, consistent with overall affordability, and are carefully balanced against concerns related to air exchange and condensation within the home living space. Any change to the standards could potentially upset that balance, with unforeseen and unintended negative consequences given the unique environment and construction of manufactured homes."

(Emphasis added).[4]

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[2] Pursuant to the express mandate of EISA section 413(b)(1), the Secretary of DOE is required to make a separate, affirmative finding that each element of the manufactured housing energy standards adopted under section 413(a) is "cost-effective." The legal implications of this mandate are addressed in MHARR's August 8, 2016 NOPR comments at pp. 24-25

[3] See, Attachment 1 to MHARR's August 8, 2016 NOPR comments.

[4] DOE's draft Environmental Assessment states, in part, that DOE's proposed standard would "establish, for the first time, energy conservation standards for all new manufactured homes..." See, DEA at p. 8. This assertion, however, is false. HUD's comprehensive federal regulatory jurisdiction over manufactured housing construction and safety already includes – and has included at all times relevant to this matter -- energy standards as codified in Subpart F

Subsequently, in total disregard of this specific warning of the need to address and account for potentially significant adverse health effects on manufactured housing residents flowing from stricter thermal requirements than the carefully-balanced HUD standards, DOE proceeded to develop a draft proposed manufactured housing energy rule in 2011 (2011 DPR). That 2011 DPR – no later than May 2012[5] -- was then selectively leaked to multiple interested parties, including energy special interests and representatives of the manufactured housing industry's largest corporate conglomerates.[6]

Without disclosing either: (1) the development of the 2011 DPR itself; or (2) the prior selective and "impermissible" leak of the 2011 DPR to DOE-favored "insiders" (and continuing ex parte contacts with those insiders), DOE, on June 25, 2013 issued a Request for Information (2013 RFI) in its manufactured housing rulemaking docket seeking, among other things, information on the relationship between air exchange rates and indoor air quality, and protecting "occupant health and safety." The 2013 RFI states, in relevant part:

> "DOE is interested in receiving information that relates to the relationship between energy efficiency and indoor air quality in manufactured housing. *** DOE believes it is important to allow interested parties an ... opportunity to provide information they feel will assist DOE in developing the proposed standards. DOE is particularly interested in receiving information on ... [i]ndoor air quality. DOE is interested in data, studies, and other such materials that address the relationship between potential reductions in levels of natural air infiltration and both indoor air quality and occupant health for a manufactured home."

(Emphasis added). (See, 78 Federal Register, No. 122, at p. 37996). DOE, therefore, consistent with its overall pattern of obfuscation and non-transparency concerning this rulemaking, misrepresented its 2013 Request for Information, indicating that it needed such information for the development of a proposed rule when, in fact, it had already developed and committed to a proposed rule -- the 2011 DPR – without that information.

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("Thermal Protection") of the HUD Manufactured Housing Construction and Safety Standards (24 C.F.R. 3280.501, et seq.).

[5] May 29, 2012 correspondence from the Manufactured Housing Institute (MHI) to DOE refers to specific requirements and provisions of a "draft proposed DOE rule" and "draft DOE standards" that were not included in the 2010 ANPR, had not been published as a proposed rule, and had not otherwise been made public. That MHI correspondence states, in part, that "the draft DOE standards requires (sic) homes to be tested in the factory" and that "separate testing is required for to measure duct leakage, whole house (building shell) tightness and air infiltration rates for each window." No such details were included in the 2010 ANPR or otherwise published or disclosed to the public. Similarly, the May 29, 2012 MHI correspondence refers to a DOE estimate of a "total cost burden to the industry [of] $4.5 million over four years." Again, no such information was provided in the 2010 ANPR or otherwise disclosed to the public. See, Attachment 4 to MHARR's August 8, 2016 NOPR comments.

[6] An attorney in DOE's Office of General Counsel admitted at the August 5, 2014 meeting of the DOE Manufactured Housing Working Group (MHWG) that the 2011 DPR had been "impermissibly distributed to many people in [the MHWG meeting] room." See, Attachment 16 to MHARR's August 8, 2016 NOPR comments. The specific circumstances and consequences of this "impermissible distribution" of the 2011 DOE draft rule are extensively detailed and fully documented in MHARR's August 8, 2016 NOPR comments at pp. 3-21.

In July 24, 2013 comments addressing the 2013 RFI, MHARR stressed that DOE was seeking information on the health effects of DOE manufactured housing energy standards after those standards had already been developed – without that necessary information -- as part of the 2011 DPR. MHARR thus stated:

> "While MHARR commends EPA for finally seeking information and data concerning these crucial issues for both the industry and consumers, its request for such information after the preparation of a draft proposed rule turns the regulatory process on its head and raises serious issues regarding the legitimacy and integrity of this entire proceeding.... The difficulty for DOE and all parties in interest is that the "proposed standards," as amply demonstrated by the above-described May 29, 2012 communication, have already been developed by DOE without the information being sought now by the agency after-the-fact."

MHARR, therefore – while noting the existence of scientific literature pointing to a correlation between the envelope tightness of manufactured homes under the present HUD thermal standards and the potential for adverse health impacts on manufactured housing residents flowing from tighter envelope standards[7] -- called for DOE to "begin anew its entire process for the development of this rule from the start, based, this time, on a proper review and consideration of all the relevant information."[8]

Ultimately, as described by DOE's Office of General Counsel (OGC), the 2011 DPR – following submission to the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) for review as an economically "significant" rule under Executive

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[7] See, Attachment 2 to MHARR's August 8, 2016 NOPR comments at pp. 6-7. "Regarding RFI issue 1, indoor air quality and specifically "the relationship between potential reductions in levels of natural air infiltration and both indoor air quality and occupant health," the Centers for Disease Control and Prevention (CDC) in a 2011 report entitled "Safety and Health in Manufactured Structures," concluded that "no comprehensive data are available on the quality of air in manufactured structures." Id. at p. 25. CDC did note, however, that "the tight building envelopes and relatively low air exchange rates in some manufactured structures combined with formaldehyde off-gassing can cause indoor levels to rise. This effect has been recognized for decades." Id. at p. 26 (citations omitted). From this, it can reasonably be inferred that even tighter building envelopes and further reductions in levels of natural air infiltration pursuant to new DOE energy standards could cause even higher concentrations of such compounds. Increasing air exchange rates, however, via mechanical ventilation or other methods, increases the risk of moisture infiltration into the home – particularly in humid climates -- that can lead to mold growth and associated impacts on indoor air quality. In this regard, the CDC report states: "Moisture can also enter buildings through operation of mechanical ventilation systems during humid weather conditions. *** Without proper dehumidification, ventilation requirements (24 CFR 3280.103) intended to improve indoor air quality and remove moisture during cool dry periods can have the opposite effect during warm humid weather, with a resulting increase in humidity in the home and increased likelihood of mold growth." Id. at p. 18 (citations omitted)." MHARR, concluded that "information and analyses concerning these relationships will need to be developed by DOE as an essential aspect of – and precursor to – any rulemaking. The best and most efficient resource available to DOE to develop and assess such necessary information – with consensus-based legitimacy – is the MHCC. Therefore, DOE, as part of its mandatory consultation with HUD, should refer both this issue and the interrelationship of the DOE and HUD standards to the MHCC for review, development of pertinent information, analysis and appropriate recommendations." (Emphasis added). No substantive "consultation" with the MHCC occurred, however, until August 9, 2016, after both the proposed rule and DEA had been developed and published. Nevertheless, the MHCC, at its August 9, 2016 meeting, adopted comments stating that "DOE has not adequately addressed the potential health effects on indoor air quality that may result from several proposed measures to increase the tightness and thereby reduce natural air infiltration through the thermal envelope...."

[8] See, Attachment 2 to MHARR's August 8, 2016 NOPR comments at pp. 3-5.

Order 12866 -- was rejected by OMB/OIRA, and returned to DOE with a directive to "start over," as specifically sought by MHARR in its written comments.[9]

Apparently, though, this OMB/OIRA rejection has had no impact on DOE, as it has once again developed – and in this instance, published – a proposed manufactured housing energy standards rule without necessary information or informed consideration of its potential impacts on manufactured housing IAQ, the health of manufactured housing residents, or the effect of those matters on the cost of the proposed rule under the cost-benefit provision of EISA section 413 and other applicable law. Indeed, DOE admits in its DEA that:

> "[Various] factors and potentially others currently limit DOE's ability to analyze the potential impacts of the [proposed rule] on indoor air quality, including potential epidemiological (population-level) impacts to occupant health in this [DEA]. *** DOE has conducted a literature review and determined [that] specific data regarding the missing information is not available. In conjunction with [the] issuance of this [DEA] ... DOE is issuing a second RFI that seeks information to help it analyze potential impacts on indoor air quality."

