

October 13, 2021

VIA FEDERAL EXPRESS AND ELECTRONIC SUBMISSION

Manufactured Housing Consensus Committee  
C/O Home Innovation Research Labs  
Administering Organization  
400 Prince George's Boulevard  
Upper Marlboro, Maryland 20774

Re: Energy Conservation Standards for Manufactured Housing – Third Comments

Dear Members of the Manufactured Housing Consensus Committee:

The Manufactured Housing Association for Regulatory Reform (MHARR) submits the following third set of comments in connection with the Manufactured Housing Consensus Committee's (MHCC) consideration of a Supplemental Notice of Proposed Rulemaking (SNPR) regarding "Energy Conservation Standards for Manufactured Housing" published by the U.S. Department of Energy (DOE) in the Federal Register on August 26, 2021.<sup>1</sup> MHARR is a national trade association representing producers of manufactured housing subject to regulation pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 (1974 Act), as amended by the Manufactured Housing Improvement Act of 2000 (2000 reform law), as well as relevant provisions of the Energy Independence and Security Act of 2007 (EISA).

**I. INTRODUCTION**

The following are MHARR's third set of comments regarding MHCC consideration of DOE's August 26, 2021 manufactured housing energy standards supplemental proposed rule. MHARR's initial comments, submitted September 15, 2021, principally addressed policy issues related to the proposed standard, including its predictably destructive cost impact on manufactured housing consumers, the manufactured housing market and the manufactured housing industry, as well as the absence of any genuine or legitimate need for excessive and discriminatory manufactured housing energy standards, based on federal data showing that manufactured housing residents already pay less for all types of home energy sources than residents of detached, single-family homes under existing HUD standards. In its second set of comments, filed October 1, 2021, MHARR provided additional information concerning the fundamental incompatibility of the International Energy Conservation Code (IECC) with manufactured housing construction and

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<sup>1</sup> MHARR's September 15, 2021 and October 1, 2021 comments are hereby incorporated herein by reference.

affordability, the fundamental incompatibility of the IECC with the objectives and consensus procedures of the Manufactured Housing Improvement Act of 2000, and an initial statement of specific DOE proposed standards that would be inappropriate, non-cost-effective for manufactured housing, or otherwise destructive of manufactured housing and the manufactured housing market.

In this third set of MHCC comments, submitted in connection with the MHCC’s scheduled meeting on October 20, 2021, MHARR addresses: (1) the substantial overlap (although denied by DOE) between the current proposed 2021 DOE manufactured housing energy standards and the thoroughly discredited manufactured housing energy standards proposed by DOE in June 2016 based on a deceitful and manipulated “negotiated rulemaking” process (subsequently rejected by the Office of Management and Budget in 2017); and (2) the fundamentally arbitrary and capricious nature of the DOE SNPR proposal, based on an unlawfully vague, ambiguous and undefined delegation of rulemaking power under section 413 of the Energy Independence and Security Act of 2007.<sup>2</sup>

For the reasons set forth in all of these comments, the August 26, 2021 proposed DOE manufactured housing energy standards rule should be rejected by the MHCC with relevant comments submitted to DOE, together with a request for an extension of the current October 25, 2021 comment deadline, in order to ensure a complete and thorough review of the DOE proposal, and proper stakeholder input.

## **II. COMMENTS**

### **A. THE PROPOSED STANDARDS ARE A DECEPTIVE “REBOOT” OF DOE’S TAINTED 2016 STANDARDS**

DOE, in its August 26, 2021 Supplemental Notice of Proposed Rulemaking (SNPR), repeatedly maintains that its “new” proposed “energy conservation” standards for manufactured homes are substantively different from the disastrously-flawed standards proposed in its original June 2016 Notice of Proposed Rulemaking,<sup>3</sup> and that the alleged “changes” incorporated in the 2021 proposed standards somehow address or mitigate the cost concerns and other fundamental flaws highlighted by MHARR and other commenters in the 2016 rulemaking. For example, DOE states in its August 26, 2021 SNPR, that its so-called “tiered” standards proposal, based on the 2021 version of the International Conservation Code (IECC), would specifically “replace DOE’s June 2016 proposal.”<sup>4</sup> Similarly, DOE asserts that this “tiered” proposal responds to “concerns raised by HUD” and others with respect to the 2016 proposed rule and the need to maintain the

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<sup>2</sup> I.e., 42 U.S.C. 17071.

<sup>3</sup> The pervasive, fundamental and fatal defects of that June 2016 proposed rule and the irretrievably tainted, sham DOE “negotiated rulemaking” process which led to that proposal, including selective undisclosed leaks to DOE-favored “insiders” (within and outside the industry) is fully documented in MHARR’s August 8, 2016 written comments to DOE (Attachment 1 to MHARR’s September 15, 2021 MHCC Comments), which are hereby incorporated herein by reference.

