Manufactured Housing Association for Regulatory Reform

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VIA FEDERAL EXPRESS AND ELECTRONIC SUBMISSION

Appliance and Equipment Standards Program
U.S. Department of Energy
Building Technologies Office
Mailstop EE-5B
1000 Independence Avenue, S.W.
Washington, D.C. 20585-0121

Re: Energy Conservation Standards for Manufactured Housing
Notice of Data Availability -- Request for Information
EERE-2009-BT-BC-0021/RIN 1904-AC11

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.) (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]

While MHARR commends the U.S. Department of Energy (DOE), under the leadership of President Trump and his appointees, for: (1) "re-evaluat[ing] its approach in developing [energy] standards for manufactured housing;"[2] (2) "reconsidering the framework"[3] for the standards previously proposed by the Department in a June 17, 2016 Notice of Proposed Rulemaking (2016 NOPR); and (3) "examining if it must set a single mandatory level of [energy] efficiency"[4]-- and will address in detail the specific issues and inquiries posed by DOE in this proceeding -- it must nevertheless reiterate, as initially stated and set forth in its August 8, 2016 comments in this

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

[2] See, 83 Federal Register, No. 150 (August 3, 2018) 38073, at p. 38075, col. 1.

[3] Id. at p. 38075, col. 1.

[4] Id.

matter,[5] that it remains inalterably opposed to the imposition of any mandatory federal energy standard(s) by DOE or any other federal agency or entity on HUD Code manufactured homes, outside of the parameters, framework, purposes, procedures and provisions of the 1974 Act and subsequent amendments to that law.

As MHARR established in its original comments in this matter, HUD Code[6] manufactured homes, according to U.S. Census Bureau data, already offer energy performance that exceeds -- or is comparable to -- that of other types of homes, at a significantly lower acquisition cost that is inherently affordable for lower and moderate-income purchasers without costly taxpayer-funded government subsidies.[7] Given this fundamental, indisputable fact, there is no objectively-defensible combination of DOE energy standards or mandates that would significantly enhance the energy performance of HUD Code manufactured homes without simultaneously undermining the affordability of those homes contrary to the purposes and letter of existing law,[8] while needlessly excluding millions of Americans from the benefits of manufactured homeownership and homeownership altogether.[9] Further, the promulgation of any such standards by DOE would violate fundamental regulatory policies of the Trump Administration as set forth in Executive Orders (EOs) 13771 ("Reducing Regulation and Controlling Regulatory Costs") issued January 30, 2017[10] and 13777 ("Enforcing the Regulatory Reform Agenda") issued February 24, 2017.[11] Accordingly, MHARR continues to oppose the standards formulation set forth in DOE's initial June 17, 2016 Notice of Proposed Rulemaking and the alternative formulations proposed in the current proceeding which, as acknowledged by DOE, are based on cost calculations and other data

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[5] See, Attachment 1, hereto.

[6] The Federal Manufactured Housing Construction and Safety Standards (FMHCSS) established by HUD pursuant to the 1974 Act, as amended, and codified at 24 C.F.R. 3280, comprehensively regulate the construction and safety of manufactured homes produced for sale or lease in the United States. These standards (in Subparts F and H) include specific performance criteria for energy usage and utilization, and other energy-related aspects of HUD-regulated manufactured housing. The performance nature of the HUD FMHCSS standards, which is a crucial component of the inherent affordability of HUD Code manufactured homes, is addressed in greater detail infra.

[7] See, Attachment 2, hereto, Table C-10-AO, "Housing Costs – All Occupied Units (National), 2013 American Housing Survey. See also, further discussion, infra, of "whole home" cost comparisons which correctly reflect the realities of the HUD Code housing market, as contrasted with "per square foot" comparisons, which are inapposite to the HUD Code market.

[8] See, 42 U.S.C. 5401(b)(1),(2) and (8): "The purposes of this title are – (1) to protect the quality, durability, safety and affordability of manufactured homes; (2) to facilitate the availability of affordable manufactured homes and to increase homeownership for all Americans.... [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 also, 42 U.S.C. 5403(e)(4): "The [Manufactured Housing] Consensus Committee, in recommending standards, regulations, and interpretations, and the Secretary, in establishing standards or regulations or issuing interpretations ... shall ... (4) consider the probable effect of such standard on the cost of the manufactured home to the public." From these provisions, it is evident that the 1974 Act, as amended by Congress in 2000, is designed to ensure that manufactured housing standards and related regulations do not undermine or adversely impact the purchase price (i.e., initial acquisition cost) affordability of federally-regulated manufactured homes.

[9] See generally, The George Washington University Regulatory Studies Center, "Public Interest Comment on the Department of Energy's Proposed Rule [for] Energy Conservation Standards for Manufactured Housing" (August 16, 2016).

[10] See, 82 Federal Register No. 22 (February 3, 2017) 9339.

[11] See, 82 Federal Register No. 39 (March 1, 2017) 12285.

derived from the same illegitimate, sham "negotiated rulemaking" process which led to the 2016 proposed rule.[12]

I. INTRODUCTION

On August 3, 2018, DOE published a Notice of Data Availability/Request for Information (NODA) in the Federal Register,[13] seeking information and comments regarding a "reexamination," "reevaluation" and "reconsideration" of the "framework" and "approach" used to develop proposed DOE energy standards for manufactured homes, as set forth in the Department's 2016 NOPR and as incorporated in a "draft final rule" to establish those standards.[14] That "draft final rule," as characterized by DOE, "did not clear" review by the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) and was subsequently "withdrawn" on January 31, 2017.[15] In relevant part, the DOE NODA preamble acknowledges: (1) the extreme negative impact on the fundamental purchase price affordability of HUD Code manufactured housing (as set forth and demonstrated in MHARR's August 8, 2016 comments) that would have inevitably resulted from the June 17, 2016 proposed rule to establish manufactured housing energy standards pursuant to section 413 of the Energy Security and Independence Act of 2007 (EISA); and (2) the net lifetime operating cost increases that the 2016 proposed rule (and associated methodology) would have imposed on significant numbers of manufactured homeowners and occupants. The NODA thus states: "Since the publication of DOE's proposals, the agency has re-examined its available data and re-evaluated its approach in developing standards for manufactured housing. In particular … DOE [is] aware of the adverse impacts on manufactured housing affordability that would likely follow if DOE were to adopt the approach laid out in its June 2016 [NOPR] proposal. *** Thus, DOE is examining if it must set a single, mandatory level of efficiency."[16]

While a reexamination, reevaluation and reconsideration of DOE's 2016 proposed energy standards rule for manufactured homes is entirely warranted and, indeed, required under the regulatory reform policies of the Trump Administration as enunciated in EOs 13771 and 13777, the entire basis, foundation and mandate of EISA section 413 -- as previously construed by DOE in this proceeding -- is utterly incompatible with both the policy and letter of existing law as set forth by Congress in the National Manufactured Housing Construction and Safety Standards Act of 1974 and the Manufactured Housing Improvement Act of 2000. Instead, given the broad policy objectives of those laws -- including but not limited to their specific purpose and objective to ensure and maintain the purchase-price affordability of manufactured homes, and their

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[12] See, U.S. Department of Energy, "Manufactured Housing NODA Packages – Draft Results" (July 2018) at p. 2: "Incremental costs and savings calculations are based on methods and data presented in the 2016 NOPR."