See, DEA at p. 19. (Emphasis added). In requesting additional information, the DEA notes the correlation between IAQ, resident health effects and the potential need to increase mechanical ventilation requirements for manufactured homes under the HUD Code (i.e., 24 C.F.R. 3280.103(b)) as a consequence of the June 17, 2016 DOE proposed rule, but does not consider (or request information concerning) the potential cost impact of increasing those standards on the consumer-level costs of the proposed rule and its alleged life-cycle benefits.

This failure to consider or address a key substantive and cost issue prior to the development and publication of the June 17, 2016 proposed rule (as was the case with the 2011 DPR), raises two inter-related issues that necessarily undermine the legitimacy and viability of the pending rulemaking, such that the proposed rule should be withdrawn, as sought by MHARR in its comments on the June 17, 2016 proposed rule.

First, the development of a proposed rule prior to the receipt of relevant information and the development of a complete factual record turns the administrative process on its head. Courts have consistently stated that "it is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data." See e.g., Portland Cement Association v. Ruckelshaus, 486 F.2d 375, 393 (D.C. Cir. 1973). The June 30, 2016 request for additional data (like the 2013 RFI), per se demonstrates that the June 17, 2016 DOE proposed rule was not based on "adequate data" concerning a key issue raised by the proposed rule – i.e., its health impacts on manufactured housing residents and its cost impact, both in terms of the purchase price exclusion of potential homebuyers and the further extension of life-cycle payback periods posited by DOE

[9] This rejection and "start over" directive, consistent with the specific relief sought by MHARR in its 2013 RFI comments, were not disclosed by DOE until after the referral of the manufactured housing rulemaking to "negotiated rulemaking" under the auspices of DOE's Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC). At the initial August 5, 2014 meeting of the "negotiated rulemaking" MHWG, a DOE-OGC attorney, in response to an MHARR inquiry and request for disclosure of the 2011 DPR, acknowledged that the 2011 DPR had "been kicked back to DOE ... with the instructions to begin the process anew...." See, Attachment 16 to MHARR's August 8, 2016 NOPR comments.

in its alleged cost-benefit analysis of the June 17, 2016 proposed rule. In this regard, courts have held that agency action does not satisfy the "arbitrary, capricious or abuse of discretion" standard of the Administrative Procedure Act (5 U.S.C. 706) where the agency has "entirely failed" to consider an important aspect of the problem before it. See, e.g., O'Keeffe's, Inc. v. U.S. Consumer Product Safety Commission, 92 F.3d 940 (9th Cir. 1996).[10]

Second, this fundamental defect cannot be remedied by DOE consideration of RFI responses in connection with the publication of a final manufactured housing energy rule, because interested parties, under that scenario, would be denied the opportunity to challenge or address the validity of the information resulting from the DEA Request for Information – or DOE conclusions drawn therefrom – at a meaningful time in the rulemaking proceeding. Section 553 of the APA, governing agency rulemaking, requires that "interested persons" be provided an opportunity by the agency to "participate in the rulemaking through submission of written data, views, or arguments." Courts applying this mandate have consistently made it clear that the opportunity for interested persons to participate must come at a time when their comments could have a meaningful impact in the formulation of the agency action in question. The "opportunity for comment must be a meaningful opportunity," see, e.g., Rural Cellular Association v. Federal Communications Commission, 588 F.3d 1095, 1101 (D.C. Cir. 2009), not after-the-fact, when de facto agency decisions have already been made, as in this case.

In this matter, DOE (again) has already developed and published a proposed rule, meaning that both the Request for Information and any information received pursuant to the RFI are an afterthought to the agency's rule development process and that any information so obtained will not and cannot come at a "meaningful" stage in the proceedings where it will be properly considered by the agency. The development of a proposed rule first – and solicitation of relevant facts and data afterward -- necessarily deprives interested parties of the opportunity to participate in a meaningful manner and at a meaningful time, and would likely result in the agency either ignoring information inconsistent with its own preconceptions as reflected in the June 17, 2016 proposed rule, or "cherry-picking" any new data to support its preconceived conclusions. See, Solite Corp. v. EPA, 952 F.2d 473, 500 (D.C. Cir. 1991) ("There is no APA precedent allowing an agency to cherry-pick a study on which it has chosen to rely in part.")

[10] The specific nature of the mandatory cost-benefit analysis required by EISA section 413 is addressed in MHARR's August 8, 2016 comments on DOE's proposed rule at pp. 24-25. Additional costs resulting from the thermal envelope requirements of the June 17, 2016 DOE proposed rule could include, among other things: (1) additional consumer health costs resulting from IAQ-related illnesses; (2) additional consumer health insurance costs; (3) additional consumer costs related to condensation and condensation impacts on health and property; (5) additional purchase price costs resulting from increased mechanical ventilation; (6) additional numbers of consumers excluded from the manufactured housing market and homeownership altogether as a result of increased purchase prices; (7) a further decline in competition within the industry resulting from disproportionate regulatory impacts on smaller manufacturers; and (8) increased insurance and litigation costs for manufacturers, which would ultimately be passed to consumers.

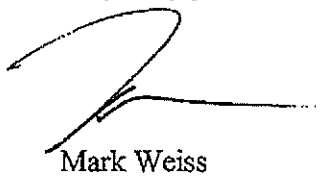
## III. CONCLUSION

In its headlong rush to publish the June 17, 2016 proposed rule and ultimately establish these standards through a final rule prior to the end of the current Administration, DOE has deliberately ignored critical health issues and very significant potential costs in the development of that rule under a statute which affirmatively requires that any resulting rule be cost-justified. In a flagrant example of "shooting first and asking questions later," DOE has published its proposed rule without a valid cost-benefit analysis, as explained in MHARR's August 8, 2016 comments, that is undermined even further by its total failure to consider the health and related cost implications of the proposed rule. This failure, moreover, is particularly egregious given the fact that MHARR, as early as its 2010 ANPR comments, highlighted this issue and the need to address IAQ and resident health effects resulting from any DOE alteration of the current, carefully-balanced HUD Code thermal standards. DOE, though, rather than address this matter with the seriousness and integrity that it deserves, is instead treating it as an afterthought, calling for additional information and input that – if received -- neither stakeholders or the general public will have an opportunity to properly vet and potentially challenge if, in fact, that information and/or input results in a final rule that differs from the June 17, 2016 proposed rule.

All of this, however, is fully consistent with the non-transparent and fundamentally-tainted nature of this rulemaking at DOE – a sham process has seriously prejudiced both the procedural and substantive rights of MHARR, its members and other affected stakeholders that were not party to – or part of – a consistent pattern of coordinated activity with favored "insiders" at the expense of consumers, smaller industry businesses and other non-"insider" stakeholders.

For all of the reasons set forth herein, as well as in MHARR's August 8, 2016 comments on the underlying DOE manufactured housing proposed energy rule, that rule should be withdrawn and DOE should undertake a valid, legitimate and credible rulemaking process -- starting over completely – as originally directed by OMB/OIRA.

Very truly yours,



Mark Weiss
President and CEO

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

Public Interest Comment[1] on

The Department of Energy's Proposed Rule

# Energy Conservation Standards for Manufactured Housing

Docket ID No. EERE-2009-BT-BC-0021
RIN: 1904-AC11

August 16, 2016

Sofie E. Miller, Senior Policy Analyst[2]

The George Washington University Regulatory Studies Center

The George Washington University Regulatory Studies Center improves regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the Department of Energy's (DOE or the Department) proposed rule establishing new energy efficiency standards for manufactured housing does not represent the views of any particular affected party or special interest, but is designed to evaluate the effect of DOE's proposal on overall consumer welfare, including effects on low-income and elderly Americans.

## Introduction

The Department of Energy's proposed rule would establish new energy efficiency standards for manufactured housing, formerly known as mobile homes. Although the Department of Housing and Urban Development (HUD) already issues efficiency standards for manufactured housing, the Energy Independence and Security Act of 2007 (EISA) requires DOE to issue its own energy

[1] This comment reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at http://regulatorystudies.columbian.gwu.edu/policy-research-integrity.

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efficiency standards for manufactured housing (MH). The statute requires DOE to issue standards that reflect the practices outlined in the current International Energy Conservation Code (IECC). The 2015 IECC is a consensus-based model code for buildings—including site-built residential homes, commercial buildings, and modular homes—published by the International Code Council.[3]

The IECC does not specifically apply to manufactured housing.[4] DOE is proposing certain modifications to the 2015 IECC to account for the HUD code requirements, dimension limitations, optimization of interior space, and construction techniques that are unique to manufactured homes. In this proposed rule, DOE is establishing energy efficiency standards for manufactured homes that largely comport with the current IECC standards for thermostats and controls, and heating and cooling equipment sizing. DOE is also proposing both prescriptive and performance-based U factors and R-values for single-section and multi-section manufactured homes in four distinct climate zones that represent regions with differing climates throughout the U.S. The standards that DOE proposes would increase the price of manufactured homes in exchange for reduced long-term operating costs, primarily reductions in heating costs.

