Manufactured Housing Association for Regulatory Reform

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VIA FEDERAL EXPRESS AND ELECTRONIC SUBMISSION

Hon. Jennifer M. Granholm
Secretary
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C, 20585

Re: Energy Conservation Program: Energy Conservation Standards for Manufactured Housing: Enforcement (EERE-2009-BT-BC-0021)

Dear Secretary Granholm:

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 organization 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, as amended by the Manufactured Housing Improvement Act of 2000 (2000 Reform Law) (42 U.S.C. 5401, et seq.) and subject to potential[1] energy-related regulation by the U.S. Department of Energy (DOE) pursuant to section 413 of the Energy Independence and Security Act of 2007 (EISA) (42 U.S.C. 17071). MHARR was founded in 1985. Its members include independent producers of manufactured housing from all regions of the United States.[2]

On December 26, 2023 – some eighteen months after the promulgation of supposedly 'final" energy conservation standards for HUD-regulated manufactured homes -- DOE published a Notice of Proposed Rulemaking (NPR) to establish a regulatory enforcement and compliance framework for those standards.[3] For the reasons stated below – and as previously set forth in multiple written comments submitted by MHARR in this rulemaking and related administrative

[1] Manufactured housing energy standards purportedly adopted by DOE on May 31, 2022 pursuant to 42 U.S.C. 17071, are subject to pending litigation in the United States District Court for the Western District of Texas seeking their invalidation on multiple grounds including, but not limited to, consumer cost burdens which significantly exceed alleged "benefits."

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

[3] See, 88 Federal Register, No. 246 (December 26, 2023) "Energy Conservation Standards for Manufactured Housing; Enforcement," p. 88844, et seq.

proceedings[4]from the outset – MHARR strenuously opposes both DOE's current proposed enforcement and regulatory compliance criteria for its pending May 31, 2022 manufactured housing energy standards and the underlying standards themselves. Those regulations and standards – conceived and developed without full compliance with all applicable provisions of their relevant enabling legislation – would, if implemented, needlessly and prohibitively increase the acquisition cost of manufactured housing, excluding millions of Americans from all of the socio-economic benefits of homeownership, while providing no (or de minimis) energy savings – all in violation of applicable law. Accordingly, MHARR again calls on DOE to withdraw all aspects of its May 31, 2022 "final standards" and current proposed enforcement procedures, and instead initiate a cooperative manufactured housing energy standards process with the U.S. Department of Housing and Urban Development (HUD) – through the statutory Manufactured Housing Consensus Committee (MHCC) -- in full and complete compliance with all relevant statutory mandates.

I. INTRODUCTION

The manufactured housing energy standards rulemaking, since it was first initiated by DOE, has involved little more than a needless, deceitful and callous attack on the nation's lowest-income homebuyers, at a time (now) when both the availability of affordable homes and homeownership itself stand near record lows. From the outset, this entire proceeding has been rife with deception, fraud and bad faith on the part of DOE as it has sought to impose the "climate change" agenda of its extremist special interest allies on the backs of hard-working lower and moderate-income Americans who are least able to afford and subsidize the activists' pet ideological fantasies.

The squalid history and background of this scandalous rulemaking is set forth in detail in MHARR's August 8, 2016 comments and subsequent filings with both DOE and the statutory Manufactured Housing Consensus Committee. These comments document efforts by DOE, "climate change" special interest groups and even some within the industry to foist discriminatory,