<sup>4</sup> See, 86 Federal Register, No. 163 (August 26, 2021) “Energy Conservation Standards for Manufactured Housing,” p. 47744 at p. 47746, col.1.

purchase price affordability of federally-regulated manufactured housing.<sup>5</sup> The reality, however, is that the 2021 DOE proposed rule is nothing more than a thinly-veiled “reboot” of the fatally-flawed and defective 2016 proposed rule – made substantively worse by the more stringent incorporated mandates of the 2021 IECC. Its putative “tiered” structure, moreover, is little more than window-dressing designed to provide a superficial veneer of supposed cost-sensitivity, while leaving DOE completely free to adopt the more costly “Tier 2” standards across-the-board in a final rule. This duplicitous bait-and-switch scheme should be rejected by the MHCC

At the outset, DOE’s assertion that the 2021 proposed standards somehow “replace” the 2016 proposed standards in any substantive way – other than to make them even more stringent and costly – is demonstrably false.

While DOE, very early in its 94-page August 26, 2021 proposed rule,<sup>6</sup> states that its current proposal “replaces” the fatally-defective June 2016 proposed manufactured housing energy standards that were rejected by the Office of Management and Budget (OMB) and ultimately withdrawn from further consideration by the Trump Administration,<sup>7</sup> it acknowledges much later in its SNPR,<sup>8</sup> that the DOE 2021 proposal, instead, merely “updat[es] the proposed energy conservation standards presented in the June 2016 NOPR.”<sup>9</sup>(Emphasis added). While the term “replace,” therefore, deceptively implies the substitution of a completely new proposal for the rejected and withdrawn 2016 proposed rule, the reality is that the 2021 proposed rule is simply a warmed-over – and even more stringent and costly version of DOE’s baseless 2016 proposed standards, due to the 2021 proposal’s reliance on the much more stringent and costly 2021 IECC, which, according to the International Code Council (ICC) is only 10% below net-zero energy usage for residential buildings.<sup>10</sup> The DOE-alleged “replacement” of the previously rejected and withdrawn 2016 DOE proposal, consequently, is a sham -- in at least two primary respects – as is explained in greater detail below. This deceptive proposal would not ameliorate the worst impacts of high-cost DOE energy regulation or protect lower and moderate-income manufactured housing consumers from those destructive impacts, up to and including total exclusion from the manufactured housing market and homeownership more broadly. Rather, the 2021 DOE proposal is a dressed-up retrenchment of the 2016 proposed rule “on steroids,” due to its reliance on the

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<sup>5</sup> Id. at p. 47759, col. 3. “As a result of concerns raised by HUD regarding the need to maintain affordability, which interrelate with the cost-effectiveness concerns specified in 42 U.S.C. 17071, DOE is presenting a primary proposal based on tiered standards....” See also, 86 Federal Register, supra at p. 47756, col. 2.

<sup>6</sup> DOE makes this fundamental – and fundamentally false – assertion at the third page of its August 26, 2021 SNPR. See, 86 Federal Register, supra at p. 47746, col. 1.

<sup>7</sup> See, 83 Federal Register, No. 150 (August 3, 2018) “Energy Conservation Standards for Manufactured Housing,” p. 38073 at p. 38074, col. 3: “On June 17, 2016, DOE published in the Federal Register a [Notice of Proposed Rulemaking]. \*\*\* DOE received nearly 50 comments on the proposed rule during the comment period. After considering those comments, DOE prepared a draft final rule governing energy efficiency in manufactured housing and submitted it to OIRA [the Office of Information and Regulatory Affairs within the Office of Management and Budget] for review under Executive Order 12866. OIRA received the draft final rule on November 1, 2016. Again, however, the draft final rule did not clear the OIRA review process and was withdrawn on January 31, 2017.” (Emphasis added) (Internal citations omitted).

<sup>8</sup> I.e., on the 21<sup>st</sup> page of its SNPR. See, 86 Federal Register, supra at p. 47765, col. 1.

<sup>9</sup> Id.

<sup>10</sup> See, International Code Council (ICC), (March 2021) IECC Frequently Asked Questions: “What Will Change About the Substance of the IECC:” “The 2021 IECC will be the starting point for revisions for the 2024 IECC. The 2021 IECC base efficiency requirements are only 10% from net zero for residential buildings....”

more stringent and -- as alleged by the National Association of Home Builders (NAHB) and others – politically manipulated 2021 IECC.<sup>11</sup>

The full scope of the deception inherent in the 2021 SNPR becomes evident only through a thorough and complete review of its entire 94 pages, within the context of the entire administrative record of the present rulemaking. Such a review demonstrates two key facts.