[13] See, 83 Federal Register, supra at p. 38073, et seq.

[14] Insofar as DOE expressly acknowledges in the August 3, 2018 NODA that its "authority to establish energy efficiency standards for appliance[s] … is separate from its authority to establish energy conservation standards for manufactured homes" (see, 83 Federal Register, No. 150 at p. 38075, col. 1) (emphasis added), it is unclear – and unexplained -- why the instant rulemaking apparently remains under the jurisdiction of DOE's "Appliance and Equipment Standards Program," which will be the recipient of comments filed in response to the NODA (see, Id. at p. 38073, col. 2).

[15] Id. at pp. 38074-38075.

[16] See, 83 Federal Register, supra at p. 38075, col. 1.

comprehensive, integrated approach to the federal regulation of manufactured home construction and safety -- the purposes, objectives and language of EISA section 413 must be read, construed and understood in a manner that is consistent with those broader, pre-existing policy and regulatory mandates.

Accordingly, as is set forth in greater detail below, any manufactured housing energy standards implemented under EISA section 413 – either through this or any other proceeding[17] -- must: (1) preserve the purchase-price affordability of manufactured housing based on current retail pricing levels; (2) be performance based, consistent with 24 C.F.R. 3280.1;[18] (3) preserve full and voluntary consumer choice in the selection of energy features and measures; (4) not result in the automatic imposition of different or more stringent future standards based on updates or amendments to any underlying code, including the International Energy Efficiency Code (IECC), or any similar code; (5) be cost-effective as defined in and required by both EISA section 413 and the 1974 Act, as amended; (6) any amendments or modifications to those standards, regardless of source or derivation, must be subject to review and recommendations by the federal Manufactured Housing Consensus Committee (MHCC) and full notice and comment rulemaking as required by 42 U.S.C. 5403; and (7) if DOE goes forward with such action, it must be pursuant to a completely new, proper and legitimate regulatory process in order to avoid potential litigation.

Put differently, objective data demonstrates that current-production manufactured homes achieve a level of energy performance under the existing federal FMHCSS standards that is comparable to other types of homes, at a significantly lower acquisition cost, that makes manufactured homes inherently affordable for Americans at all income levels, including those who would otherwise be unable to afford any other type of home. With Congress having specifically recognized this fundamental attribute of manufactured housing, and having institutionalized the preservation and maintenance of that crucial attribute as a central policy objective of federal law in both the 1974 Act and the 2000 reform law, no action by DOE can – or should – be permitted to undermine the inherent affordability of HUD Code manufactured housing and thereby effectively exclude large numbers of mostly lower and moderate-income Americans from all of the benefits of homeownership[19] in the name of unproven "junk" science and related political agendas.[20]

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[17] Consistent with the comprehensive regulatory structure established by the 1974 Act and enhanced by the 2000 reform law, this entire matter should be under the jurisdiction of HUD, including all aspects of the 1974 Act and the 2000 reform law relating to the development and promulgation of FMHCSS standards and related regulations, including all MHCC review, notice and comment and publication requirements.

[18] 24 C.F.R. 3280.1 states, in relevant part: "This standard seeks to the maximum extent possible to establish performance requirements." (Emphasis added).

[19] As MHARR noted in its 2016 NOPR comments, the only evidence presented to the DOE "negotiated rulemaking" Manufactured Housing Working Group (MHWG) on the cost-impact of its proposed "Term Sheet" energy standards (by the National Association of Home Builders) demonstrated that "a $1,000 increase in the purchase price of a new manufactured home [would] exclude[e] 347,901 households from the market for a new single-section [manufactured] home, while the same $1,000 increase [would] exclude[e] 315,385 households from the market for a double-section home." See, Attachment 1, supra, at p. 25 and text related to note 78.

[20] This is particularly the case insofar as much of that alleged "science" and related political agendas have been expressly rejected and disavowed by the Trump Administration. See, Attachment 3, hereto, MHARR's July 14, 2017 written comments to DOE regarding "Reducing Regulation and Controlling Regulatory Costs Under Executive Orders 13771 and 13777" pursuant to a DOE Request for Information published May 30, 2017, noting the Trump

Accordingly, any consideration of alternative approaches by DOE under EISA section 413 must proceed from a specific recognition and express acknowledgement by DOE that its June 2016 proposed rule and "draft final rule" derived therefrom, and its previous construction of – and approach to – EISA section 413, was and is fatally defective and fundamentally erroneous in its premises, basis and approach, and that no part, aspect, element, or rationale relating to that proposed rule or "draft final rule" will be proposed, advanced or in any way incorporated by DOE in this matter going forward. That is not the case with the instant NODA, however, as the purported cost-benefit data relied upon by DOE to re-evaluate and re-cast its January 2016 proposed rule continues to be based upon the same irretrievably-flawed, inaccurate, unreliable and illegitimate data "developed" by DOE during – and incident to – its utterly discredited "negotiated" rulemaking on this matter.[21] As was demonstrated by MHARR in its August 8, 2016 comments to DOE's 2016 NOPR, its August 15, 2016 comments on DOE's related "Request for Information on Impacts to Indoor Air Quality"[22] and its July 14, 2017 comments concerning the application of EOs 13771 and 13777 to this matter,[23] both the June 17, 2016 proposed rule published by DOE and the 2016 "draft final rule" derived therefrom, are fatally flawed and unacceptable, and must not be rehabilitated or revived in any way through this proceeding.

II. BACKGROUND AND PROCEDURAL HISTORY

Although DOE suggests that it may be willing to revisit its previous construction of – and approach to – manufactured housing energy standards under EISA section 413, which formed the basis for its sham "negotiated rulemaking" and related activity concerning those standards (including both the June 17, 2016 proposed rule and subsequent "draft final rule"),[24] it does not, in its NODA, repudiate (or even address) the fatal deficiencies of that process, or the continuing impact of that fundamentally-tainted and discredited "negotiated rulemaking" on its NODA proposals and underlying "incremental cost and savings calculations."[25]The specific details of that illegitimate, scandalous and fundamentally-tainted process, accordingly, necessarily remain directly relevant to this proceeding. While MHARR, in order to avoid unnecessary duplication, will not restate herein the full narrative of that sham proceeding set forth in its August 8, 2016 NOPR comments, it does hereby incorporate by reference herein those comments, together with their supporting documentation and evidence. MHARR believes that the incorporation and inclusion of that complete procedural history in the instant NODA proceeding is essential in order: (1) to ensure the existence of a proper public record of this entire matter, both for the information of stakeholders and the general public; (2) to document the manner – and extent to which -- improper, unscrupulous, and unethical prior actions by DOE have infected virtually every aspect

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Administration's rejection of both the Obama Administration's "Social Cost of Carbon" (SCC) construct and the so-called "Paris Climate Accord," which formed the policy basis for this matter.

[21] See, note 12, supra.

[22] See, Attachment 4, hereto.

[23] See, Attachment 3, supra.

[24] See, 83 Federal Register, supra at p. 38075: "DOE … has begun reconsidering the framework to use in regulating these structures … [and] is examining if it must set a single, mandatory level of [energy] efficiency."