DOE estimates that the standards will save most manufactured homeowners money, in addition to reducing site emissions of carbon dioxide ($CO_2$), nitric oxide and nitrogen dioxide ($NO_X$), sulfur dioxide ($SO_2$), methane ($CH_4$), and nitrous oxide ($N_2O$). DOE also estimates that, by reducing demand, the standards will reduce upstream emissions from energy production, extraction, processing, and transportation.[5]

This comment makes three distinct points:

- DOE may be overestimating the benefits of its proposal by disregarding average MH tenant occupancy and resale market obstacles that prevent MH owners from recouping higher upfront costs from increased efficiency. Taking these factors into account suggests that a significant portion of the purchasers of single-section and multi-section manufactured homes will bear net costs instead of benefits.

- Within Climate Zones 1 and 2, the higher costs of DOE's proposal are less likely to provide compensating benefits in the form of reduced heating costs. These areas have relatively higher poverty rates, so that distributive impacts are important to consider as DOE finalizes efficiency standards for manufactured homes.

[3] International Code Council. http://www.iccsafe.org/
[4] 81 FR 39766
[5] 81 FR 39759

- DOE should commit to retrospectively reviewing its standard to ensure there is no conflict or overlap with existing HUD regulations and to evaluate the rule's effects on competition within the MH market and the availability of affordable housing.

## Regulatory Analysis

### Resale Obstacles Shorten Manufactured Home Lifetimes

DOE calculates large lifecycle cost savings for manufactured home owners using a 30-year MH lifetime.[6] However, these estimates may not represent actual cost savings to MH owners, who live in their manufactured homes for approximately 13 years on average, according to a recent report by the Consumer Financial Protection Bureau (CFPB).[7] Although this statistic is for owners who live in manufactured home communities, which does not represent the entire market of MH owners, it is consistent with the median and average homeowner tenure in the site-built home market, which the Board of Governors of the Federal Reserve System estimates at 12 and 15 years respectively.[8]

Typically, we can assume that higher upfront costs are recouped by homeowners when they resell their homes. However, the manufactured housing resale market faces many obstacles that may make it difficult for owners to resell their unit at all, much less recoup increased unit costs. For example, second-hand buyers have difficulty financing resold manufactured homes because lenders often charge a much higher interest rate on used MH units than new ones.[9] In addition, literature reviews and independent regression analyses indicate that manufactured homes are statistically much more likely to depreciate over time than site-built homes, particularly for MH owners who do not own their own land.[10] As a result, owned manufactured homes tend to have a very high loan-to-value ratio.[11] As Consumer Union reported in 2003, before the initiation of the financial crisis, this depreciation can cause MH owners to bypass resale markets completely:

> Investors are concerned because depreciation leads to higher repossession rates as homeowners who find themselves underwater in a loan (owing more than the home is worth) simply walk away from the deal, leaving their home and credit

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6 81 FR 39783

7 Consumer Financial Protection Bureau. *Manufactured-housing consumer finance in the United States*. September 2014. http://files.consumerfinance.gov/f/201409_cfpb_report_manufactured-housing.pdf

8 Board of Governors of the Federal Reserve System. *Report on the Economic Well-Being of U.S. Households in 2014. May 2015*. Page 12. http://www.federalreserve.gov/econresdata/2014-report-economic-well-being-us-households-201505.pdf

9 Kevin Jewell. "Manufactured Housing Appreciation: Stereotypes and Data." *Consumers Union, Southwest Regional Office*. May 2003. Page 6. http://consumersunion.org/pdf/mh/Appreciation.pdf

10 Kevin Jewell. "Manufactured Housing Appreciation: Stereotypes and Data." *Consumers Union, Southwest Regional Office*. May 2003. http://consumersunion.org/pdf/mh/Appreciation.pdf

11 Kathy Mitchell. "In Over Our Heads." *Consumers Union, Southwest Regional Office*. Public Policy Series, Vol. 5, No. 1, February 2002.

> behind. Newspaper classifieds are littered with ads for "abandoned" mobile homes.[12]

For all of these reasons, the lifespan of certain manufactured homes may only be as long as average tenure for consumers who do not own the land on which their homes are sited. According to 2011 data, the CFPB reported that approximately 40% of MH owners don't own land;[13] however, in 2013, only 14% of new manufactured homes were listed as "real property,"[14] which may indicate that the number of MH owners who own their land may be decreasing over time. If so, the lifespan may be much shorter for many MH owners than DOE estimates, and use of a 30-year analysis would overstate payback to many MH owners who do not own the land on which their home is sited.

DOE's analysis included separate calculations of net costs and benefits for a 10-year lifetime, which better approximates average MH owner tenure. Notably, this analysis indicates much smaller benefits for affected consumers, and also indicates that some groups (including low-income MH owners) will bear net costs.[15] An analysis that reflects that MH lifespans may be much shorter than DOE assumes would better reflect the actual costs and benefits to consumers of DOE's proposed standards. The current 30-year analysis estimates large benefits by essentially doubling the realistic amount of time that a MH unit is used and disregards the difficulty that is entailed in recouping higher upfront costs via resale.

## Discounting Regulatory Benefits

Following federal analytical guidelines, DOE discounts future energy savings to compare them with the upfront costs of the proposed standards. This well-established practice allows DOE to compare costs and benefits that occur in different time periods using a common unit of measurement to evaluate the net effects of the requirement. As a result of this calculation, DOE found that:

> Although DOE preliminarily has determined that the proposed standards would result in increased purchase prices of manufactured homes, manufactured

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[12] Kevin Jewell. "Manufactured Housing Appreciation: Stereotypes and Data." *Consumers Union, Southwest Regional Office*. May 2003. Page 4. http://consumersunion.org/pdf/mh/Appreciation.pdf

[13] Consumer Financial Protection Bureau. *Manufactured-housing consumer finance in the United States*. September 2014. Page 24. http://files.consumerfinance.gov/f/201409_cfpb_report_manufactured-housing.pdf

[14] Tim Parker. "Are Mortgages Available For Mobile Homes?" *Investopedia.com*. March 31, 2015. http://www.investopedia.com/articles/personal-finance/033115/are-mortgages-available-mobile-homes.asp

[15] Department of Energy. "Table 9.2 10-Year Analysis Period Total Cost of Ownership Savings of the Proposed Rule Compared to the HUD Code for Personal Property Loans." *Technical Support Document for the U.S. Department of Energy's Notice of Proposed Rulemaking Establishing Energy Conservation Standards for Manufactured Housing*. Pages 9.62-3.

> homeowners, on average, would realize significant LCC [life cycle cost] savings and energy savings as a result of the proposed rule.[16]

As noted above, these large life cycle cost savings may not represent actual usage cases because they are calculated using a 30-year analysis, which more than doubles the amount of time that many MH units are used. However, these estimates are further complicated by the discount rate used in these analyses.

In its technical support document (TSD), DOE describes a range of appropriate discount rates given the market characteristics of MH financing. To calculate the LCC of efficient manufactured homes, DOE used a nominal discount rate of 9% for buyers who finance via chattel loans (i.e., personal property loans, like a car loan), and 5% for buyers who financed using real estate loans.[17] For reference, both DOE and CFPB conclude that approximately 78 – 79% of MH buyers finance their purchase via chattel loans,[18] indicating that the vast majority of buyers finance at a relatively higher interest rate. Rates on chattel loans range from 7 – 13%,[19] which suggests a higher upper bound on nominal discount rates than DOE assumed in its TSD.

DOE reports the benefits and costs of its standards in the preamble of its rule, separate from the LCC analysis in the TSD. Despite the range of plausible discount rates derived from consumer financing costs, DOE discounts the benefits and costs in its preamble only at 3% and 7% (real). However, use of the more realistic discount rates discussed above reflects a much lower benefit to consumers than DOE includes in its proposed rule.