First, the “two-tiered” approach set forth as DOE’s “primary” proposal in the 2021 SNPR, is not binding on DOE with respect to any final rule in this proceeding. Put differently, it is entirely possible, if not likely, that a DOE final rule in this proceeding would impose the so-called “Tier 2” standards (or some variant thereof) on all manufactured homes, regardless of price.<sup>12</sup> Among other things, this is demonstrated by the fact that while the two-tiered regulatory approach is deemed “primary” in DOE’s August 26, 2021 SNPR, and a “one-size-fits-all,” one-tier approach is identified as an “alternate” methodology in that SNPR, the two approaches were presented in a completely opposite configuration just weeks earlier, in DOE’s July 7, 2021 “Notice of Intent to Prepare an Environmental Impact Statement for Energy Conservation Standards for Manufactured Housing.”<sup>13</sup> In that statutorily-required document,<sup>14</sup> DOE referred to a single, across-the-board energy conservation standard for manufactured homes “based on the 2021 IECC” as its primary “proposed action,” with a “tiered approach” being “consider[ed]” only as “an action alternative.”<sup>15</sup> (Emphasis added). Having published both proposals (*i.e.*, “tiered” and “un-tiered”) in the Federal Register, DOE could attempt to adopt a full-scale, un-tiered, IECC 2021-based standard for all manufactured homes, regardless of price, as its final rule. The MHCC should not accept or endorse such a “bait-and-switch” scenario.

Second, any claim that the 2021 proposed standards are somehow “different” from, less stringent than, or more cost-sensitive than the fatally-flawed 2016 proposed standards is, again, demonstrably false. While DOE does, in fact, attempt to portray the 2021 proposed standards as being more cost-sensitive than the 2016 proposed rule,<sup>16</sup> a close review of the 2021 SNPR shows that contention to be baseless and deceptive. In the 2021 SNPR’s 23-page summary and explanation of the 2021 proposed standards,<sup>17</sup> DOE states 30 times that various elements of its August 26, 2021 SNPR proposal are either “consistent with,” “based on” or “remain the same” as either the 2016 “negotiated rulemaking,” the Manufactured Housing Working Group’s (MHWG)

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<sup>11</sup> See, MHARR October 1, 2021 MHCC Comments at pp. 4-6 and third-party sources cited therein.

<sup>12</sup> The August 26, 2021 SNPR thus states, for example: “DOE’s alternate proposal is the ‘untiered’ approach, wherein energy conservation standards for all manufactured homes would be based only on the 2021 IECC. Both proposals replace DOE’s June 2016 proposals and the selected approach would be codified in a new part of the Code of Federal Regulations....” See, 86 Federal Register, supra at p. 47746, col. 1. (Emphasis added).

<sup>13</sup> See, 86 Federal Register, No. 127 (July 7, 2021) “Notice of Intent to Prepare an Environmental Impact Statement for Energy Conservation Standards for Manufactured Housing,” p. 35773, at p. 35774

<sup>14</sup> DOE’s July 7, 2021 Notice was published in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA). See, 86 Federal Register, supra at p. 35773.

<sup>15</sup> Id. at p. 35774, col. 3.

<sup>16</sup> See, e.g., 86 Federal Register, supra at p. 47759, col. 3: “As a result of concerns raised by HUD regarding the need to maintain affordability, which interrelate with the cost-effectiveness concerns specified in 42 U.S.C. 17071, DOE is presenting a primary proposal based on tiered standards that would prescribe a complement of cost-effective energy conservation requirements based on the requirements in the 2021 IECC.”

<sup>17</sup> See, 86 Federal Register, supra at pp. 47765-47788.

2015/2016 recommendations, or the 2016 proposed rule, or some combination of the three.<sup>18</sup> Further, of the 24 separate components addressed in SNPR Tables III-13 and Table III-14 concerning “insulation installation” and “air barrier” criteria,<sup>19</sup> DOE proposes “no change” between the 2016 IECC and 2021 IECC levels for 11 components and proposes updating the applicable criteria for 5 more to 2021 IECC levels. By contrast, it proposes eliminating or excluding just 4 of those 24 components.<sup>20</sup> Again, therefore, the fundamental thrust of the 2021 DOE proposal is not to materially ameliorate the destructive cost impacts of the 2021 IECC, or its original 2016 proposed rule, but to use the 2021 IECC to bootstrap its original 2016 IECC-based proposals and add a significant number of even more stringent and costly measures that would needlessly undermine the affordability of manufactured homes as mandated by preexisting federal law.