[4] MHARR hereby incorporates by reference herein as if restated in full, its August 8, 2016 Comments and Attachments in response to DOE's June 17, 2016 Notice of Proposed Rulemaking regarding Energy Conservation Standards for Manufactured Housing; its August 2, 2021 Comments and Attachments in response to DOE's July 7, 2021 Notice of Intent to Prepare an Environmental Impact Statement for Energy Conservation Standards for Manufactured Housing; its October 25, 2021 Comments and Attachments in response to DOE's August 26, 2021 Supplemental Notice of Proposed Rulemaking regarding Energy Conservation Standards for Manufactured Housing; its November 22, 2021 Supplemental Comments and Attachments in response to DOE's August 26, 2021 Supplemental Notice of Proposed Rulemaking regarding Energy Conservation Standards for Manufactured Housing; its February 25, 2022 Comments and Attachments in Response to DOE's January 14, 2022 proposed Environmental Impact Statement regarding Energy Conservation Standards for Manufactured Housing; and its April 13, 2023 Comments and Attachments in response to DOE's Notice of Proposed Rulemaking regarding Extension of the Compliance Date for the May 31, 2022 Manufactured Housing Energy Conservation Standards. MHARR also incorporates by reference herein its September 15, 2021 Comments and Attachments to the Manufactured Housing Consensus Committee regarding DOE's August 26, 2021 proposed Energy Conservation Standards for Manufactured Housing; its October 1, 2021 Comments and Attachments to the Manufactured Housing Consensus Committee regarding DOE's August 26, 2021 proposed Energy Conservation Standards for Manufactured Housing; its October 13, 2021 Comments and Attachments to the Manufactured Housing Consensus Committee regarding DOE's August 26, 2021 proposed Energy Conservation Standards for Manufactured Housing; and its November 9, 2022 Comments to the Manufactured Housing Consensus 1Committee regarding Energy Conservation Standards for Manufactured Housing.

ultra-high cost DOE energy standards on lower and moderate-income manufactured housing consumers, even though energy operating costs for manufactured homes, according to U.S. government data are —and have been – lower than those for site-built single-family homes.[5] While MHARR incorporates those prior comments herein by reference – and the information and observations contained therein continue to be highly relevant to the current proceeding – MHARR will not expressly re-state them here. Nevertheless, the deception, fraud and bad faith that have characterized nearly every phase of this proceeding since its inception, fatally impact, infect and invalidate all of its various aspects, including the development of enforcement regulations as addressed in this proceeding.

Accordingly, on August 26, 2021, DOE published a Supplemental Notice of Proposed Rulemaking (SNPR) in the Federal Register in a third effort to establish "Energy Conservation Standards for Manufactured Housing" pursuant to EISA section 413.[6] While that publication purported to include a "cost-benefit" analysis of the proposed standards as affirmatively required by EISA itself[7] and other applicable federal law[8] -- that assessment, by DOE's own admission,[9] did not estimate or even attempt to consider the cost-benefit impact(s) of ongoing regulatory compliance costs related to the proposed standards that would inevitably be passed to consumers under the proposed standards. In relevant part, DOE stated: "DOE is not proposing any testing, compliance or enforcement provisions at this time. DOE has also not included any potential associated costs of testing, compliance or enforcement." (Emphasis added). Thus, the alleged "benefits" of the proposed energy standards for manufactured housing consumers were not – at the time of the purported adoption of the "final" DOE standards[10] -- netted-out against the full, likely and predictable cost of the standards and their implementation, thereby rendering the entire regulatory scheme and cost-benefit "analysis" "arbitrary, capricious and abuse of discretion or otherwise not in accordance with law" pursuant to the Administrative Procedure Act (APA).[11]

In written comments filed on October 25, 2021 opposing DOE's proposed standards, MHARR emphasized this fatal flaw, among many others, stating: "DOE's August 26, 2021 SNPR

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[5] See, e.g., MHARR October 25, 2021 Comments and Attachment in Response to Supplemental Notice of Proposed Rulemaking Regarding Manufactured Housing Energy Conservation Standards, supra at pp. 5-7.

[6] See, 86 Federal Register, No. 163 (August 26, 2021), Energy Conservation Standards for Manufactured Housing," pp. 47744, et seq. This followed an earlier (June 17, 2016) DOE Notice of Proposed Rulemaking on the same topic with proposed manufactured housing "energy" standards which were rejected by the Office of Information and Regulatory Affairs (OIRA). See, 81 Federal Register, No. 117 at pp. 39756, et seq. A modified standards regimen was proposed via a Notice of Data Availability (NODA) issued by HUD on August 3, 2018. See, 83 Federal Register, No.150 (August 3, 2018) at p. 38073, et seq.