## Life Cycle Cost Analysis

A life cycle cost analysis that uses discount rates derived from actual financing rates shows net costs for MH owners in many regions when combined with the potentially shorter MH lifespan discussed in the section above. For this comment we conducted an LCC analysis using the upfront price increases for single- and multi-section manufactured homes[20] and annual cost savings for single- and multi-section manufactured homes in 2015$ by city and by climate zone

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[16] 81 FR 39784

[17] Department of Energy. *Technical Support Document for the U.S. Department of Energy's Notice of Proposed Rulemaking Establishing Energy Conservation Standards for Manufactured Housing*. Chapter 8

[18] Department of Energy. *Technical Support Document for the U.S. Department of Energy's Notice of Proposed Rulemaking Establishing Energy Conservation Standards for Manufactured Housing*. Page 8.52.
See also: Consumer Financial Protection Bureau. *Manufactured-housing consumer finance in the United States*. September 2014. http://files.consumerfinance.gov/f/201409_cfpb_report_manufactured-housing.pdf

[19] Paola Iuspa. "Refinancing mobile home loan at lower rate." Bankrate.com. http://www.bankrate.com/finance/refinance/refinancing-mobile-home-loan.aspx

[20] Upfront manufactured home price increases were derived from: Department of Energy. "Table 8.1 Total Incremental Purchase Price of Manufactured Homes Under the Proposed Standard Over the HUD Code." *Technical Support Document for the U.S. Department of Energy's Notice of Proposed Rulemaking Establishing Energy Conservation Standards for Manufactured Housing*. Page 8.51

from DOE's TSD.[21] It used discount rates cited by DOE and external literature on chattel loan rates, and included 5%, 9%, and 13% adjusted for inflation.[22]

Our own LCC analysis using these inputs finds that consumers throughout Climate Zone 1 would bear net costs as a result of the proposed standards, including net costs for both single-section and multi-section manufactured homeowners in Miami and Houston. MH owners in Miami will be especially hard-hit by the proposed standards, where both single-section and multi-section buyers are likely to bear net costs at rates as low as 6%. Buyers of single-section and multi-section manufactured homes in Houston will see net costs at real discount rates above 10%.

In Climate Zone 2, single-section and multi-section MH buyers in Charleston, South Carolina could bear net costs. In Climate Zone 3, both single-section and multi-section MH owners in San Francisco would bear net costs, along with Salem, Massachusetts and Boise, Idaho in Climate Zone 4. The cities where consumers are anticipated to bear net costs represent 28.5% of all shipments of single-section manufactured homes and 35.1% of all shipments of multi-section manufactured homes, a large market share of manufactured home buyers. The table below highlights the cities where buyers will face net costs as a result of the rule and each city's associated percentage of national market share.

**Percent of National Shipments Allocated to the 19 Cities for Single-Section and Multi-Section Manufactured Homes**

| City | Single Section Shipments | Multi-Section Shipments |
|---|---|---|
| **Miami** | 4.2% | 8.6% |
| **Houston** | 19.2% | 12.1% |
| **Phoenix** | 0.6% | 1.2% |
| **Atlanta** | 1.2% | 2.4% |
| **Charleston, SC** | 2.7% | 3.7% |
| **Jackson, MS** | 7.7% | 5.3% |
| **Birmingham, AL** | 3.6% | 4.0% |
| **Memphis, TN** | 5.6% | 7.0% |
| **El Paso, TX** | 16.7% | 11.6% |
| **San Francisco** | 0.9% | 6.8% |
| **Baltimore** | 7.1% | 8.1% |
| **Albuquerque, NM** | 2.2% | 2.9% |
| **Salem, OR** | 0.9% | 3.9% |

[21] Annual cost savings were derived from: Department of Energy. "Table 8.5 Annual Energy Cost Savings Associated with the Proposed Rule Over the HUD Code." *Technical Support Document for the U.S. Department of Energy's Notice of Proposed Rulemaking Establishing Energy Conservation Standards for Manufactured Housing*. Page 8.57

[22] These discount rates were converted from nominal to real rates (e.g. assuming future inflation) to discount annual energy savings measured by DOE in 2015$ (e.g. both assuming and adjusting for future inflation).

| | | |
|---|---|---|
| **Chicago** | 13.3% | 10.3% |
| **Boise, ID** | 0.6% | 1.6% |
| **Burlington, VT** | 5.9% | 6.5% |
| **Helena, MT** | 3.0% | 1.6% |
| **Duluth, MN** | 4.3% | 2.5% |
| **Fairbanks, AK** | 0.1% | 0.02% |
| **Total Market of Net Cost Regions** | **28.5%** | **35.1%** |

These net costs affect a large market share of manufactured homes. As DOE's TSD analysis further suggests, benefits will be smaller still for low-income manufactured home buyers,[23] who generally finance via higher-rate chattel loans and represent a large portion of all MH buyers/owners.[24]

## Standard Fails Statutory Cost-Effectiveness Requirement

As mentioned previously in this comment, DOE is required by statute to issue energy efficiency standards for manufactured housing that reflects the current International Energy Conservation Code (IECC). However, DOE may deviate from the IECC if it finds that such standards would not be cost-effective:

> The statutory authority for this rulemaking requires DOE to base its standards on the most recent version of the IECC and any supplements to that document, except where DOE finds that the IECC is not cost-effective or where a more stringent standard would be more cost-effective, based on the impact of the IECC on the purchase price of manufactured housing and on total lifecycle construction and operating costs.[25]

As referenced above, this assessment of cost-effectiveness includes consideration of life cycle cost. The data provided in this comment, which relies on DOE's input parameters and external literature on the markets for manufactured housing, suggest that the proposed standard does not meet this statutory threshold for cost effectiveness.

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[23] Department of Energy. "Life-Cycle Cost Subgroup Analysis." *Technical Support Document for the U.S. Department of Energy's Notice of Proposed Rulemaking Establishing Energy Conservation Standards for Manufactured Housing*. Chapter 9.

[24] Consumer Financial Protection Bureau. *Manufactured-housing consumer finance in the United States*. September 2014. http://files.consumerfinance.gov/f/201409_cfpb_report_manufactured-housing.pdf

[25] 81 FR 39762

## Distributional Effects

The Department took a step in the right direction by analyzing the effects of its proposed standards on low-income households,[26] who are more likely to own manufactured homes than other income groups. In DOE's preamble, some commenters note that there is already a range of energy efficiency among manufactured homes on the market; however, the higher cost of these more efficient units makes them inaccessible to many potential customers.[27] It does not require extensive analysis to conclude that mandatory, across-the-board increases in efficiency will price many low-income consumers out of the market for manufactured homes entirely.

The anticipated price increases are largest in Climate Zones 1 and 2,[28] which include Louisiana, Alabama, Mississippi, Florida, South Carolina, and parts of Texas and Arizona. According to our life cycle analysis, even in southern cities that do not bear net costs the overall benefits are very small, such as in Birmingham, Atlanta, and Jackson where consumers stand to save as little as $14 over the lifetime of their manufactured home. Because the largest cost savings from these standards are associated with heating costs,[29] the anticipated cost savings are largest for Climate Zone 4, which includes 28 states in cooler climates to the north. The regional distribution of effects means the Southern states will bear the highest costs. This is particularly important because the South has emphasized manufactured housing as a means to increase homeownership,[30] and because DOE's shipment data indicate that a significant portion (e.g. ~40%) of MH shipments are to regions in Climate Zones 1 and 2.

This may be problematic from a distributional standpoint because poverty rates are much higher in Climate Zones 1 and 2 where consumers are likely to bear higher costs, according to DOE's analysis. Based on additional analysis in this comment, consumers are likely to bear net costs in Miami, Houston, and Charleston, where poverty rates are 29.9%, 22.9%, and 19% respectively. (For reference, the national poverty rate is 14.8%.)[31] As noted above, overall benefits are very small in Birmingham, Atlanta, and Jackson, where poverty rates are 31%, 25.2%, and 29.9%, respectively. For comparison, the following maps display DOE's proposed climate zones and the corresponding poverty rates in those areas.

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[26] Department of Energy. "Life-Cycle Cost Subgroup Analysis." *Technical Support Document for the U.S. Department of Energy's Notice of Proposed Rulemaking Establishing Energy Conservation Standards for Manufactured Housing*. Chapter 9.

[27] 81 FR 39763

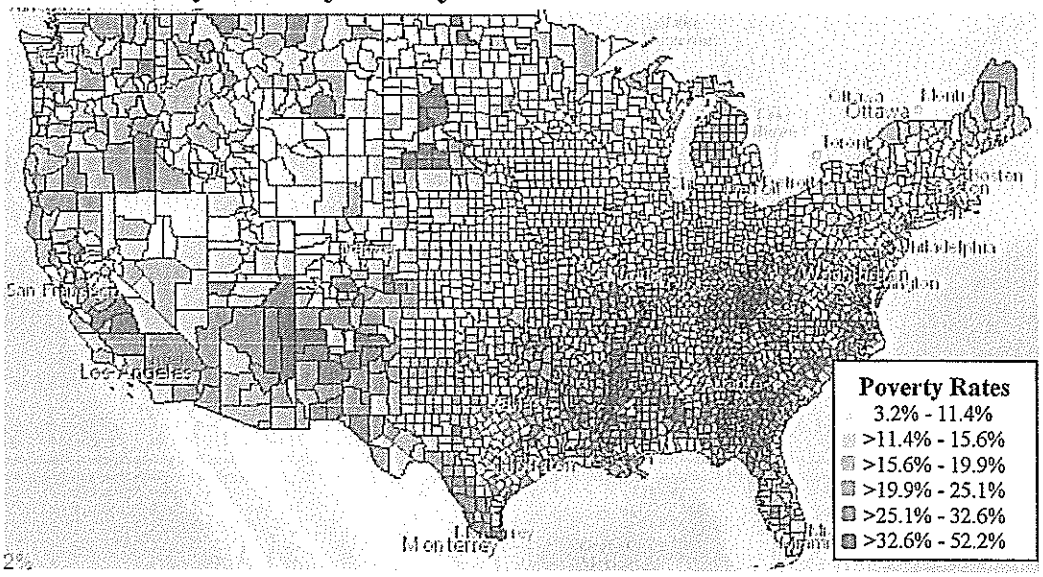
[28] 81 FR 39783-4, *Table IV.1—Average Manufactured Home Purchase Price and Percentage Increases Under the Proposed Rule by Climate Zone.*

[29] 81 FR 39784

[30] U.S. Census Bureau. "Manufactured Housing." 2002.