Again, the MHCC should not sanction or endorse such a flagrant “bait and switch” stratagem, and should, instead, reject the DOE 2021 SNPR proposal in its entirety.

## **B. DOE’S ENTIRE PROPOSAL IS ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION IN VIOLATION OF LAW**

The federal Administrative Procedure Act (APA) provides for the invalidation of agency action that is determined to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>21</sup> To satisfy this statutory standard, an agency “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 245-246, 9 L.Ed.2d 207 (1962).

In order to provide a complete and fully-articulated administrative record for a reviewing court in any possible legal challenge to DOE’s final rule in this matter,<sup>22</sup> the MHCC should identify, consider and expressly reject the various ways that DOE, in its SNPR, has arbitrarily and subjectively altered, modified, or transformed the application of the 2021 IECC, due to the fact – specifically acknowledged by DOE – that the IECC is not a code established or designed for manufactured homes as defined by federal manufactured housing law.<sup>23</sup> Put differently, DOE’s

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<sup>18</sup> See, 86 Federal Register, supra at p. 47766, col. 3, p.47768, col. 1, p. 47771, col. 2 and 3, p. 47773, col. 2 and 3, p. 47774, col. 1 and 3, p. 47775, col. 1 and 2, p. 47776, col. 1, p. 47777, col. 3, p. 47778, col. 3, p. 47778, col. 2, p. 47781, col. 2 and 3, p. 47785, col. 2 and 3, p. 47786, col. 1, 2 and 3, p. 47787, col. 3

<sup>19</sup> See, 86 Federal Register, supra at p. 47780-47781 and 47783-47784.

<sup>20</sup> The August 26, 2021 SNPR “seeks comment” on whether updated 2021 IECC requirements should be imposed for the remaining four components.

<sup>21</sup> See, 5 U. S. C. §706(2)(A).

<sup>22</sup> See, *Department of Commerce v. New York*, 588 U.S. \_\_\_, (2019): “[I]n order to permit meaningful judicial review, an agency must “disclose the basis” of its action. *Burlington Truck Lines, Inc. v. United States*, 371 U. S. 156, 167–169 (1962) (internal quotation marks omitted); see also *SEC v. Chenery Corp.*, 318 U. S. 80, 94 (1943) (“[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.”). Second, in reviewing agency action, a court is ordinarily limited to evaluating the agency’s contemporaneous explanation in light of the existing administrative record.

<sup>23</sup> See e.g., 86 Federal Register, supra at p. 47763, col. 1: “[T]he IECC is specific to site-built structures.” See also, Id. at p. 47754, col. 3: “DOE notes that the IECC is designed for building structures that have a permanent foundation.

August 26, 2021 proposed rule relies on an inconsistent jumble of arbitrary thresholds, modifications, alterations, and outright fabrications, concocted by DOE in a futile effort to convert the 2021 IECC from a code not designed, intended, or appropriate for manufactured housing, into something that it is not – a legitimate, cost-effective energy standard for the unique nature and construction of HUD-regulated manufactured housing. The MHCC should not accept or endorse, even implicitly, this phony exercise that will decimate the manufactured housing market and place homeownership beyond the means of millions of Americans who would otherwise be able to afford a modern HUD-regulated manufactured home.

Significantly, DOE does not deny that it has exercised “broad” (and, in fact, overbroad) discretion in its August 26, 2021 SNPR, to alter, modify and/or eliminate certain elements of the 2021 IECC and its application, in a subjective and arbitrary effort to unilaterally convert the IECC from a code for more costly, larger and differently-designed, constructed and configured site-built homes, into a code for federally-regulated manufactured homes. DOE thus states in its SNPR:

“Because the IECC is specific to site-built structures, DOE’s supplemental proposal, while based on the 2021 IECC, has required modifications to the IECC provisions for application to manufactured homes. In DOE’s view, the language Congress used in instructing DOE to set standards for these structures is broad and does not require the imposition of requirements for manufactured homes that are identical to those that the IECC provides for site-built structures. The use of the phrase ‘based on’ readily indicates that Congress anticipated that DOE would use its discretion in adapting elements of the IECC’s provisions for manufactured housing use, including whether those elements would be appropriate in light of the specific circumstances related to the structure.”<sup>24</sup>

(Emphasis added). While MHARR agrees that the statutory directive of 42 U.S.C. 17071 does not require the imposition of energy standards for manufactured homes that “are identical to those that the IECC provides for site-built structures,”<sup>25</sup> the reality is that the statute provides no specific benchmarks, standards, principles, or criteria whatsoever, for the necessary conversion of the IECC from a site-built-only code into a code for non-site-built manufactured housing, and DOE has articulated no such overriding criteria in its August 26, 2021 SNPR.