[25] See, note 12, supra.

of this proceeding; and (3) to ensure a complete public record in the event that litigation becomes necessary with respect to any final standard adopted by DOE as a consequence of this rulemaking.

The complete procedural history of prior DOE administrative activity in the instant rulemaking, as set forth in MHARR's August 8, 2016 NOPR comments, exposes a consistent pattern of deceptive, deceitful and non-transparent conduct and interactions which totally undermine the legitimacy -- and any possible probative value – of that "process" or any information, data, position, or alleged "consensus" derived from that process. In relevant part, that history documents false, illegitimate and arguably unlawful activity by DOE in this proceeding, including but not limited to:

1. DOE's selective leak of a 2011 "draft proposed" manufactured housing energy rule (DPR) to parties in interest, including large industry manufacturers. The selective, discriminatory disclosure of key rulemaking information and plans by DOE to a limited, DOE-determined group of interested parties (not including either MHARR or its members) – ultimately admitted by attorneys from DOE's Office of General Counsel (OGC) after long-standing and false denials -- was characterized as "impermissible" by those attorneys;[26]
2. DOE's failure to disclose the existence or substance of ex parte communications and 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;[27]
3. DOE's development of the 2011 DPR without essential relevant information, leading to a deceptive 2013 DOE Request for Information (RFI), seeking such information after-the-fact, without disclosing the previous development and existence of the 2011 DOE DPR or its rejection by OMB/OIRA in 2014 with a directive to DOE to "start over" proceedings relating to manufactured housing energy standards;[28]
4. DOE's false denial of the selective leak of the 2011 DOE-DPR to parties in interest;[29]
5. DOE's refusal to investigate or otherwise provide relevant details concerning the 2011 DOE-DPR selective leak in response to specific inquiries from MHARR;[30]
6. DOE's failure to disclose responsive documents addressing the aforesaid matters pursuant to MHARR FOIA requests;[31]
7. DOE's failure to disclose the 2014 OMB/OIRA "start-over" directive;[32]
8. DOE's failure to disclose documented ex parte coordination with selective leak recipients regarding the referral of manufactured home energy standards to a "negotiated rulemaking;"[33]

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[26] See, Attachment 1, hereto at pp. 4-5, 11-12, and referenced attachments thereto.

[27] Id.

[28] Id. at pp. 5-8, and referenced attachments thereto. See also, 83 Federal Register, supra at p. 38074, col.2.

[29] Id. at p. 5, 12, and referenced attachments thereto.

[30] Id. at pp. 5-8, and referenced attachments thereto.

[31] Id.

[32] Id. at p. 12.

[33] Id. at pp. 13-14, and referenced attachments thereto.

9. DOE's failure to disclose ex parte coordination with selective leak recipients to establish the parameters of that "negotiated rulemaking;"[34]
10. DOE's documented ex parte coordination with selective leak recipients to establish a clearly inadequate and unnecessarily truncated time-frame, schedule and deadline for the completion of that "negotiated rulemaking;"[35]
11. DOE's ex parte coordination with selective leak recipients to establish a "negotiated rulemaking" Manufactured Housing Working Group (MHWG) dominated and effectively controlled by "insider" selective leak recipients, leading, in conjunction with Item 10, above, to an illegitimate, sham "negotiated rulemaking" process;[36]
12. Non-transparent and unverified data inputs to the MHWG on crucial rulemaking issues, including cost-benefit calculations;[37]
13. Undisclosed MHWG conflicts of interest precluding "good faith" negotiation as required by applicable law;[38]
14. DOE manipulation of alleged "research" contracts to steer funds to one or more MHWG members to influence the "negotiated rulemaking" process;[39]
15. DOE's refusal to disclose the 2011 DOE DPR for comparison to the 2016 DOE proposed rule;[40]
16. DOE's refusal to disclose the 2011 DOE "draft" NOPR, Technical Support Document (TSD) and related cost-benefit analysis for comparison to the corresponding 2016 DOE rulemaking documents;[41]
17. DOE's failure to provide specific evidence of substantive "consultation" with HUD, prior to publication of the 2016 draft rule, as required by EISA section 413, the time of that consultation, the substance of any input received from HUD (if any), and any changes made to the June 17, 2016 proposed rule, NOPR, or 2016 draft final rule as a result of that alleged "consultation";[42] and
18. DOE and HUD's failure to consult with the MHCC at a meaningful point in rulemaking process as required by EISA section 413 and other applicable law.[43]

In its entirety, this sham process – as fully detailed in MHARR's 2016 NOPR comments -- which continues today, through DOE's admitted ongoing reliance on "methods and data" from the 2016 NOPR in this proceeding -- has seriously prejudiced both the procedural and substantive

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[34] Id. at pp. 9-11, and referenced attachments thereto.

[35] Id.

[36] Id. See also, Attachment 5, hereto, The George Washington University Regulatory Studies Center, "Public Interest Comment on the Department of Energy's Proposed Rule [for] Energy Conservation Standards for Manufactured Housing," at p. 10-11.

[37] Id. at pp. 14-17, and referenced attachments thereto.

[38] Id.

[39] Id.

[40] Id. at p. 12.

[41] Id. at pp. 11-12, and referenced attachments thereto.

[42] Id. at pp. 18-19, and referenced attachments thereto.

[43] Id. See e.g., Rural Cellular Association v. Federal Communications Commission, 583 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 a Notice of Proposed Rulemaking (NPRM) is published and the comment period begins, the agency is highly unlikely to alter its policy significantly."

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, phony and unreliable underlying "data," a phony alleged MHWG "consensus" and, ultimately, an illegitimate MHWG Term Sheet and illegitimate proposed rule. For all of these reasons, which continue to impact and infect the current NODA proceeding, this rulemaking – going back to its initial roots and activity at DOE – should be scrapped and repudiated by DOE in its entirety and, if pursued by DOE at all, should be based on an entirely new, proper and legitimate rulemaking process that strictly complies with the parameters, framework, purposes, procedures and provisions of the 1974 Act and subsequent amendments to that law.[44]

III. COMMENTS

A. MANUFACTURED HOUSING ENERGY STANDARDS ARE UNNECESSARY AND CONTRARY TO TRUMP ADMINISTRATION REGULATORY POLICY

The touchstone for any regulatory and/or policy analysis of DOE action regarding energy standards for manufactured homes – including the alternative "framework" and proposals set forth in the August 3, 2018 NODA -- is necessarily Executive Order 13777 ("Enforcing the Regulatory Reform Agenda"), issued February 24, 2017,[45] which enunciates the fundamental regulatory reform policy and approach of the Trump Administration. While that EO refers to the "repeal, replacement or modification" of "existing [federal] regulations" (i.e., retroactive review) there can be no doubt that the same criteria, considerations, qualifications and policies apply, with equal force, to the development of potential new and/or revised regulations by federal government agencies.