[7] See 42 U.S.C. 17071(b)(1): "The energy conservation standards established under this section shall be … cost effective … based on the impact of the code on the purchase price of manufactured housing and on total life-cycle construction and operating costs."

[8] See, e.g., 42 U.S.C. 5401(b)(2); 5 U.S.C. 706 and Executive Order 12866, among others.

[9] See, 86 Federal Register, supra at p. 47759, col. 1.

[10] DOE has – and continues – to take the anomalous position that its May 31, 2022 manufactured housing energy standards are "final" (see, e.g., Defendant's Reply in Support of Motion to Dismiss, Manufactured Housing Institute v. Department of Energy, No. 1:23-CV-00174DAE) ("DOE never argued that the standards rule does not constitute final agency action"), despite the fact that DOE has not now and has not ever established the full costs of the standards (including regulatory compliance) for purposes of the cost-benefit analysis affirmatively required by applicable law to justify and establish a "final" standard.

[11] See, 5 U.S.C. 706.

asserts that proposed manufactured housing energy conservation standards will result in net "life-cycle" operating cost savings to manufactured housing purchasers that would offset and exceed projected purchase price increases attributable to the proposed standards. The findings of DOE's cost analysis are necessarily flawed, skewed and materially inaccurate, however, in that they do not reflect, consider or account for key cost components or information. As a result, the claimed benefits of the proposed rule are deceitfully netted against incomplete and/or inaccurate cost data, thereby yielding alleged "payback" amounts that are distorted and biased in favor of the proposed rule." Most significantly, the DOE cost-benefit analysis fails to include or consider significant additional costs that will be incurred by manufacturers – and inevitably passed to consumers in the purchase price of a new manufactured home – for (1) testing, certification, inspections and other related activities to ensure compliance with any new DOE standards; (2) enforcement compliance and related activity; and (3) ongoing regulatory compliance, all of which are unique to federally-regulated manufactured housing and the manufactured housing industry. Although such expenses are recognized as an integral component of the ultimate consumer-level cost of any mandatory rule, they are totally excluded from DOE's cost benefit and life-cycle cost (LLC) analyses in this rulemaking."[12]

Despite these (and other) fatal defects, DOE purported to publish "final" manufactured housing energy conservation standards on May 31, 2022 – with a compliance date of May 31, 2023 -- without developing, establishing, or considering the consumer-level cost impact of testing, enforcement and regulatory compliance. DOE's purported "final" rule, therefore, failed to include an essential element of any legislative "rule," i.e., a cost-benefit analysis incorporating all of the cost elements of the impending regulatory regime. As such, any purported "cost-benefit" analysis performed by DOE in connection with that "final" rule is necessarily incomplete and insufficient. As a result, the so-called "final" rule itself is – and continues to be -- incomplete, insufficient, arbitrary and not otherwise in accordance with law.

Consistent with MHARR's longstanding position that the absence of a valid cost-benefit analysis (or, indeed, any cost-benefit analysis) incorporating testing, regulatory compliance and enforcement costs necessarily renders the May 31, 2022 DOE standards fatally defective, litigation was filed against DOE in the U.S. District Court for the Western District of Texas on February 15, 2023, alleging, among other things, that the DOE "final" standards were in violation of EISA section 413, as well as the APA. Faced with judicial review in this manner, DOE immediately backtracked, claiming that it had planned all along to defer enforcement of the May 31, 2022 standards (notwithstanding the purported May 31, 2023 "effective" date). It therefore published a Notice of Proposed Rulemaking on March 24, 2023 to extend the "compliance" dates for the so-called "final" manufactured housing energy, standards, so that those supposedly already "final" standards could in fact be "finalized" with regulatory compliance regulations that should – legally—have been part of the May 31, 2022 "final" standards – but were not.[13]As a result compliance with the so-called "final" standards and any enforcement regulations ultimately adopted through this proceeding has been deferred to a date sixty days after the adoption of DOE's

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[12] See, MHARR's October 25, 2021 Comments and Attachments in response to DOE's Supplemental Notice of Proposed Rulemaking regarding Manufactured Housing Energy Conservation Standards, supra at pp. 19-20 and notes thereto. Footnotes omitted.