Indeed, there is no evidence that Congress, at the time of its adoption of the Energy Independence and Security Act of 2007 – and EISA’s section 413 manufactured housing energy directive -- was even aware that the IECC is (and continues to be) designed solely for site-built housing, is not an appropriate or cost-effective code for manufactured housing, and is voted-on, in its final form, exclusively by state and local building code officials with no direct responsibility for the regulation of manufactured housing construction or safety. Further, there is no evidence

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Manufactured housing structures, however, are not built on permanent foundations but are built on a chassis to enable them to be moved or towed when needed. As a result, because they present their own unique set of unique considerations that the IECC was not intended to address, some aspects of the IECC are unable, or highly impractical, to be applied to manufactured housing.” (Emphasis added).

<sup>24</sup> See, 86 Federal Register, supra at p. 47757, col. 1.

<sup>25</sup> It should be noted that the IECC, per se, has no binding force, effect or authority, except as separately adopted by law at the local, state or federal level.

and no indication from the statutory text of EISA section 413, that Congress intended to confer upon DOE – an agency with no other comparable regulatory role regarding housing or residential construction -- unlimited, undefined and unrestrained discretion to alter aspects of the IECC, or its application, based on its own unilateral decisions.<sup>26</sup> Nevertheless, the August 26, 2021 SNPR contains multiple modifications and alterations to the 2021 IECC and its application.

As an initial matter, DOE attempts to “limit” the predictably devastating purchase price and manufactured housing market impacts of the 2021 IECC by applying a highly-modified and, supposedly, limited version of the IECC standards to manufactured homes with a manufacturer’s “retail list price” of \$55,000 or less.<sup>27</sup> These modified standards, according to DOE, will result in a purchase price increase of no more than \$750.00 for homes within “Tier 1” of DOE’s two-tiered, “primary” proposal.<sup>28</sup> Virtually every aspect of this proposal, however, is fundamentally arbitrary in violation of the APA.

First, there is no express or implied authorization in EISA section 413 for a multi-tiered regulatory regime. Clearly, if Congress had wanted a multi-tiered regulatory system, or wished to authorize a multi-tiered regulatory system that would effectively discriminate against certain purchasers or subcategories of manufactured homes<sup>29</sup> – all of which are expressly identified and protected as “affordable” homes under federal manufactured housing law – it could have done so, but manifestly, did not.

Second, there is nothing express or implied in EISA section 413 to authorize a two-tiered or multi-tiered energy regulatory structure based specifically on a manufacturer’s retail list price, in violation of pre-existing federal law, which identifies and was designed specifically by Congress to protect the purchase price affordability of all manufactured homes as a major source of affordable homeownership for all Americans.<sup>30</sup> Moreover, using this particular parameter as the demarcation line between the extreme “Tier 1” proposed standards and the even more extreme “Tier 2” standards is fundamentally arbitrary, in violation of the APA because, as DOE admits in its August 26, 2021 SNPR, the manufacturer’s retail list price is not the same as the retail purchase price of the home to the consumer, and does not necessarily correspond directly or closely with that final acquisition price.<sup>31</sup>

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<sup>26</sup> I.e., whether reached based on non-binding “consultation” with HUD or not.

<sup>27</sup> See, 86 Federal Register, supra at p. 47746, col. 1-2.

<sup>28</sup> Id. at p. 47746, col. 2.

<sup>29</sup> I.e., by compelling those purchasers who remain in the market to pay thousands of dollars more for the purchase of certain manufactured homes – comprising some 75% of the HUD Code market as calculated by DOE -- than those same purchasers do today. See, 86 Federal Register, supra at p. 47760, col. 2.

<sup>30</sup> See, e.g., 42 U.S.C. 5401(b)(2), stating that “the purposes” of the Manufactured Housing Improvement Act of 2000 include “facilit[ating] the availability of affordable manufactured homes and to increase homeownership for all Americans.”

<sup>31</sup> See, e.g., 86 Federal Register, supra at p. 47760, col. 2-3: “DOE acknowledges that the boundary of the proposed tiers is being applied to manufacturers’ retail list prices, while the underlying data from which the boundary is derived in the [2019 U.S. Census Bureau] data are sales and/or purchase price data of manufactured homes, DOE understands the manufacturer’s retail list price to be the price that the manufacturer provides in the sales contract to a distributor or retailer.... On the other hand, the purchase price is the final sales price of the home to the consumer. The manufacturer’s retail list price and the purchase price are not the same.” (Emphasis added).