[31] U.S. Census Bureau, "Income and Poverty in the United States: 2014." September 2015. http://www.census.gov/library/publications/2015/demo/p60-252.html

## Map of U.S. Poverty Rates by County




Source: United States Census Bureau. *Small Area Income Poverty Estimates*. "2014 All Ages in Poverty."

## Map of DOE's Proposed Climate Zones

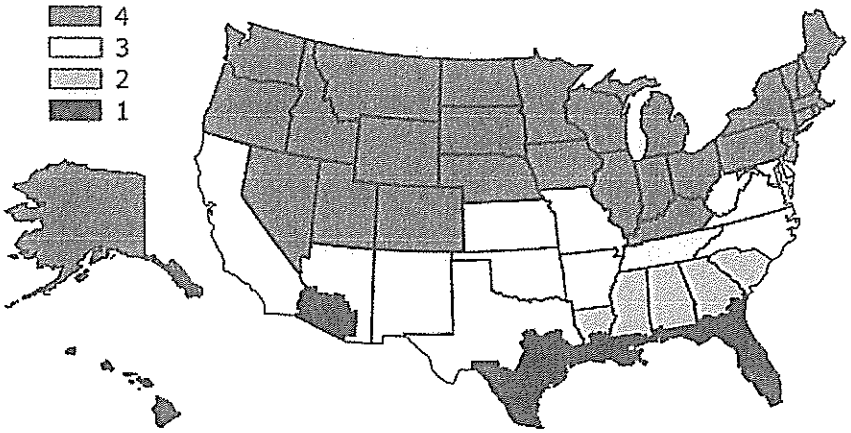



**Figure 7.3 Proposed Climate Zone Map**

Source: U.S. Department of Energy. *Technical Support Document for the U.S. Department of Energy's Notice of Proposed Rulemaking Establishing Energy Conservation Standards for Manufactured Housing.*

In 2011, President Obama signed Executive Order 13563, which makes particular mention of considering equity and distributive impacts when issuing regulations:

> Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.[32]

[32] Executive Order 13563 §1(c). "Improving Regulation and Regulatory Review." January 18, 2011.

In light of this information, DOE may want to consider the distributive impacts of its proposal and the effects on equity, human dignity, and fairness, particularly since the proposal would have a regressive impact on low-income consumers in high-poverty regions.

## Effect on Competition

Regulations have a significant influence on marketplace competition, which affects the options available to consumers and the quality of products in the marketplace.[33] Recognizing the importance of this relationship, on April 15th of this year President Barack Obama signed an Executive Order instructing federal agencies to identify and address barriers to competition. According to that Executive Order:

> Promoting competitive markets and ensuring that consumers and workers have access to the information needed to make informed choices must be a shared priority across the Federal Government. Executive departments and agencies can contribute to these goals through, among other things, pro-competitive rulemaking and regulations, and by eliminating regulations that create barriers to or limit competition.[34]

The Department would benefit from giving due consideration to the effects of its proposed rule on competition in the manufactured housing market, particularly since the primary consumers of manufactured homes are low-income[35] and elderly households.[36]

The proposed standards were developed through recommendations and a negotiated consensus from the manufactured housing working group, comprised of 20 stakeholders and two representatives from DOE and the Appliance Standards and Rulemaking Federal Advisory Committee.[37] Forty percent of the stakeholders were affiliated with the Manufactured Housing Institute, a trade association that represents some MH manufacturers. Other stakeholders have

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[33] Miller, Pérez, Dudley, & Mannix. "Regulatory Reforms to Enhance Competition: Recommendations for Implementing Executive Order 13725." *The George Washington University Regulatory Studies Center*. May 11, 2016.

[34] Executive Order 13725. "Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy." April 15, 2016. Available at: https://www.whitehouse.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers

[35] Consumer Financial Protection Bureau. *Manufactured-housing consumer finance in the United States*. September 2014. http://files.consumerfinance.gov/f/201409_cfpb_report_manufactured-housing.pdf

[36] Robert W. Wilden. "Manufactured Housing And Its Impact on Seniors." *Prepared for the Commission on Affordable Housing and Health Facility Needs for Seniors in the 21st Century*. February 2002. http://govinfo.library.unt.edu/seniorscommission/pages/final_report/g5.pdf

[37] 79 FR 41456-7
For more information on the Appliance Standards and Rulemaking Federal Advisory Committee, see: http://energy.gov/eere/buildings/appliance-standards-and-rulemaking-federal-advisory-committee

raised concerns that the Manufactured Housing Institute is using the negotiated rulemaking process to push competitors out of the market.[38]

DOE is required by statute to consider "the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard" before finalizing an efficiency standard.[39] This evaluation is typically conducted by the Department of Justice (DOJ); however, DOE does not reference DOJ's competition analysis in its proposed rule, and we could not locate DOJ's competition analysis in the docket.

Due to the concerns about potential anti-competitive effects, and due to President Obama's recent Executive Order 13725, DOE should pay particular attention to the prospective effects of its proposed rule on competition within the MH market.

## Retrospective Review

### Potential for Conflicting Standards

DOE is attempting to ensure that its proposed standards will not conflict with the standards for manufactured housing issued by HUD:

> DOE's intention in proposing energy conservation standards for manufactured homes is that, if finalized, there would be no conflict between the proposed requirements and the construction and safety standards for manufactured homes as established by HUD.[40]

Although much thought has gone into resolving any potential conflicts early in the rulemaking process, DOE might consider whether to commit to retrospectively reviewing its rule after implementation to assess any potential overlap or conflicts between the two standards.

### Effect on Manufactured Home Ownership

The Federal government has identified increasing MH ownership as a means to expand affordable housing options, especially in rural areas and in the South.[41] This goal has been

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[38] See the Manufactured Housing Association for Regulatory Reform, "DOE Publishes Destructive MH "ENERGY" Rule – Schemes To Blunt Growing Opposition." June 20, 2016. "Thus, the industry's largest corporate conglomerates – and their national representative MHI – have not only "gone along" with DOE, but appear to have worked publicly and behind the scenes to advance government action that will disproportionately harm smaller competitors. This, together with a level of industry domination that either does—or will—exceed half the national manufactured housing market, raises antitrust questions that should and will be explored further." http://www.mhmarketingsalesmanagement.com/latest-news-from-mharr/11731-doe-publishes-destructive-mh-energy-rule--schemes-to-blunt-growing-opposition

[39] 42 U.S.C. 6295(o)(2)(B)(i)(V). http://www.gpo.gov/fdsys/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap77-subchapIII-partA-sec6295.pdf

[40] 81 FR 39780

[41] Maria I. Marshall & Thomas L. Marsh. "Consumer and investment demand for manufactured housing units." *Journal of Housing Economics*. Vol. 6 Issue 1, March 2007.

furthered by HUD, which, pursuant to the 2000 Manufactured Housing Improvement Act, is responsible for facilitating the availability of affordable manufactured homes.[42] Because DOE's proposed rule will make manufactured homes less affordable and price some customers out of the MH market, the Department may want to revisit the effect of its energy efficiency standards on the federal government's goal to increase the availability of affordable housing.

## Conclusion

Because this proposed standard would overwhelmingly affect low-income households and elderly households, DOE should take special care to evaluate the distributive impacts of its rule and any potential regressive effects. Specifically, DOE may be overestimating the benefits of its proposal by disregarding resale market obstacles that prevent MH owners from recouping higher upfront costs from increased efficiency. These obstacles greatly reduce the lifetime to manufactured homes for some occupants and suggest that a significant portion of the purchasers of single-section and multi-section manufactured homes will bear net costs instead of benefits. Many of those who bear net costs are low-income households who are likely borrowing at higher rates to finance the purchase of their manufactured home.