Section 1 of EO 13777 states unequivocally that "it is the policy of the United States of America to alleviate unnecessary regulatory burdens placed on the American people."[46] (Emphasis added). Section 3(d) of EO 13777 further describes the types of federal regulatory mandates that place "unreasonable burdens" on Americans and, therefore, warrant elimination. Such mandates include those that are "unnecessary," that "eliminate jobs, or inhibit job creation," impose costs that exceed benefits," "rely in whole or in part on data, information, or methods that are not publicly available, or are insufficiently transparent to meet the standard for reproducibility," or

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[44] In addition to its substantive objections, as set forth and explained in greater detail below, MHARR also objects to the inadequate and inexplicably truncated time period provided for comments in response to the NODA. For a proceeding requesting detailed data and policy inputs on new concept and proposals in a major rulemaking – with major market implications for American consumers, the manufactured housing industry in general, and the smaller, independent manufacturers represented by MHARR in particular -- a mere 45 days for responsive comments is grossly and prejudicially insufficient, particularly given the less than exemplary history of this proceeding. Moreover, before proceeding to a new/modified proposed rule, or a final rule that differs in any material respect from the June 2016 proposed rule, DOE, pursuant to EISA section 413, must consult with HUD which, in turn, under the Manufactured Housing Improvement Act of 2000, must consult with the statutory Manufactured Housing Consensus Committee.

[45] The DOE NODA specifically invites comments based on the applicability of EO 13777 to this matter. See, 83 Federal Register, supra at p. 38075, col. 1-2.

[46] See, Attachment 6, hereto, at p.1.

"derive from or implement Executive Orders … that have been subsequently rescinded, among other things."[47]

Measured against these benchmarks, the manufactured Housing "energy" standards proposed by DOE at every stage of this proceeding -- including the approaches and framework set forth in the NODA itself -- violate fundamental Administration policy and would impose clearly "unnecessary regulatory burdens" on the American people. As a result, DOE should not impose any additional mandatory energy standards on manufactured housing.[48]

1. All "Analytical Aspects" of the June 2016 Proposed Rule Should be "Re-Examined" and Expressly Rejected by DOE

As an initial matter, the threshold inquiry posed by DOE in the August 3, 2018 NODA, is "What analytical aspects related to DOE's June 2016 proposal … should DOE consider re-examining as part of its of its ongoing consideration of a final rule for manufactured housing?"[49]Related to this inquiry, the NODA states:

> "As with any of its appliance and equipment standards rulemaking proposals, DOE made a number of analytical assumptions to determine what minimum level of efficiency it should use in establishing mandatory energy conservation standards for manufactured housing. These assumptions spanned a variety of factors, including affordability, which climate zones to use, which solar heat gain coefficient (SHGC) to use in a given climate zone, the price elasticity value to use in DOE's calculation of potential impacts, whether to include certification, compliance and enforcement costs as part of DOE's analysis, and whether tightening of a manufactured home's building envelope … would impact indoor air quality by increasing the likelihood of trapping pollutants inside the building."[50]

MHARR's simple and straightforward response to this threshold inquiry is that all of the "assumptions," data and alleged factual predicate underlying the June 2016 proposed rule should not only be "re-examined," but should be expressly rejected by DOE, withdrawn, and replaced

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[47] Id. at p. 2, section 3(d).

[48] While MHARR recognizes that publication of the instant NODA may be related to pending litigation filed by the special interest Sierra Club in the United States District Court for the District of Columbia (Sierra Club v. Perry, 1:17-cv-02700) seeking to compel DOE to adopt final manufactured housing "energy" standards, the Sierra Club, as noted by DOE in its April 2, 2018 Motion to Dismiss that action, does not represent, in any manner, the interests of either manufactured home residents, likely or potential manufactured home purchasers, or any segment of the industry itself, and, therefore, lacks standing to maintain that action. Furthermore, the specific interests of those affected parties demand that DOE not proceed with energy standards -- of any type -- that would needlessly increase the acquisition cost of HUD Code manufactured housing while eliminating substantial numbers of lower and moderate-income Americans from the housing market altogether. As a result, MHARR, as a legitimate representative of parties that would be negatively impacted by any such standards – i.e., smaller federally-regulated manufactured housing producers – specifically reserves its right to take legal action to enjoin the implementation of any DOE energy standard to which its members object.

[49] See, 83 Federal Register, supra, at p. 38075, col.2. ("Issue 1")

[50] Id.

with valid, legitimate and transparent data developed by and through a valid, legitimate and transparent process.[51]This is particularly the case insofar as DOE's 2016 draft final rule -- based on the June 2016 proposed rule and the "negotiated rulemaking" process which led to that draft final rule – did "not clear" regulatory review by the OMB Office of Information and Regulatory Affairs[52] and was withdrawn as a result.[53]

First, DOE expressly states in the NODA that its "authority to establish energy efficiency standards for appliance standards (sic) is separate from its authority to establish energy conservation standards for manufactured homes."[54]Given this difference in authority -- which, unfortunately, is not further detailed, explained, or analyzed in the NODA -- it is evident that DOE, in developing the June 2016 proposed rule, utilized procedures that were not apposite or applicable to the factual and/or policy issues presented by the potential regulation of a key aspect of an entire class of housing that is expressly recognized and enshrined as "affordable" housing in federal law. Accordingly, from the outset – and in its fundamental bases and procedures – the process which led to the development of the June 2016 proposed rule was invalid and illegitimate, and could not – and did not – result in proper, transparent and legally defensible standard.

Second, irrespective of the authority and procedure issue raised by DOE (i.e., appliance standards development versus EISA manufactured housing standards), the alleged "negotiated rulemaking" underlying the June 2016 proposed rule, as painstakingly detailed by MHARR in its August 8, 2016 comments, was fundamentally and irretrievably tainted by undisclosed communications, coordination, financial conflicts of interest and other non-transparent activity between DOE and select participants (not including MHARR) in that proceeding, which fatally undermined its legitimacy.[55] As a result – and for the specific reasons set out by MHARR in its August 8, 2016 comments -- no information, data, analysis, analytics, or assumptions developed or utilized within that proceeding that led to the June 2016 DOE proposed rule, is either legitimate, transparent or reliable.

Third, even if the alleged DOE "negotiated rulemaking" in this matter were not fundamentally and irretrievably tainted – which it was – the data, information and "assumptions" underlying that proceeding, its final Term Sheet and, ultimately, the June 2016 DOE proposed rule, were not produced, obtained or developed pursuant to an open or "transparent" process within the meaning of EO 13777.[56]Specifically, cost information inputs (apparently still being utilized by

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[51] This section also addresses NODA "Issue 6," which states: "DOE is interested in feedback regarding whether any aspect of its 2016 proposal need further consideration and, if so, why." Again, for the reasons, set forth herein and in MHARR's previous comments as incorporated by reference herein, the June 2016 DOE proposed rule is fatally defective in its entirety – both procedurally and substantively – and should be expressly and completely rejected by DOE.

[52] Presumably as a result of a specific deficiency determined by OIRA pursuant to Executive Order 12866.

[53] See, 83 Federal Register, No. 150 at p. 38075, col. 1.

[54] Id.

[55] See, Attachment 1, hereto at pp. 3-21.

[56] See, Attachment 6, supra, at p. 2. See, 83 Federal Register, No. 150 supra, at p. 38075, col.1., section 3(d)(v): "Each Regulatory Reform Task Force shall … make recommendations … for the repeal, replacement, or modification … [of] regulations that: … (v) … rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility…."