Third, there is nothing express or implied in EISA section 413 to authorize a manufacturer's retail list price demarcation line of \$55,000 to separate so-called "Tier 1" energy standards from so-called "Tier 2" energy standards. And, indeed, this demarcation or "boundary" as characterized by DOE,<sup>32</sup> is arbitrary and capricious – in itself – in multiple respects. As an initial matter, DOE's unilateral creation of a multi-tiered standard, in itself, is arbitrary, as noted above. Further, the selection of the manufacturer's "retail list price" as the metric for the demarcation line, is arbitrary. As DOE itself notes, the manufacturer's retail list price is not synonymous with or equal to the final acquisition price paid by the home purchaser. As DOE thus acknowledges, "the manufacturer's retail list price and the purchase price are not the same."<sup>33</sup> Indeed, the demarcation price selected by DOE as the threshold between its proposed "Tier 1 and "Tier 2" standards: (1) bears no relation to the price paid by the ultimate purchaser of the home; (2) bears no relation to the ability of that consumer to qualify for financing to purchase the home at that price level;<sup>34</sup> or (3) the number of lower and moderate-income consumers who would likely be excluded from the manufactured housing market -- and homeownership altogether – by such a price increase, especially when combined with the as yet unknown purchase cost impacts of regulatory compliance, testing and enforcement requirements, which have not yet been estimated or considered by DOE.<sup>35</sup>

Related to this, is the fact that a cost of \$55,000 – even if it did reflect a relevant number – such as the home purchaser's final cost, would still be arbitrary and capricious in violation of the APA, in that it is based on outdated information, is not consistent with current manufactured housing price metrics, and would be limited in application to less than 20% of the 2021 manufactured housing market. As MHARR explained in its initial comments submitted on September 15, 2021, the most recent U.S. Census Bureau data for manufactured housing, found that the "average" sales price of a single-section manufactured home, in 2020, was \$57,300.00,<sup>36</sup> while, the "average" price of a double-section manufactured home was \$108,500.00 and the "average" price of all manufactured homes was \$87,000.00.<sup>37</sup> With material costs having increased in 2021, moreover, these amounts are likely to be substantially higher today. The \$55,000.00 demarcation line, accordingly, was in 2020 – and is in 2021 -- less than the average price of a single-section manufactured home. Single-section homes, in turn, comprise less than 45% of the total HUD Code manufactured housing market. The overwhelming majority of the HUD Code market in 2021, therefore, is comprised of homes priced in excess of \$55,000.00. As a result, the

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<sup>32</sup> See, e.g., 86 Federal Register, supra at p. 47760, col. 2.

<sup>33</sup> Id. at p. 47760, col. 3.

<sup>34</sup> DOE summarily dismisses concerns related to financing manufactured homes at higher prices attributable to its proposed energy regulations, stating: "Comments regarding loan practices are beyond the scope of this rulemaking."

<sup>35</sup> See, 86 Federal Register, supra at p. 47759: "DOE is not addressing a test procedure, or compliance and enforcement provisions for an energy conservation standard for manufactured housing in this document." DOE further "acknowledges that it has not fully enumerated testing and enforcement costs at this time." Id. Oddly enough, however, while DOE apparently cannot or will not calculate the full consumer purchase cost impacts of its proposed rule "at this time," it does provide, in its August 26, 2021 SNPR, a calculation of the "potential global benefits resulting from reduced CO2 emissions" pursuant to the proposed rule. Id.

<sup>36</sup> See, U.S. Census Bureau, "Cost and Size Comparisons: New Manufactured Homes and New Single-Family Site-Built Homes, 2014-2020."

<sup>37</sup> DOE's August 26, 2021 SNPR admits that it is "aware" of the existence of these figures, but "has not reviewed [them] in detail or incorporated these new data into the analysis presented" in its SNPR. See, 86 Federal Register, supra, at p. 47758, col. 2.



more costly, more extreme and more burdensome “Tier 2” standards will impact the overwhelming majority of manufactured homes and manufactured housing consumers, in an arbitrary and discriminatory manner, with devastating market consequences.<sup>38</sup>

Fourth, there is nothing express or implied in section 413 to indicate that an alleged \$750.00 initial purchase price impact is a valid, legitimate or lawful price increase to impose on Tier 1 homes and Tier 1 home purchasers. Put differently, even if the \$750.00 alleged purchase price impact on Tier 1 homes were validly calculated – which it is not, per se, in that, among other things, it fails to acknowledge or consider the across-the-board purchase price impacts of testing, enforcement and regulatory compliance costs, including modified and ongoing design and production recertifications – there is nothing in EISA section 413 which states or indicates that \$750.00 is an appropriate, legitimate, or defensible amount of additional costs to impose on those homeowners. Viewed in this manner, the amounts associated with the proposed “tiered” energy standards system entail multiple and compounded arbitrary and capricious parameters – beginning with the \$55,000.00 demarcation threshold which is based, effectively, on nothing, which is further compounded by the \$750.00 “Tier 1” cost impact figure which, again, was effectively conjured and “made up” by DOE with absolutely no basis in fact or law. Put differently, there is no basis in law (i.e., EISA section 413) or fact to distinguish these figures from, for example, an \$85,000.00 demarcation line between “Tier 1” and “Tier 2,” and a putative \$350.00 alleged cost impact on Tier 1 homes and consumers.