There is already a range of energy efficiency among manufactured homes on the market, and as previous commenters have noted, the higher cost of more efficient units makes them inaccessible to many potential customers. It follows that mandatory, across-the-board increases in efficiency will price many low-income consumers out of the market for manufactured homes entirely. This will have two effects: the first is a negative distributional effect on MH owners, particularly low-income and elderly households, in the Southern U.S. The second is to counter the federal government's existing goal to increase homeownership and the accessibility of affordable housing.

The price increases that DOE projects as a result of its rule are largest in Climate Zones 1 and 2, where the costs of the standards are less likely to provide compensating benefits in the form of reduced heating costs. The regional distribution of effects means the Southern states will bear the highest costs. This is particularly important because the South has emphasized manufactured housing as a means to increase homeownership and a significant portion of manufactured homes are purchased in Climate Zones 1 and 2. The regions in these Climate Zones also have relatively higher poverty rates, so that distributive impacts are important to consider as DOE finalizes efficiency standards for manufactured homes.

[42] U.S. Government Accountability Office. *MANUFACTURED HOUSING: Efforts Needed to Enhance Program Effectiveness and Ensure Funding Stability.* GAO-14-410. July 2014. http://gao.gov/assets/670/664632.pdf

**Manufactured Housing Association for Regulatory Reform**

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April 26, 2017

VIA FEDERAL EXPRESS

Hon. Rick Perry
Secretary
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Re: Energy Efficiency Standards for Manufactured Housing
Docket No. EERE-2009-BT-BC-0021 – RIN 1904-AC11

Dear Secretary Perry:

I am writing in reference to proposed "energy efficiency" standards for manufactured homes published by the U.S. Department of Energy (DOE) on June 17, 2016.[1] On behalf of its members – smaller and medium-sized independent producers of manufactured housing subject to comprehensive regulation by the U.S. Department of Housing and Urban Development (HUD) pursuant to the National Manufactured Housing Construction and Safety Standards Act, 42 U.S.C. 5401, et seq. (as amended) – MHARR, on August 8, 2016, submitted written comments to DOE, strenuously objecting to this proposed rule,[2] as, among other things, a baseless, regressive tax on the mostly lower and moderate-income American families that rely on affordable manufactured housing, and a significant, unwarranted and discriminatory burden on the uniquely American manufactured housing industry, which provides inherently affordable, non-subsidized housing for millions of Americans and thousands of much-needed manufactured jobs across the nation's heartland. Subsequently, MHARR wrote to you on March 10, 2017,[3] calling for the withdrawal of this fatally-flawed proposed rule,[4] which stands in direct conflict with the core values enunciated in President Trump's regulatory Executive Orders (EO) 13771 ("Reducing Regulation and Controlling Regulatory Costs") (January 30, 2017) and 13777 ("Enforcing the Regulatory Reform

[1] See, 81 Federal Register, No. 117 at p. 39756, et seq.
[2] See, Attachment A, hereto.
[3] See, Attachment B, hereto.
[4] MHARR's written comments detail – with specific evidence – the irretrievably tainted, non-transparent and fatally defective DOE rulemaking process that led to this proposed rule. See, Attachment A, hereto at pp. 3-21.

Agenda") (February 24, 2017), and the broader regulatory reform policies of the Trump Administration.[5]

In its written comments opposing the DOE proposed rule, MHARR pointed-out multiple fatal deficiencies in the DOE cost-benefit analysis required by statute[6] (as well as Executive Order 12866 insofar as the proposed rule was deemed a "major rule" by the Office of Management and Budget (OMB)), including:

1. Its total failure to quantify or account for testing, enforcement and regulatory compliance costs;[7]

2. Its total failure to account for the individual, industry and national-level economic impact of the exclusion of millions of lower and moderate-income Americans from home ownership due to costs attributable to the rule;[8]

3. Its total failure to quantify or certify the impact of unique and disproportionate costs of the proposed rule on smaller industry businesses;[9]

4. Its total failure to quantify or account for the disruptive industry impact of successive standards changes under the proposed rule;[10] and

5. Its unlawful netting of partial domestic costs against monetized "global" environmental benefits pursuant to the Obama Administration "Social Cost of Carbon" (SCC) construct in violation of OMB Circular A-4, "Regulatory Analysis."[11]

MHARR specifically objected to DOE's use of the Obama Administration's SCC construct to derive alleged national-level "environmental benefits" flowing from the proposed rule as a result of supposedly "reduced emissions of air pollutants and greenhouse gasses associated with electricity production."[12] In part, MHARR stated:

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[5] MHARR has also called on Congress to reject this rule pursuant to the Congressional Review Act of 1996 in the event that it is not voluntarily withdrawn by DOE and is ultimately promulgated as a final rule. (See, Attachment C, hereto).

[6] Section 413 of the Energy Security and Independence Act of 2007 (EISA) authorizes the development of energy efficiency standards based "on the most recent version of the International Energy Conservation Code (including supplements), except in cases in which the Secretary finds that code is not cost effective ... based on the impact of the code on the purchase price of manufactured housing and on ... total life-cycle construction and operating costs." (Emphasis added).

[7] See, Attachment A, hereto at pp. 26-28.

[8] Id. at pp. 28-30

[9] Id. at pp. 30, 33-35. See also, August 16, 2016 comments submitted on by the U.S. Small Business Administration (SBA) Office of Advocacy at p. 2: "DOE has not quantified nor described the economic impact of its proposed rule on small manufacturers."

[10] Id. at p. 31.

[11] Id. at pp. 32-33.

[12] See, 81 Federal Register, No. 117, supra at pp. 39790-39792.

> "DOE admits that alleged SCC benefits are 'uncertain' and 'should be treated as revisable.' Thus DOE attributes 'benefits' to the proposed rule based on metrics acknowledged to be 'uncertain,' while it totally ignores predictable consumer, industry and national level costs of the proposed rule, which it totally ignores, thus over-inflating the alleged benefits of the proposed rule with junk science while significantly understating its costs. Indeed, while DOE exhibits great concern over the global 'social costs' of carbon, it apparently could care less about the domestic social cost of millions of Americans who would be excluded from the benefits of homeownership under its rule, as it makes no effort whatsoever to quantify or consider those costs, which would be enormous. *** Given each of these fatal defects in the utilization of arbitrary and speculative SCC values – and the other fundamental analytical and data failures of the June 17, 2016 DOE cost-benefit analysis, that 'analysis' is factually worthless and insufficient to meet the substantive requirements of EISA section 413 and the [Administrative Procedure Act]."

(Footnotes omitted).[13]

Now, though, beyond these multiple fatal defects, Section 5 of Executive Order 13783, "Promoting Energy Independence and Economic Growth" (March 28, 2017),[14] expressly states that the November 2013 SCC Technical Update relied-upon by DOE in support of the June 17, 2016 proposed manufactured housing rule,[15]is "withdrawn as no longer representative of [federal] government policy." (Emphasis added). In addition EO 13783 expressly disbands the "inter-agency working group" that developed the SCC and its various updates and iterations.

Insofar as DOE concluded – incorrectly – based on the now-invalidated SCC construct, that national-level environmental and related economic benefits would accrue under the proposed rule leading, in substantial part, to its broader conclusion that alleged benefits of the proposed rule would exceed its alleged costs, its purported cost-benefit analysis (as affirmatively required by EISA) has been fundamentally undermined and invalidated. For this reason, as well as the other and additional reasons set forth in MHARR's comments, pertaining to the fatal deficiencies not only of DOE's alleged cost-benefit analysis, but other fundamental aspects of its standards-

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[13] See, Attachment B, hereto at pp. 32-33.

[14] See, Attachment D, hereto

[15] See, 81 Federal Register, No. 117, supra at p. 39791 at n. 14.

development process in this matter, its June 17, 2016 proposed rule herein should be withdrawn in toto, as lacking any substantive basis, or demonstrable benefits exceeding its significant known and predictable costs.

MHARR, therefore, calls upon you to retract this proposed rule and to refrain from any further rulemaking activity concerning this matter pending further guidance from either Congress or the President.

Furthermore, given the urgency of this matter, we will contact your office soon to arrange a meeting to address this baseless regulatory assault on affordable housing and working Americans.

Thank you.

Sincerely,

Mark Weiss
President and CEO

cc: Hon. Mick Mulvaney
Hon. Lisa Murkowski
Hon. Maria Cantwell
Hon. Greg Walden
Hon. Frank Pallone
HUD Code Industry Members

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**The White House**

Office of the Press Secretary

For Immediate Release March 28, 2017

# Presidential Executive Order on Promoting Energy Independence and Economic Growth

EXECUTIVE ORDER

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PROMOTING ENERGY INDEPENDENCE AND ECONOMIC GROWTH

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. (a) It is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation. Moreover, the prudent development of these

natural resources is essential to ensuring the Nation's geopolitical security.