DOE in calculating the cost of its proposed energy "packages")[57]were provided to DOE by the Manufactured Housing Institute (MHI) -- through a now-former Vice President who was a member of the "negotiated rulemaking" Manufactured Housing Working Group (MHWG) -- without those cost inputs, or their source, or derivation, being disclosed either to other MHWG members, to the Manufactured Housing Consensus Committee (MHCC), or to the public. To the contrary, requests for the full disclosure of such information by MHARR's representative to the MHWG were specifically denied.

Fourth, as was noted by MHARR in its July 14, 2017 comments to DOE in response to its May 30, 2017 Request for Information (RFI) seeking public comment pursuant to EO 13777 and EO 13771 ("Reducing Regulation and Controlling Regulatory Costs") on DOE rules that are "outdated, ineffective, or excessively burdensome,"[58]the June 2016 DOE proposed rule was based, in substantial part, on cost-benefit information derived from the Obama Administration's so-called "Social Cost of Carbon" (SCC) construct. The SCC construct relied-upon by DOE, however, was repealed by the Trump Administration through Executive Order 13783 ("Promoting Energy Independence and Economic Growth"), issued on March 28, 2017, which stated that the SCC was being "withdrawn as no longer representative of [federal] government policy." Given this action, the June 2016 proposed DOE rule, which substantially relies on alleged consumer "benefit" information derived from the SCC, violates Section 3(d)(vi) of EO 13777, which provides for the repeal, replacement, or modification of regulations that "derive from or implement Executive Orders or other presidential directives that have been subsequently rescinded...."

As a result of the foregoing, none of the data, information, or assumptions utilized or produced by the MHWG or by DOE in developing or supporting the June 2016 proposed rule is legitimate, reliable, or consistent with EO 13777. Accordingly, all of that data should not merely be "reconsidered," but should be affirmatively rejected by DOE, should be eliminated in its entirety from this proceeding, and replaced (if DOE proceeds with any such standards) with new research, research methods, data and analytics that are fully transparent and fully consistent with Trump Administration regulatory policy.

2. DOE Cost-Benefit Data and Analyses Based on "Per-Square-Foot" Calculations Are Irrelevant to and Misrepresent the HUD Code Market

The August 3, 2018 NODA, under "Issue 2," poses a further inquiry based on DOE's supposed determination – and apparent regulatory premise, both with regard to the June 2016 proposed rule and potential NODA "alternatives" – that according to "DOE's own data from its Residential Energy Consumption Survey of 2015 ... manufactured housing households pay about 60% more for their energy per square foot than the entire housing stock."[59] (Emphasis added). The NODA then asks if this "estimate" is "accurate" or, "if it is not accurate, why – [and] what specific factors are being overlooked in the survey to that contribute to its inaccuracy?"[60]This inquiry, however, as structured and phrased by DOE, misses a fundamental and essential point – indeed

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[57] See, Note 12, supra. See also, further discussion of NODA proposed energy "package" cost assumptions infra.

[58] See, Attachment 3, supra at pp. 4-8.

[59] See, 83 Federal Register, supra, at p. 38076, col. 2. ("Issue 2b").

[60] Id.

the fundamental and essential substantive point of this proceeding -- as the "accuracy" of a per-square-foot cost "estimate," or a per-square-foot energy cost comparison between HUD Code manufactured homes and site-built (or other types of) homes is functionally irrelevant within the unique context of the manufactured housing market and the physical and financial realities which characterize that market.

As MHARR explained in detail in its August 8, 2016 comments in this matter, mandatory DOE energy standards for manufactured homes[61] are not necessary from the standpoint of consumers, will needlessly increase the acquisition cost of manufactured homes, thereby excluding hundreds-of-thousands of lower and moderate-income Americans from homeownership altogether, will needlessly reduce sales of manufactured homes and employment within the manufactured housing industry, and will needlessly infringe on the freedom of choice of consumers who are not otherwise excluded from the market by such unnecessary regulatory-driven price increases, by effectively and without any legitimate basis, replacing private decision-making regarding home features, amenities and the allocation of purchaser dollars with costly, unwarranted and heavy-handed government mandates. Moreover, the apparent cost-benefit premise of DOE's entire rulemaking in this matter – including the framework and approach of the August 3, 2018 NODA – is based on a fundamentally inaccurate, inapposite and irrelevant construct.

The reality is that manufactured homes, due, in part, to state law limitations on the size and configuration of transportable units, HUD Code standards, the HUD Code manufacturing process itself, and the demands of the free market, have had – and continue to have – a significantly smaller size footprint than site-built homes. U.S. Census Bureau data shows that the (2016) average size of a new manufactured home was 1,446 square feet, as contrasted with a (2016) average size of 2,676 square feet for a new site-built home. The "average" new manufactured home, accordingly, is 1,230 square feet – or 85% -- smaller than the "average" new site-built home. Moreover, while the average size of site-built homes generally increased over the 2007-2016 timeframe covered by the latest Census Bureau data[62] -- by a factor of nearly 8% -- the average size of a new HUD Code manufactured home decreased over the same period by some 154 square feet, or a factor of 9.6%.[63] Because of this fundamental and ongoing size differential, "per-square-foot" energy-cost comparisons between HUD Code and site-built homes are tantamount to comparing "apples and oranges." While manufactured homes are constructed of the same materials as site-built homes, the factory construction and transportation processes that are integral to the manufactured housing market mean that the vast majority of HUD Code manufactured homes are smaller in size than site-built homes. Thus, "per-square-foot" energy cost comparisons, from a consumer standpoint, are totally irrelevant. Consumers pay real operating costs based on the size and characteristics of the home they actually buy, not a theoretical "per-square-foot" construct based on HUD Code home sizes that either do not exist or represent a tiny fraction of the market.

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[61] I.e., energy standards in addition to – or with more stringent and/or costly requirements -- than those already incorporated within the HUD Part 3280 FMHCSS.

[62] See, Attachment 7, hereto, U.S. Census Bureau, "Cost and Size Comparisons: New Manufactured Homes and New Single-Family Site-Built Homes (2007-2016).

[63] Id.

By contrast, on a "whole-house" basis – which is the reality of the current-day manufactured housing market and has not significantly changed in the nearly 50 years since the adoption of the 1974 Act – manufactured home operating costs, including energy expenditures, are already significantly lower than those for site-built homes. First, in terms of broadly-defined "housing costs," federal government studies show that the "mean monthly housing cost" of consumer-owned manufactured homes – under existing HUD standards -- is "much lower than other alternatives, including renting."[64]Second, U.S. Census Bureau data shows that the whole-home median monthly energy (operating) cost for HUD Code manufactured homes using common types of energy sources, is either lower than -- or very close to -- the median monthly energy cost for the same types of fuels as used in other types of homes. For example, for fuel oil, the median monthly household expenditure for new site-built homes was $267.00, while the median monthly expenditure for all manufactured homes was just $92.00. For piped natural gas, the median monthly expenditure for new site-built homes was $38.00 as compared with $34.00 for manufactured homes. For these two key fuel types, accordingly, manufactured home operating costs were significantly lower than the directly comparable whole-home energy operating cost of site-built homes, while for electricity, the median monthly expenditure for new site-built homes was $105.00 versus $119.00 for manufactured homes, a differential of only $14.00 per month, or $168.00 on an annualized basis.[65]

Consequently, of the three energy sources tracked by the Census Bureau, whole-home manufactured home operating costs under the existing HUD standards are already lower than comparable site-built whole home operating costs for two fuel types, and only marginally higher for one fuel type – i.e., electricity. By contrast, independent data compiled and analyzed by the National Association of Home Builders (NAHB)[66]shows that for each $1,000.00 added to the acquisition cost of new manufactured homes, 347,901 households are excluded from the market for a single-section home, while 315,385 would be excluded from the market for double-section home. Extrapolating this data to the energy "packages" posited by DOE in its August 3, 2018 NODA – with alleged "upfront" (i.e., acquisition) cost levels of $500.00, $1,000.00 or $1,500.00 each – some 173,950 to 521,851 households would be excluded from the single-section manufactured housing market, while some 157,692 to 473,077 households would be excluded from the double-section manufactured housing market, with correspondingly negative impacts on industry employment on a nationwide basis, as well as increased homelessness and the negative individual and societal impacts of increased homelessness, all to overcome an operating cost differential of less than $200.00, for just one type of energy.