[13] See, 88 Federal Register, No. 57 (March 24, 2023) "Energy Conservation Standards for Manufactured Housing; Extension of Compliance Date," p. 17745, et seq.

enforcement regulations for the manufactured housing energy conservation standards for so-called "Tier1" homes and to July 1, 2025 for so-called "Tier 2" homes.

Having delayed enforcement of the May 31, 2022 "final" energy standards in this manner, DOE has now issued a separate Notice of Proposed Rulemaking (NPR) to promulgate the enforcement and regulatory compliance criteria that it initially and intentionally failed to include (together with applicable costs) in its so-called "final energy standards rule."[14] For all of the reasons stated below, DOE's proposed enforcement and regulatory compliance regulations are needlessly costly, would impose significant new and additional cost burdens on both manufactured housing producers (especially including smaller, independent producers), would needlessly and exponentially increase the acquisition cost of currently affordable manufactured homes, would exclude millions of lower and moderate-income Americans from the manufactured housing market – and from homeownership generally – and would devastate an already struggling manufactured housing industry. Indeed, HUD statistics show that manufactured housing production has been in steep decline since DOE's May 31, 2022 "final rule" was announced. As a result, 2023 production will be well below the 100,000 home benchmark and some 22% lower than 2022 production – all at a time when the nation is in dire need of affordable housing. Consequently, the proposed enforcement regulations and the DOE standards themselves should be withdrawn and subject to a de novo rulemaking process in full compliance with all applicable law and statutory criteria.

II. ARGUMENT

A. THE PROPOSED REGULATIONS WILL SIGNIFICANTLY INCREASE CONSUMER AND PRODUCER COST BURDENS

DOE incredulously maintains, in its December 26, 2023 NPR, that the cost impact of enforcement and regulatory compliance with its proposed enforcement regulations will either be minimal or non-existent. The NPR, accordingly, states that "DOE tentatively concludes, consistent with the expectations it stated in the May 2022 Final Rule … that the costs of complying with DOE's enforcement mechanisms will be minimal."[15](Emphasis added). Shortly thereafter, though, DOE maintains that the "proposed rule would not impose any new, additional costs beyond the costs already required by separate requirements."[16](Emphasis added). These claims – which are inconsistent among themselves (i.e., "none" versus "minimal") – are absurd and without any demonstrable basis in evidence or fact.

First, DOE offers no evidence to show that the cost of collecting, maintaining, organizing, retaining, archiving and, where necessary, researching and retrieving additional records relating to the DOE energy standards – over, above and different – from those currently maintained for and pursuant to the HUD enforcement system for the Federal Manufactured Housing Construction and Safety Standards (FMHCSS),[17] will be zero or, alternatively, "minimal." Rather than attempt to estimate and reconcile the costs of maintaining such additional records and responding to

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[15] See, 88 Federal Register, supra at p. 88848, col.3.

[16] Id.

[17] See, 24 C.F.R. 3282.

document requests and inquiries by DOE and related investigatory activities, (i.e., rather than developing and legitimately evaluating real data and evidence concerning such costs) the NPR simply sets forth a summary conclusion and assertion with no supporting facts or analysis. DOE's bald assertion, however, is totally inconsistent with reality.