In each case,<sup>39</sup> these parameters, reflecting quasi-legislative policy decisions and determinations by DOE – together with proposed modifications to the 2021 IECC itself -- are not based upon specific, defined authority set forth in EISA section 413, are not based on specific, valid facts and information, and are fundamentally arbitrary and capricious within the meaning of the APA. Consequently, the MHCC should – and must -- go on record as disapproving of all of these provisions and proposed structures, in their entirety.

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<sup>38</sup> DOE’s August 26, 2021 SNPR estimates that Tier 1 will comprise “approximately 25 percent of the sales total ... of manufactured homes.” See, 86 Federal Register, supra at p. 47760, col. 2. With the documented 2020 increase in the purchase price of a single-section manufactured home, however, above DOE’s \$55,000 benchmark, and continuing raw material cost increases in 2021, MHARR has estimated that Tier 1, at most, would apply to 17.3% of the current-day manufactured housing market. See, MHARR October 1, 2021 MHCC Comments at p. 13, n. 43.

<sup>39</sup> There are many other examples of DOE determinations in the August 26, 2021 SNPR that are arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law, in violation of the APA. These include, but are not limited to, DOE’s alleged “analysis” of market exclusion as a result of extreme purchase price increases resulting from its proposed energy standards. Among other things, DOE’s August 26, 2021 SNPR summarily rejects a 2014 NAHB purchaser exclusion analysis specific to the manufactured housing market, that was presented to the “negotiated rulemaking” MHWG. That analysis showed exclusion levels well in excess of 300,000 households for every \$1,000.00 increase in the purchase price of a manufactured home. DOE mischaracterizes this study, asserting that it “assum[es] all American households intend to buy a home.” See, 86 Federal Register, supra at p. 47796, col. 3. It then compounds this false characterization with a baseless “assumption” of its own, stating: “Rather than analyzing all American households, DOE’s estimate in this SNOPR calculates the number of households no longer able to purchase a manufactured home from the pool of households planning to purchase a manufactured home (which is much smaller than the total number of American households).” Exactly how DOE “calculated” the number of American households “planning to purchase a manufactured home,” however -- under either current price levels or the increased price levels attributable to its proposed standards -- is unclear. Moreover, even if DOE were somehow able to discern such a figure, its calculation or estimate would still be fundamentally arbitrary and capricious, in that it would not account for the additional costs of testing, enforcement, or regulatory compliance – none of which have been calculated by DOE – or the additional levels of market exclusion that would be attributable to those additional, but uncalculated costs.

### **III. SUMMARY OF COMMENTS**

MHARR strongly urges the MHCC to reject DOE’s proposed manufactured housing energy standards as set forth in its August 26, 2021 SNPR, for multiple, compelling reasons as are more particularly detailed in its comments submitted on September 15, 2021, October 1, 2021, and in these comments. In summary, those reasons include,<sup>40</sup> but are not limited to:

1. Manufactured homes, under current HUD standards, are already energy-efficient on a whole-home basis;
2. Manufactured home monthly energy costs are already lower than those for site-built single-family homes;
3. Total manufactured home monthly operating costs are already lower than those for site-built single-family homes;
4. The IECC is not a code developed for manufactured homes;
5. The IECC, through and including its 2021 iteration, was voted-on and approved by state and local building code officials with no direct responsibility for manufactured housing standards;
6. The IECC, through and including its 2021 iteration, was voted-on and approved by state and local building code officials often representing governments that discriminatorily exclude or severely restrict the placement of manufactured homes in their respective jurisdictions;
7. The IECC, unlike the HUD Code, is not based on a statutorily-mandated balance of protection and purchase price;
8. Application of the 2021 IECC to manufactured homes – even in a modified form – would result in prohibitive purchase price increases;
9. Application of the 2021 IECC to manufactured homes – even in a modified form – would result in purchase price increases significantly higher than those “estimated” by DOE, which have consistently been understated;
10. Application of the 2021 IECC to manufactured homes – even in a modified form – would result in purchase price increases significantly higher than those “estimated” by DOE, which do not include, or account for, costs attributable to increased testing, compliance and regulatory enforcement burdens;

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<sup>40</sup> MHARR will address other and additional reasons for the rejection of DOE’s August 26, 2021 proposed rule in its comprehensive comments to DOE which will be filed subsequent to the MHCC’s currently scheduled October 20, 2021 meeting.