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[64] 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 period (1993-2001), 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. For example, in 1993, among low-income households, the mean monthly housing cost for manufactured homes was $305.13, as compared with $420.61 for other types of owned homes and $461.04 for rental units. In 1997, the comparable figures were $355.20 for owned manufactured homes, $484.81 for owned site-built homes, and $512.88 for rental units. By 2001, the comparable figures were $407.96 for owned manufactured homes, $621.66 for owned site-built homes and $612.62 for rental units.

[65] See, Attachment 2 supra, U.S. Census Bureau, Housing Costs – All occupied Units (National), 2013 American Housing Survey, Table C-16-AO.

[66] The NAHB calculations were the only acquisition cost-impact data presented during the DOE "negotiated rulemaking."

Even these figures, however, are severely and significantly understated to the extent that DOE's alternative "packages" rely upon and incorporate the same non-transparent cost data inputs provided by parties other than MHARR during the sham DOE "negotiated rulemaking" process.[67] In its June 2016 NOPR, for example, DOE estimated retail price increases – under that proposal – of up to $2,422.00 for a new single-section home (with a national average price increase of $2,26.00), and up to $3,748.00 for a new multi-section manufactured home (with a national average of $3,109.00).[68] MHARR manufacturers, by contrast, calculated retail cost increases for new manufactured homes under the 2016 DOE proposed rule, as up to $4,601.94 for a new single-section manufactured home, and up to $5,825.17 for a new multi-section manufactured home, figures that, respectively, were 90% and 55% higher than corresponding DOE estimates. Based on a new analysis of the $500.00, $1,000.00 and $1,500.00 energy "packages" posited by DOE – which still apparently do not account for regulatory and enforcement-related costs as emphasized by MHARR in its August 8, 2016 comments[69] – MHARR members have calculated that those packages would result in actual retail cost increases, in Climate Zone 3, from approximately $2,500.00 for a single-section home, to $5,000.00 for a double-section home.[70] Price increases of this magnitude, based on the NAHB price-exclusion data presented to the MHWG, would result in the exclusion, based on these requirements, if adopted, of up to 869,752 households from the market for a single-section manufactured housing home[71]and up to 1,576, 925 households from the multi-section manufactured housing market,[72] with corresponding negative impacts on employment within the manufactured housing industry. These higher purchase price increases would also significantly increase the alleged life-cycle "payback" period for these "packages," well beyond the estimates contained in DOE's "NODA Packages – Draft Results" document.

Furthermore, information provided to MHARR indicates that certain aspects of the NODA suggested energy packages may not even be feasible under existing designs, such as the requirement for R-38 floor insulation in Climate Zone 3, Package 2 (With Sealing).

From this data and analysis, the following conclusions can be drawn:

1. DOE manufactured housing energy standards are "unnecessary," within the meaning of EO 13777, as existing HUD standards already result in a combination of affordable acquisition cost and affordable whole house operating costs, based on the actual size footprint of current-day, post-2000 Act manufactured homes.

2. "Per-square-foot" energy operating cost comparisons between HUD Code manufactured homes and larger site-built homes are irrelevant, misleading and inapposite in a market where the average manufactured home size is 1,230 square feet (85%) smaller than site-built homes. Such comparisons, accordingly, fail to provide a

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[67] See, Note 12, supra.

[68] See, Attachment 1, supra, at p. 25.

[69] Id. at pp. 27-28.

[70] I.e., retail price increases in proposed/current Zone 3, over and above the cost attributable to current HUD Part 3280 requirements.

[71] I.e., 347,901 households excluded per $1,000.00 price increase (base) (see, note 19, supra) x 2.5 = 869,752.

legitimate analytical basis or cost-benefit basis for either the June 2016 proposed rule or the NODA "packages" posited by DOE;

3. Both the June 2016 proposed rule and the NODA packages posited by DOE would impose costs that exceed their benefits, in violation of EO 13777, through: (1) the exclusion of potentially millions of lower and moderate-income Americans from the manufactured housing market and, in fact, homeownership altogether; and (2) for those not excluded from the HUD Code market altogether, by imposing significant additional life-cycle operating costs that could either not be recovered at all over the average ownership tenure of a manufactured home,[73] or only very late in that tenure;

4. The exclusion of potentially millions of consumers from the manufactured housing market – with HUD Code production and sales levels already significantly lower over the past decade (2008-2017) than the preceding decade (1998-2007)[74] – will further depress the manufactured housing market, with destructive impacts on employment within (and related to) the manufactured housing industry, in violation of EO 13777.

5. Both the June 2016 proposed rule and the August 3, 2018 NODA "alternative" approaches and packages rely on non-transparent data inputs (developed through a fundamentally tainted and illegitimate process)[75] in violation of EO 13777.

In view of all the foregoing, DOE, based on EO 13777, should: (1) finally and ultimately reject the June 2016 proposed rule and the 2016 draft final rule in their entirety, including, but not limited to, their underlying data inputs, framework, analytics, cost-benefit analysis and structure; (2) reject and withdraw the August 3, 2018 NODA alternative energy packages and their underlying, data inputs, framework, analytics and/or cost-benefit analyses, to the extent that they rely – either in whole or in part – or are in any way based upon, data inputs derived from the previous DOE "negotiated rulemaking" process, or data, analytics, or policy considerations arising from either the DOE SCC construct or United Nations "Paris" Climate Accord, which were respectively invalidated by the Trump Administration through EO 13783 and a June 1, 2017 Presidential Proclamation;[76] and (3) reject the adoption of any mandatory energy standards or criteria for federally-regulated manufactured homes, beyond or outside of the structure, framework

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[73] The average ownership tenure of a new manufactured home is approximately 13 years. See, The George Washington University Regulatory Studies Center, "Public Interest Comment on the Department of Energy's Proposed Rule [for] Energy Conservation Standards for Manufactured Housing" (August 16, 2016), supra, at p. 3.

[74] Average annual manufactured home production between 1998 and 2007, based on data compiled by HUD, was 195,176 per year. By contrast, average annual manufactured home production between 2008 and 2017 fell to 65,683 per year, a decline of 66.3%.