(b) It is further in the national interest to ensure that the Nation's electricity is affordable, reliable, safe, secure, and clean, and that it can be produced from coal, natural gas, nuclear material, flowing water, and other domestic sources, including renewable sources.

(c) Accordingly, it is the policy of the United States that executive departments and agencies (agencies) immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.

(d) It further is the policy of the United States that, to the extent permitted by law, all agencies should take appropriate actions to promote clean air and clean water for the American people, while also respecting the proper roles of the Congress and the States concerning these matters in our constitutional republic.

(e) It is also the policy of the United States that necessary and appropriate environmental regulations comply with the law, are of greater benefit than cost, when permissible, achieve environmental improvements for the American people, and are developed through transparent processes that employ the best available peer-reviewed science and economics.

Sec. 2. Immediate Review of All Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources. (a) The heads of agencies shall review all existing regulations, orders, guidance documents, policies, and any other similar agency actions

(collectively, agency actions) that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. Such review shall not include agency actions that are mandated by law, necessary for the public interest, and consistent with the policy set forth in section 1 of this order.

(b) For purposes of this order, "burden" means to unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources.

(c) Within 45 days of the date of this order, the head of each agency with agency actions described in subsection (a) of this section shall develop and submit to the Director of the Office of Management and Budget (OMB Director) a plan to carry out the review required by subsection (a) of this section. The plans shall also be sent to the Vice President, the Assistant to the President for Economic Policy, the Assistant to the President for Domestic Policy, and the Chair of the Council on Environmental Quality. The head of any agency who determines that such agency does not have agency actions described in subsection (a) of this section shall submit to the OMB Director a written statement to that effect and, absent a determination by the OMB Director that such agency does have agency actions described in subsection (a) of this section, shall have no further responsibilities under this section.

(d) Within 120 days of the date of this order, the head of each agency shall submit a draft final report detailing the agency actions described in subsection (a) of this section to the Vice President, the OMB Director, the Assistant to the President for Economic Policy, the Assistant to the President for Domestic Policy, and the Chair of the Council on Environmental Quality. The report shall include specific recommendations that, to the extent permitted by law, could alleviate or eliminate aspects of agency actions

that burden domestic energy production.

(e) The report shall be finalized within 180 days of the date of this order, unless the OMB Director, in consultation with the other officials who receive the draft final reports, extends that deadline.

(f) The OMB Director, in consultation with the Assistant to the President for Economic Policy, shall be responsible for coordinating the recommended actions included in the agency final reports within the Executive Office of the President.

(g) With respect to any agency action for which specific recommendations are made in a final report pursuant to subsection (e) of this section, the head of the relevant agency shall, as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding, those actions, as appropriate and consistent with law. Agencies shall endeavor to coordinate such regulatory reforms with their activities undertaken in compliance with Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs).

Sec. 3. Rescission of Certain Energy and Climate-Related Presidential and Regulatory Actions. (a) The following Presidential actions are hereby revoked:

(i) Executive Order 13653 of November 1, 2013 (Preparing the United States for the Impacts of Climate Change);

(ii) The Presidential Memorandum of June 25, 2013 (Power Sector Carbon Pollution Standards);

(iii) The Presidential Memorandum of November 3, 2015 (Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment); and

(iv) The Presidential Memorandum of September 21, 2016 (Climate Change and National Security).

(b) The following reports shall be rescinded:

(i) The Report of the Executive Office of the President of June 2013 (The President's Climate Action Plan); and

(ii) The Report of the Executive Office of the President of March 2014 (Climate Action Plan Strategy to Reduce Methane Emissions).

(c) The Council on Environmental Quality shall rescind its final guidance entitled "Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews," which is referred to in "Notice of Availability," 81 Fed. Reg. 51866 (August 5, 2016).

(d) The heads of all agencies shall identify existing agency actions related to or arising from the Presidential actions listed in subsection (a) of this section, the reports listed in subsection (b) of this section, or the final guidance listed in subsection (c) of this section. Each agency shall, as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding any such actions, as appropriate and consistent with law and with the policies set forth in section 1 of this order.

Sec. 4. Review of the Environmental Protection Agency's "Clean Power Plan" and Related Rules and Agency Actions. (a) The Administrator of the Environmental Protection Agency (Administrator) shall immediately take all steps necessary to review the final rules set forth in subsections (b)(i) and (b)(ii) of this section, and any rules and guidance issued pursuant to them, for consistency with the policy set forth in section 1 of this order and, if appropriate,

shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules. In addition, the Administrator shall immediately take all steps necessary to review the proposed rule set forth in subsection (b)(iii) of this section, and, if appropriate, shall, as soon as practicable, determine whether to revise or withdraw the proposed rule.

(b) This section applies to the following final or proposed rules:

(i) The final rule entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64661 (October 23, 2015) (Clean Power Plan);

(ii) The final rule entitled "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64509 (October 23, 2015); and

(iii) The proposed rule entitled "Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; Proposed Rule," 80 Fed. Reg. 64966 (October 23, 2015).

(c) The Administrator shall review and, if appropriate, as soon as practicable, take lawful action to suspend, revise, or rescind, as appropriate and consistent with law, the "Legal Memorandum Accompanying Clean Power Plan for Certain Issues," which was published in conjunction with the Clean Power Plan.

(d) The Administrator shall promptly notify the Attorney General of any actions taken by the Administrator pursuant to this order related to the rules identified in

subsection (b) of this section so that the Attorney General may, as appropriate, provide notice of this order and any such action to any court with jurisdiction over pending litigation related to those rules, and may, in his discretion, request that the court stay the litigation or otherwise delay further litigation, or seek other appropriate relief consistent with this order, pending the completion of the administrative actions described in subsection (a) of this section.

Sec. 5. Review of Estimates of the Social Cost of Carbon, Nitrous Oxide, and Methane for Regulatory Impact Analysis. (a) In order to ensure sound regulatory decision making, it is essential that agencies use estimates of costs and benefits in their regulatory analyses that are based on the best available science and economics.

(b) The Interagency Working Group on Social Cost of Greenhouse Gases (IWG), which was convened by the Council of Economic Advisers and the OMB Director, shall be disbanded, and the following documents issued by the IWG shall be withdrawn as no longer representative of governmental policy:

(i) Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (February 2010);

(ii) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (May 2013);

(iii) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (November 2013);

(iv) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (July 2015);

(v) Addendum to the Technical Support Document for Social Cost of Carbon: Application of the Methodology to Estimate the Social Cost of Methane

and the Social Cost of Nitrous Oxide (August 2016); and

(vi) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (August 2016).

(c) Effective immediately, when monetizing the value of changes in greenhouse gas emissions resulting from regulations, including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates, agencies shall ensure, to the extent permitted by law, that any such estimates are consistent with the guidance contained in OMB Circular A-4 of September 17, 2003 (Regulatory Analysis), which was issued after peer review and public comment and has been widely accepted for more than a decade as embodying the best practices for conducting regulatory cost-benefit analysis.

Sec. 6. Federal Land Coal Leasing Moratorium. The Secretary of the Interior shall take all steps necessary and appropriate to amend or withdraw Secretary's Order 3338 dated January 15, 2016 (Discretionary Programmatic Environmental Impact Statement (PEIS) to Modernize the Federal Coal Program), and to lift any and all moratoria on Federal land coal leasing activities related to Order 3338. The Secretary shall commence Federal coal leasing activities consistent with all applicable laws and regulations.

Sec. 7. Review of Regulations Related to United States Oil and Gas Development. (a) The Administrator shall review the final rule entitled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources," 81 Fed. Reg. 35824 (June 3, 2016), and any rules and guidance issued pursuant to it, for consistency with the policy set forth in section 1 of this order and, if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and

comment proposed rules suspending, revising, or rescinding those rules.

(b) The Secretary of the Interior shall review the following final rules, and any rules and guidance issued pursuant to them, for consistency with the policy set forth in section 1 of this order and, if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules:

(i) The final rule entitled "Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands," 80 Fed. Reg. 16128 (March 26, 2015);

(ii) The final rule entitled "General Provisions and Non-Federal Oil and Gas Rights," 81 Fed. Reg. 77972 (November 4, 2016);

(iii) The final rule entitled "Management of Non Federal Oil and Gas Rights," 81 Fed. Reg. 79948 (November 14, 2016); and

(iv) The final rule entitled "Waste Prevention, Production Subject to Royalties, and Resource Conservation," 81 Fed. Reg. 83008 (November 18, 2016).

(c) The Administrator or the Secretary of the Interior, as applicable, shall promptly notify the Attorney General of any actions taken by them related to the rules identified in subsections (a) and (b) of this section so that the Attorney General may, as appropriate, provide notice of this order and any such action to any court with jurisdiction over pending litigation related to those rules, and may, in his discretion, request that the court stay the litigation or otherwise delay further litigation, or seek other appropriate relief consistent with this order, until the completion of the administrative actions described in subsections (a) and (b) of this section.