While DOE maintains that manufacturers, under the proposed enforcement regulations, will only be required to maintain and provide access to records that are already mandated under the HUD FMHCSS enforcement system,[18]this contention is simply not true. While the records required by DOE may be similar in nature to those already required by the HUD FMHCSS regulations with respect to the HUD manufactured housing standards (which are separate and distinct from the pending DOE energy standards), the DOE-mandated records involve and relate to totally separate and new features, measures, and parameters specific to the DOE standards. Thus, the type, volume and focus of the new records required by DOE will significantly exceed in scope and substance those currently required separately by HUD. And inevitably, by requiring a higher volume of records, relating to subjects and criteria that are not now addressed specifically by the FMHCSS standards, and by establishing a sprawling "star chamber" investigatory system specifically tied to those new and additional records,[19] the DOE enforcement system will precipitate new, additional and substantial costs for manufacturers that will ultimately be passed to consumers in the retail price of new manufactured homes.

Consequently, DOE's assertion that its energy standards enforcement regulations will have zero cost impact is absurd and false on its face. Conversely, DOE also maintains – incongruously – that additional costs related to regulatory compliance with its standards will be "minimal." This contention, however, is subjective, without any evidentiary basis or context and, effectively, meaningless. At the outset, DOE does not define or quantify the term "minimal." A cost that is considered "minimal," for example, by an industry corporate conglomerate may not be "minimal" to a smaller independent manufacturer. Similarly, a cost considered "minimal" by those within higher income brackets may not be "minimal" for the lower and moderate-income Americans who predominately depend on the purchase price affordability of federally-regulated manufactured homes as their only available source of affordable homeownership. The claim, therefore, that the cost impact of the proposed DOE enforcement regulations would be "minimal," is effectively

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[18] See e.g., 88 Federal Register, supra at p. 88848, col. 3: "[T]he documentation that manufacturers would be required to maintain by section 460.306(a) of this proposed rule is already subject to separate, existing maintenance requirements imposed by HUD. Therefore, this proposed rule would not impose any new, additional costs beyond the costs already required by separate requirements." (Emphasis added). This contention, however, is undermined and shown to be false and misleading by the proposed regulations themselves. See, note 20, infra.

[19] The virtually open-ended, unlimited writ that would be provided to DOE by the proposed regulations to demand from HUD Code manufacturers any and all records related to the DOE standards – and not just those required by HUD – is demonstrated by proposed section 460.306(c). That section provides in relevant part: "A manufacturer must provide to DOE the information and records described in paragraph (a) of this section [i.e., records otherwise required by HUD], and any additional available records DOE determines necessary to determine a manufacturer's compliance with any standard or requirement under this part, during an administrative action, investigation, or audit conducted by DOE against the manufacturer pursuant to this subpart." (Emphasis added). In reality, then, and pursuant to precedents that will undoubtedly be established during various DOE investigations and "administrative actions" pursuant to the proposed regulations, manufacturers will inevitably be required to maintain and produce virtually any document or scrap of information pertaining in any way to the DOE energy standards. This, in turn, will further increase and exacerbate manufacturers' regulatory compliance costs.

meaningless and without content, and thereby clearly insufficient to satisfy the substantive cost-benefit mandates of applicable law.

Furthermore, and more particularly, DOE ignores the predictably significant costs of compliance with its various proposed investigatory and administrative functions. These include, but are not limited to: (1) the cost of investigating and responding to a Notice of Noncompliance (section 460.310); (2) the cost of investigating and responding to a Notice of Proposed Civil Penalty (section 460.312); (3) the cost of investigating and responding to a Final Notice of Proposed Covil Penalty (section 460.316); (4) the cost of proceedings before an administrative law judge (section 460.320); and/or (5) the cost of a judicial proceeding to vindicate the manufacturers' rights. Even aside from responding to DOE-initiated actions and/or inquiries, however, manufacturers, under the proposed enforcement regulations, would bear the increased cost and capital burden of maintaining, retaining, organizing, managing, storing, retrieving and investigating records pertaining to the DOE energy standards. This will inevitably result in additional employee-hours and employees, thereby increasing production costs that are ultimately passed to consumers in the acquisition cost of the home. Thus, far from having little or no cost impact, DOE's proposed enforcement regulations would impose significant additional costs on manufacturers and ultimately consumers in return for little – if any – energy operating savings.