[75] The DOE "negotiated rulemaking" process relied almost exclusively on non-identified/non-transparent cost/benefit data and inputs provided by the Manufactured Housing Institute (MHI). As was noted by the George Washington Regulatory Studies Center in the 2016 proposed rulemaking proceeding: "Forty percent of the [MHWG] stakeholders were affiliated with the Manufactured Housing Institute, a trade association that represents some MH manufacturers. Other stakeholders have raised concerns that the Manufactured Housing Institute is using the negotiated rulemaking process to push competitors out of the market." See, The George Washington University Regulatory Studies Center, "Public Interest Comment on the Department of Energy's Proposed Rule [for] Energy Conservation Standards for Manufactured Housing," supra at pp. 10-11.

[76] See, Attachment 3, supra at pp. 4-8.

and requirements of the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended.

3. "Up-Front" Versus Operating Cost "Affordability" is a False and Misleading Dichotomy in the Context of Manufactured Housing

Under NODA "Issue 3," DOE states: "Affordability is a combination of upfront cost, which may price out some consumers at time of purchase, and operating costs, which will affect all manufactured housing owners over a longer time horizon. The Department seeks comments that provide information on how to weigh these components in defining 'affordability' with particular focus on affordability for low-income consumers."[77]This is a false and misleading dichotomy, however – and, consequently, false and misleading inquiry – both legally and factually.

At the outset, there is nothing for DOE to either "weigh" or to define with respect to the "affordability" of manufactured housing in a federal regulatory context. That issue has already been definitively addressed and resolved by Congress in the 1974 Act, as amended by the Manufactured Housing Improvement Act of 2000. Those laws make it clear that federal standards for manufactured housing must be "reasonable,"[78]so as to "facilitate the availability of affordable manufactured homes and ... increase homeownership for all Americans,"[79]based on due consideration of the "probable effect of [any proposed] standard on the cost of the manufactured home to the public."[80]From this statutory formulation, it is evident that the purchase price "affordability" of manufactured housing is paramount, insofar as: (1) operating cost "affordability" is a non-issue – and, therefore, totally irrelevant as a policy factor or consideration – for those excluded from the market as a result of regulation-driven purchase price increases; and (2) more specifically, the exclusion of literally millions of lower and-moderate income Americans from the market for manufactured housing (and from homeownership altogether) would not "facilitate the availability of manufactured homes for a significant segment of the public and would not "increase homeownership" as mandated by law. To the contrary, substantial regulation-driven increases in the purchase price of manufactured homes would decrease homeownership which, in 2015, reached an historic low level.[81]

Furthermore, as is demonstrated by the public and fully-transparent U.S. Census Bureau data cited above, the whole house median monthly energy operating cost for two out of three fuel types (i.e., fuel oil and piped natural gas) in manufactured housing is already lower than for other types of new residential construction and, in the case of electricity, is only $14.00 higher per month. Put simply, there is no legitimate basis or argument for applying discriminatorily harsh energy standards to manufactured homes that would – without any doubt -- exclude hundreds-of-thousands or millions of Americans from all of the benefits of homeownership in a quixotic mission to further-reduce manufactured home energy "operating" costs that are already either

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[77] See, 83 Federal Register, supra at p. 38076, col. 3.

[78] See, 42 U.S.C. 5402(7): "'Federal Manufactured Home Construction and Safety Standard' means a reasonable standard for the construction, design, and performance of a manufactured home...."

[79] See, 42 U.S.C. 5401(b)(2).

[80] See, 42 U.S.C. 5403(e)(4).

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

lower than, or comparable to, other types of housing. Rather, the legitimate and transparent Census Bureau data demonstrates that the existing HUD Manufactured housing energy standards already yield the lowest reasonable combination of construction, purchase price and operating affordability, consistent with the purposes and objectives of federal law. Any action by DOE to alter that careful and carefully-crafted balance would needlessly, unjustifiably and unlawfully undermine both the affordability and availability of manufactured housing in violation of the 2000 reform law and would warrant legal action to restrain and enjoin any such action.[82]

4. DOE "Alternative" Approaches

NODA "Issue 7" seeks comment on "whether [DOE] should consider and implement a cost-based tier structure with respect to regulating the energy efficiency of manufactured housing." Specifically, the NODA (and related materials) include proposed packages of energy efficiency measures (identified as "Packages 1-5). Packages 1-3, as stated by DOE, entail "up-front" cost increases ranging from $500.00 to $1,500.00, while Package 4 would entail energy-related labelling of manufactured homes "in conjunction with" either Packages 1-3, or some alternative approach developed in response to the NODA. Package 5, in turn, would exclude from any such standard adopted, any manufactured home with a purchase price – not including land – equal to or less than the loan limit established in accordance with Section 2(b)(1)(C) of the National Housing Act, currently $73,162.00.[83]

While MHARR appreciates DOE's attempt to address the extreme purchase price impacts of the June 2016 proposed rule through the NODA-proposed "packages," the reality is that even the proposed packages entail purchase price impacts that: (1) are significantly understated; and (2) would – like the June 2016 DOE proposed rule -- continue to have severe market-exclusion consequences. Again, input from MHARR members indicates that the true cost of the proposed packages could range up to $2,500.00 for a single section home in Climate Zone 3 and up to $5,000.00 for a multi-section home in Climate Zone 3, with correspondingly drastic market exclusion impacts.[84] Those impacts would be further exacerbated by additional regulatory and enforcement costs that have not yet been estimated or even developed conceptually by DOE. It is also significant to note that the statutory Manufactured Housing Consensus Committee in NODA comments adopted at its meeting on September 12, 2018, has objected to both the "timing and substance" of the proposals set forth in the NODA.[85] In relevant part, the MHCC's initial comments state: "The MHCC objects to the timing and substance of DOE's Request for

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[82] The foregoing points and analysis also address NODA Issues 3(b), 3(d), 4, 6 and 7 – i.e., there is no formulation of more stringent manufactured housing energy standards under any version of the International Energy Conservation Code or any other basis that would not undermine the availability and affordability of manufactured housing in violation of existing law.

[83] See, 83 Federal Register, No. 150, at p. 38078, col. 1-2.

[84] See, text at notes 71-72, supra.

[85] MHARR, as noted above, see, note 44, supra, concurs with the MHCC that DOE has not provided sufficient time for a full response to all of the policy and data-driven inquiries set forth in the August3, 2018 NODA. In particular, MHARR would stress that there has not been sufficient time to research the availability of "new information" as requested by DOE in Issues 10, 11 and 12. See, 83 Federal Register, No. 150, supra, at p. 38079, col. 1. MHARR provided information related to these inquiries – as was available at the time – in Attachment 4, hereto, its August 15, 2016 comments on DOE's "Request for Information on Impacts to Indoor Air Quality."

Information and content of the proposed rule. *** [The] MHCC sees a need for significant review of [the] conclusions reached in this [NODA]. It is the belief of this Committee that the goals of affordable and safe energy efficient housing would be best served by re-delegating this regulatory authority to HUD/MHCC."

Furthermore, with respect to NODA-proposed "Package 5," which supposedly would exempt from any final DOE energy standards, manufactured homes with a retail cost equal to or less than $73,162.00,[86] while MHARR, again, appreciates DOE's effort -- on a conceptual level – to limit or somehow ameliorate the inevitable, severe and profound "up-front" cost and market-exclusionary impacts of its various suggested packages, a cost "floor" of the type suggested by DOE would still, ultimately, not provide material or effective protection against the type of exclusionary impacts and manufactured housing market distortions and dislocations which would ensue from either the June 2016 proposed rule or the energy "packages" delineated in the NODA and related DOE materials.