Sec. 8. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

THE WHITE HOUSE,
March 28, 2017.

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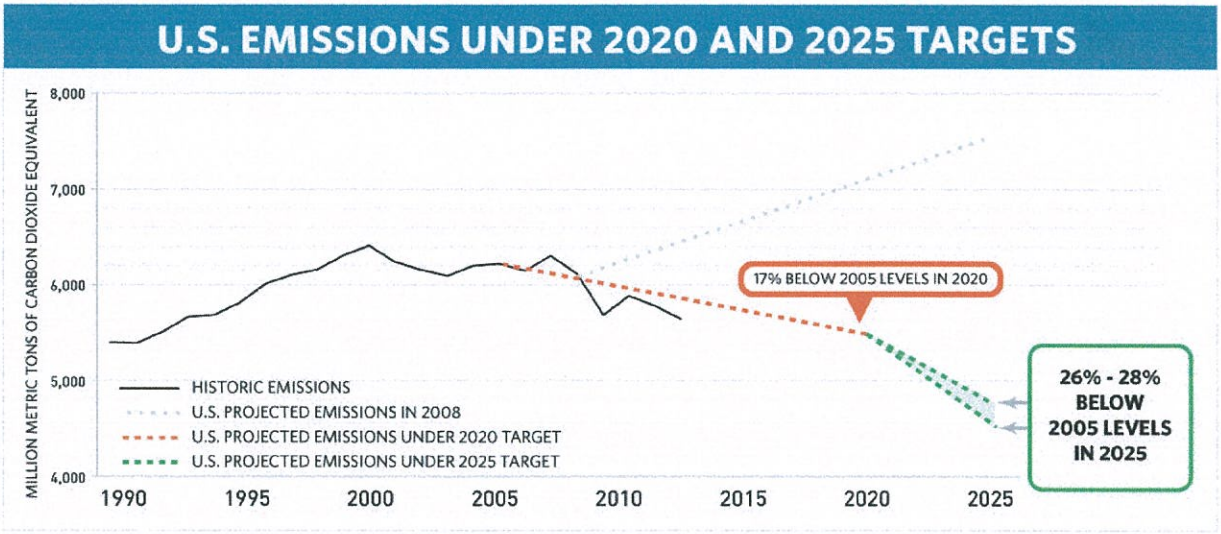
Our Government

The United States is pleased to communicate its intended nationally determined contribution, as well as information to facilitate the clarity, transparency, and understanding of the contribution.

The United States is strongly committed to reducing greenhouse gas pollution, thereby contributing to the objective of the Convention. In response to the request in Lima to communicate to the secretariat its intended nationally determined contribution towards achieving the objective of the Convention as set out in its Article 2—the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system—the United States intends to achieve an economy-wide target of reducing its greenhouse gas emissions by 26-28 per cent below its 2005 level in 2025 and to make best efforts to reduce its emissions by 28%.




The target is fair and ambitious. The United States has already undertaken substantial policy action to reduce its emissions, taking the necessary steps to place us on a path to achieve the 2020 target of reducing emissions in the range of 17 percent below the 2005 level in 2020. Additional action to achieve the 2025 target represents a substantial acceleration of the current pace of greenhouse gas emission reductions. Achieving the 2025 target will require a further emission reduction of 9-11% beyond our 2020 target compared to the 2005 baseline and a substantial acceleration of the 2005-2020 annual pace of reduction, to 2.3-2.8 percent per year, or an approximate doubling.

Substantial global emission reductions are needed to keep the global temperature rise below 2 degrees Celsius, and the 2025 target is consistent with a path to deep

**Party**: United States of America

| **Intended nationally determined contribution** |
| --- |
| The United States intends to achieve an economy-wide target of reducing its greenhouse gas emissions by 26%-28% below its 2005 level in 2025 and to make best efforts to reduce its emissions by 28%. |

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| **Information provided in order to facilitate clarity, transparency, and understanding** |
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| **Scope and coverage:**<br><br>*Gases*:<br><br>The U.S. target covers all greenhouse gases included in the 2014 Inventory of United States Greenhouse Gas Emissions and Sinks: carbon dioxide ($CO_2$), methane ($CH_4$), nitrous oxide ($N_2O$), perfluorocarbons (PFCs), hydrofluorocarbons (HFCs), sulfur hexafluoride ($SF_6$), and nitrogen trifluoride ($NF_3$).<br><br>*Sectors*:<br><br>The U.S. target covers all IPCC sectors.<br><br>*Percentage of total greenhouse gas emissions:*<br><br>The United States intends to account for 100 percent of U.S. greenhouse gas emissions and removals for the base year 2005 as published in the Inventory of United States Greenhouse Gas Emissions and Sinks, on a net-net basis. |
| **Quantifiable information on the reference point, time frames, assumptions and methodological approaches including those for estimating and accounting for anthropogenic greenhouse gas emissions and removals:**<br><br>*Timeframe and reference point:*<br><br>The U.S. target is for a single year: 2025. The base year against which the target is measured is 2005. |

*Accounting approach for land sector:*

The United States intends to include all categories of emissions by sources and removals by sinks, and all pools and gases, as reported in the Inventory of United States Greenhouse Gas Emissions and Sinks; to account for the land sector using a net-net approach; and to use a "production approach" to account for harvested wood products consistent with IPCC guidance. The United States may also exclude emissions from natural disturbances, consistent with available IPCC guidance.

There are material data collection and methodological challenges to estimating emissions and removals in the land sector. Consistent with IPCC Good Practice, the United States has continued to improve its land sector greenhouse gas reporting, which involves updating its methodologies. The base year and target for the U.S. INDC were established on the basis of the methodologies used for the land sector in the 2014 Inventory of United States Greenhouse Gas Emissions and Sinks and the United States 2014 Biennial Report.

*Metric*:

The United States intends to use 100-year global warming potential (GWP) values to calculate $CO_2$ equivalent totals. The United States intends to report emissions totals using Fourth Assessment Report values, and will consider future updates to GWP values from the IPCC.

*Use of markets:*

At this time, the United States does not intend to utilize international market mechanisms to implement its 2025 target.

*Domestic laws, regulations, and measures relevant to implementation:*

Several U.S. laws, as well as existing and proposed regulations thereunder, are relevant to the implementation of the U.S. target, including the Clean Air Act (42 U.S.C. §7401 et seq.), the Energy Policy Act (42 U.S.C. §13201 et seq.), and the Energy Independence and Security Act (42 U.S.C. § 17001 et seq.).

Since 2009, the United States has completed the following regulatory actions:

- Under the Clean Air Act, the United States Department of Transportation and the United States Environmental Protection Agency adopted fuel economy standards for light-duty vehicles for model years 2012-2025 and for heavy-duty vehicles for model years 2014-2018.
- Under the Energy Policy Act and the Energy Independence and Security Act, the United States Department of Energy has finalized multiple measures addressing buildings sector emissions including energy conservation standards for 29 categories

of appliances and equipment as well as a building code determination for commercial buildings.

- Under the Clean Air Act, the United States Environmental Protection Agency has approved the use of specific alternatives to high-GWP HFCs in certain applications through the Significant New Alternatives Policy program.

At this time:

- Under the Clean Air Act, the United States Environmental Protection Agency is moving to finalize by summer 2015 regulations to cut carbon pollution from new and existing power plants.
- Under the Clean Air Act, the United States Department of Transportation and the United States Environmental Protection Agency are moving to promulgate post-2018 fuel economy standards for heavy-duty vehicles.
- Under the Clean Air Act, the United States Environmental Protection Agency is developing standards to address methane emissions from landfills and the oil and gas sector.
- Under the Clean Air Act, the United States Environmental Protection Agency is moving to reduce the use and emissions of high-GWP HFCs through the Significant New Alternatives Policy program.
- Under the Energy Policy Act and the Energy Independence and Security Act, the United States Department of Energy is continuing to reduce buildings sector emissions including by promulgating energy conservation standards for a broad range of appliances and equipment, as well as a building code determination for residential buildings.

In addition, since 2008 the United States has reduced greenhouse gas emissions from Federal Government operations by 17 percent and, under Executive Order 13693 issued on March 25th 2015, has set a new target to reduce these emissions 40 percent below 2005 levels by 2025.

*Relationship with inventory:*

This approach, and the definitions and metrics used, are fully consistent with our greenhouse gas inventory. The United States intends to continue to improve its greenhouse gas inventory over time, and may incorporate these improvements into its intended nationally determined contribution accordingly. Additional information on the greenhouse gas inventory, including calculations, models, data sources, and references can be found here:

www.epa.gov/climatechange/ghgemissions/usinventoryreport.html#about