- 11.** Application of the 2021 IECC to manufactured homes – even in a modified form – would result in purchase price increases significantly higher than those estimated by DOE, which do not include, or account for, costs attributable to further and additional IECC revisions on a three-year code cycle without mandatory consideration or balancing of costs and benefits;
- 12.** Application of the 2021 IECC to manufactured homes – even in a modified form – would result in potential retail price increases up to \$12,908.00 (excluding costs of testing, enforcement and regulatory compliance) for double-section manufactured homes;
- 13.** Application of the 2021 IECC to manufactured homes – even in a modified form – would result in the exclusion of 4, 068,466, or more, households from the single-section manufactured housing market, and the exclusion of 6,816,883, or more, households from the double-section manufactured housing market, based on metrics specific to manufactured housing developed by the National Association of Home Builders;
- 14.** Application of the 2021 IECC to manufactured homes – even in a modified form – would result in the rejection of significantly more manufactured home purchase loans than at current price levels, exacerbating a rejection rate for manufactured home purchase loans that already exceeds the site-built home loan rejection rate by 500%;<sup>41</sup>
- 15.** Application of the 2021 IECC to manufactured homes – even in a modified form – would result in disproportionately more costly regulatory burden impacts for smaller industry manufacturers;
- 16.** Application of the 2021 IECC to manufactured homes – in any form – would be discriminatory and prejudicial, in that the 2021 IECC has not been adopted by any state for site-built homes;
- 17.** Disproportionate regulatory burden impacts on smaller manufacturers would lead to a further consolidation of production within a market already distorted by the market-dominance of a small number of large manufacturers;
- 18.** A further exacerbation of already-existing market dominance by a small number of large manufacturers will lead to further and additional purchase price increases borne by consumers, which will inevitably eliminate those at lower income levels from the manufactured housing market and from homeownership altogether;

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<sup>41</sup> According to a May 2021 Consumer Financial Protection Bureau (CFPB) report not considered by DOE, 42% of all manufactured home purchase loan applications were denied over the specified reporting period, as compared with 7% of site-built home purchase loan applications.

19. DOE's 2021 SNPR proposed rule is no less costly than its fatally-flawed 2016 proposed manufactured housing energy rule and – in fact – is substantively little more than a “re-boot” of the wholly-deficient 2016 proposal;
20. DOE's “tiered” proposal is not binding for any final rule, which could and likely will impose the 2021 IECC on an “untiered” basis;
21. Even if DOE's “tiered” proposal were binding – which it is not – DOE's \$55,000.00 demarcation line between “Tier 1” and “Tier 2” is arbitrary and capricious in violation of applicable law;
22. Even if DOE's “tiered” proposal were binding – which it is not – a tier demarcation “boundary” based on the manufacturer's retail list price is not synonymous with the customer purchase price and is arbitrary and capricious in violation of applicable law;
23. DOE's \$55,000.00 demarcation between “Tier 1” and “Tier 2” standards is arbitrary and capricious in that it is not based on current or accurate data and information;
24. DOE's purchase price impact target of \$750.00 for so-called “Tier 1” homes is itself arbitrary and capricious in violation of applicable law;
25. DOE's 2021 SNPR still lacks a valid, complete and accurate cost-benefit analysis, incorporating all relevant purchase price cost factors, in violation of both the APA and EISA section 413.

Each of these fundamental flaws – both individually and cumulatively – and as is more fully detailed in MHARR's comments to the MHCC, represent a sufficient and compelling basis for the MHCC to reject DOE's August 26, 2021 proposed rule for manufactured housing energy standards.

#### **IV. CONCLUSION**

For all the foregoing reasons, the MHCC should reject the proposed manufactured housing energy standards set forth in DOE's August 26, 2021 SNPR as being inappropriate for manufactured housing, excessively costly in violation of applicable law, destructive of the affordable manufactured housing market, not cost-justified, and fundamentally arbitrary and capricious in violation of applicable law, and should submit comments reflecting that rejection (and its bases) to DOE in advance of the existing (or any extended) comment deadline.

Sincerely,

Mark Weiss  
President and CEO

cc: Hon. Jennifer Granholm  
Hon. Marcia Fudge  
Hon. Shalanda Young (OMB)  
HUD Code Industry Producers, retailers and Communities