Among other things: (1) the $73,162.00 retail price level cited by DOE is already at or near the "average" sales price of all manufactured homes as determined by the U.S. Census Bureau, and is well below the "average" sales price of a double-section manufactured home.[87] As a result, even the suggested packages, with the suggested "floor" level, would still impact significant numbers of potential purchasers – including approximately half of all potential purchasers – and eliminate many if not all of those potential purchasers from the market. Put simply, there is no product market in the United States – and especially one that serves a lower and moderate-income purchaser base – that could withstand this type of mass market exclusion. (2) Any type of regulatory "floor" would be subject to inevitable "regulatory creep," i.e., constant pressure from within or outside government, or both, to expand the scope and impact of any DOE manufactured housing energy standards by either raising the floor amount or through other means or devices. (3) A price floor of this type would distort the manufactured housing market and effectively place the federal government, through DOE, in the position of picking market "winners" and "losers" via regulation – contrary to the regulatory policies of the Trump Administration. Among the companies with produce manufactured homes, there are those that primarily serve the most affordable segment of the market, while there are others that primarily serve the larger, more elaborate multi-section segment of the market. A costly energy standard that would be applied on a de facto discriminatory basis, linked to the price of the home, would result in market-exclusionary impacts that would decimate the non-exempt portion of the industry and lead to massive market dislocation with ripple effects throughout the industry and throughout the manufactured housing market.[88]

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[86] See, 83 Federal Register, No. 150 at p. 38078, col. 2.

[87] See, Attachment 7, hereto, U.S. Census Bureau, "Cost and Size Comparisons: New Manufactured Homes and New Single-Family Site-Built Homes (2007-2016)," showing the "average" sales price of all manufactured homes – in 2016 – as $70,600.00 and the "average" sales price of a double-section manufactured home as $89.500.00. While this represents the most recent data available from the U.S. Census Bureau, the trend-line in both the "all" manufactured homes category and double-section price category, reflects recent increases of approximately $2,500.00 per year. Applying that factor to the Census Bureau data from 2016, would indicate a 2018 average sales price for all manufactured homes of approximately $75,600.00, and $94,500.00 for double-section homes. In each case then, the price "floor" posited by DOE would be well below the price of the current "average" manufactured home.

[88] Significantly, in its comments opposing the June 2016 DOE proposed rule, the George Washington University Regulatory Studies Center noted that the 2016 proposed rule failed to consider potentially significant impacts on

Consequently, MHARR must object as well to a price "floor" concept.[89]

5. NODA Labeling Proposals

In addition to its various alternative "packages," the NODA also addresses the possibility of mandating energy-related "labels" for manufactured homes. The NODA thus states, in part: "The NODA presents an option that would provide tired labeling for consumers to compare and contrast information on upfront costs and long-term energy savings across manufactured housing structures."[90]The simple response to this inquiry (i.e., NODA "Issue 8") is that MHARR objects to any and all labelling requirements that are applied to HUD Code manufactured housing on a discriminatory basis. Insofar as manufactured homes are constructed of the same materials that are used for all other types of housing and are built to a federal code designed to ensure safety, quality and durability at an inherently affordable price-point, there is no legitimate basis for subjecting manufactured homes to labelling requirements that are not similarly applied to other types of housing. Nor does it appear, again, that DOE has studied or considered the market and competitive impacts of such a labelling system. Consequently, MHARR – consistent with its established and long-standing policy on such matters – objects to any such labels or label requirement being imposed on manufactured homes on a discriminatory basis.

B. COMPLIANCE LEAD TIMES

NODA "Issue 14" seeks comment on "lead times" to implement any new DOE energy standards. Insofar as MHARR continues to oppose the imposition of any new DOE manufactured housing energy standards, compliance "lead-times" are irrelevant. As MHARR has indicated previously, any new manufactured housing energy standards must be developed through a completely new, proper and legitimate rulemaking process. Considerations relating to implementation, enforcement and compliance lead times should properly be addressed as part of that new rulemaking (if any). In the event, however, that DOE fails to engage in a completely new rulemaking, the compliance lead-time should be significantly lengthened to account, in part, for: (1) the development and approval of new designs, and any related construction changes; (2) the development and implementation of new enforcement mechanisms; (3) inevitable market dislocations; and (4) the impact of litigation and litigation-related delays.

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lessening competition within the manufactured housing market, stating, in relevant part: "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 … 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." See, The George Washington University Regulatory Studies Center, "Public Interest Comment on the Department of Energy's Proposed Rule [for] Energy Conservation Standards for Manufactured Housing," supra, at p. 11. Yet, it appears that no consideration of potentially severe market-distortion impacts has occurred in connection with the various NODA "packages" and that no such DOE market-impact analysis has yet been conducted with respect to those packages in violation of 42 U.S.C.6295(o)(2)(B)(i)(V).

[89] The foregoing comments, and particularly point 3, above (p. 18 and note 87, supra), also address NODA "Issue 7," with respect to a "tiered" regulatory structure.

[90] See, 83 Federal Register, No. 150, supra, at p. 38078, col. 2-3.

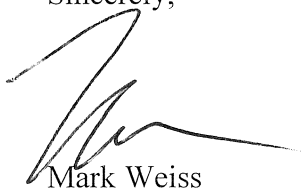
C. ENFORCEMENT MECHANISM

Lastly, NODA "Issue 15" seeks comment on "the most appropriate" enforcement mechanism for any manufactured housing energy standards issued by DOE. Subject to the points referenced in section III.B, above, and as MHARR has previously indicated, for reasons of cost-efficiency, consistency with other existing manufactured housing construction and safety standards enforced by HUD, and consistency with existing enforcement mechanisms applicable to virtually every other aspect of manufactured housing construction and safety, the enforcement of any such standard(s) should be delegated to HUD. Indeed, and as requested by the MHCC in its September 12, 2018 comments, this matter, in its entirety, should be re-delegated to HUD.

IV. CONCLUSION

For all of the foregoing reasons, MHARR continues to strenuously oppose the imposition of any DOE energy standards for federally-regulated manufactured housing (outside of the cost-benefit parameters and purposes of the 1974 Act, as amended), which would prohibitively increase the cost of manufactured housing and needlessly exclude hundreds-of-thousands or millions of lower and moderate-income Americans from the manufactured housing market and from homeownership altogether, in exchange for dubious, speculative, or inconsequential "life-cycle operating cost" reductions. Furthermore, to the extent that the scandalous DOE "negotiated rulemaking" procedure leading to this juncture was, is, and remains, irretrievably and fatally tainted, any cost or alleged benefit data derived from that proceeding is similarly tainted and should not form the basis for any new proposed or final rule. Instead, any further or subsequent DOE proposal must be based on a completely new, proper and legitimate rulemaking proceeding utilizing a completely new process and new information inputs and data, in order to avoid potential legal action.

Sincerely,



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Hon. Mick Mulvaney, Director, Office of Management and Budget
Hon. Neomi Rao, Administrator, Office of Information and Regulatory Affairs
Office of Advocacy, U.S. Small Business Administration