DOE's cost "analysis," therefore, consists of bald, baseless assertions and declarations, with no apparent (or stated) consideration of entirely predictable costs that will inevitably result from its new and expanded energy regulation mandates. In a very recent decision – also involving DOE -- the Fifth Circuit U.S. Court of Appeals held that such a "process" was inherently deficient, arbitrary and capricious in violation of the APA (5 U.S.C. 706). In that January 8, 2024 opinion, the court stated:

> "[B]are acknowledgment is no substitute for reasoned consideration. We have previously held that "conclusory statements"—like DOE's—do not constitute adequate agency consideration of an important aspect of a problem. See Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1227 (5th Cir. 1991); see also Getty v. Fed. Sav. & Loan Ins. Corp., 805 F.2d 1050, 1055 (D.C. Cir. 1986) ("Stating that a factor was considered, however, is not a substitute for considering it."). The Repeal Rule appears to rest on DOE's unexplained balancing of evidence. It's a well-worn principle of arbitrary-and-capricious review that an administrative 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." State Farm, 463 U.S. at 43 (quotation omitted). Here, however, the 2022 DOE recognized the facts that undermined its Repeal Rule, cited other facts to suggest the Repeal Rule would conserve water and energy, see 87 Fed. Reg. at 2683–85, and then implicitly credited the latter without explaining why. That is the touchstone of arbitrary and capricious agency action."

See, Slip Opinion, Louisiana v. U.S. Department of Energy, No. 22-60146 (5th Cir. 2024). (Emphasis added). The situation is no different here. As is demonstrated above, DOE's NPR, ignores clearly inevitable costs that would be necessitated by its standards and proposed

enforcement system and, instead, puts forward its own conclusory assertions with no supporting data or analysis.

Beyond these procedural costs, the NPR is vague and fundamentally incomplete in that it fails to specify or address multiple enforcement-related issues, including but not limited to: (1) what standard or quantum of evidence must be met to initiate an investigation (i.e., what threshold level of evidence is required to initiate a DOE compliance investigation)? (2) what is the standard of proof for determining a noncompliance? (3) which party bears the burden of proof with respect to an alleged noncompliance? (4) what is/would be the standard of proof and/or review before an administrative law judge or reviewing court? All of these issues are pertinent to the regulatory compliance burdens – and, therefore, costs that would be borne by manufacturers (and ultimately lower and moderate-income consumers), but are not specifically addressed by the December 26, 2023 NPR.

And while DOE, in regard to some of these issues, refers interested parties to its Procedures for Administrative Adjudication of Civil Penalty Actions,[20](Administrative Procedures Guidelines) a review of that document indicates that it was developed and adopted as a civil penalty guide for actions under the Energy Policy and Conservation Act of 1975 (EPCA), pursuant to authority conferred by EPCA.[21] But, as DOE has itself pointed out, in response to comments filed by MHARR in DOE's 2020 EPCA reform and modernization rulemaking, EPCA and EISA are separate, unrelated statutes with separate unrelated and different grants of authority, which are not interchangeable.[22] Accordingly, by DOE's own precedent, EPCA-based procedures pertaining to "consumer products" and "commercial equipment"[23] are not relevant or applicable to actions under authority of EISA. Thus, the referenced guidelines are inapposite to the enforcement system proposed by DOE and cannot be used to fill procedural and/or substantive gaps in the proposed enforcement system.[24] And without valid and legitimate answers to the foregoing gaps and

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[20] See e.g., 88 Federal Register, supra at p. 88853, col. 2.

[21] See e.g., Administrative Procedure Guidelines, supra at p. 1: "The U.S. Department of Energy (DOE or the Department) issues this policy statement regarding civil penalties for violations of energy and water conservation standards and requirements under the Energy Policy and Conservation Act, as amended."

[22] See, 85 Federal Register, No. 31 (February 14, 2020), "Energy Conservation Program for Appliance Standards: Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/industrial Equipment," p. 8626, at p.8676, col.1: "With respect to MHARR's suggestion to apply the Process Rule's provisions to the separate rulemaking on manufactured housing that is currently underway, while DOE appreciates this suggestion, we note that the statutory authorities for manufactured housing and the appliance standards that are addressed by this final rule are in separate chapters within Title 42 of the U.S. Code and have no relationship with each other—aside from applying generally to DOE. Consequently, DOE is declining to adopt this suggestion." (Emphasis added).

[23] See, Administrative Procedure Guidelines, supra at p. 1.

[24] Even beyond this fatal disconnect in statutory authority, the Administrative Procedure Guidelines, by their own terms are not binding on DOE, which can change and alter those "guidelines" at any time. See, Administrative Procedure Guidelines at p. 1, n.1: "The procedures set forth in this document are intended solely as guidance. They are not intended, and cannot be relied on, to create rights, substantive or procedural, enforceable by any party. The Department reserves its right to act at variance with this guidance and to change it at any time without public notice." As a result, the "guidelines" are meaningless in terms of protecting the due process rights of manufacturers and establishing a clear and consistent process for enforcement actions under the proposed DOE regulatory compliance regulations.

deficiencies in the DOE proposed enforcement system, that system violates, inter alia, the due process rights of HUD Code manufacturers and must be withdrawn.

B. THE PROPOSED REGULATIONS MIRROR AND EXPAND THE MOST ONEROUS AND COSTLY ASPECTS OF HUD SUBPART I

The enforcement regulations proposed by DOE will also have a significant cost impact insofar as they will effectively expand and exacerbate the most costly element of the existing HUD Part 3282 manufactured housing enforcement system – i.e., Subpart I.[25] Under Subpart I, manufacturers must investigate alleged violations of the FMHCSS standards and provide notification and correction of certain types serious defects and imminent safety hazards. Given the extremely broad scope of Subpart I and its lack of any time limitation (in the nature of a statute of limitations), the cost burdens imposed on manufacturers and consumers by Subpart I – as demonstrated by MHARR in written and verbal testimony on multiple occasions[26] – are significant and represent a major (albeit needlessly complex and costly) component of the cost of regulatory compliance under the HUD standards. The de facto addition of the DOE standards to this regime, however, would effectively expand Subpart I and significantly inflate manufacturers' regulatory compliance costs. Again, therefore, DOE's claim that the proposed enforcement standards would result in zero or "minimal" costs, is absurd.

Specifically, proposed section 460.306(a)(3) would require a HUD Code manufacturer to "provide [DOE] information and records relevant to determining compliance with any standard or requirement[27]under this part, including … records relating to a manufacturer's determination of noncompliance, defect, serious defect, or imminent safety hazard, as well as any corrections made by the manufacturer, that the manufacturer is required to maintain under 24 C.F.R. 3282.417." Since, however, the HUD FMHCSS standards codified at 24 C.F.R. 3280 do not currently include the DOE manufactured housing energy conservation standards and may not – and may never – include the May 31, 2022 DOE standards as promulgated by DOE, and exist and are established under a separate grant of statutory authority, there is, ab initio, no legitimate basis for DOE to seek and be provided with Subpart I records, as those records would not relate to compliance or noncompliance with the DOE energy standards. That is, unless DOE, through this provision, is surreptitiously seeking to incorporate the May 31, 2022 energy standards into Subpart I by fiat.

Any such action (or construction of that provision) by DOE would exponentially increase the cost impact of its proposed enforcement system. As noted previously, Subpart I is one of the most costly, labor-intensive elements of the HUD FMHCSS enforcement system and has been the focus of extreme regulatory abuse for decades. Expanding that system through the inclusion of

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[25] See, 24 C.F.R. 3282.401, et seq.

[26] See e.g., February 1, 2012 testimony of MHARR submitted to the U.S. House of Representatives Subcommittee on Insurance, Housing and Community Opportunity at a hearing on "Implementation of the Manufactured Housing Improvement Act of 2000."

[27] MHARR strenuously objects to any reference to compliance with "requirements" as distinct from duly promulgated standards and regulations. Use of the word "requirements" implies that there could be mandates imposed by DOE on manufacturers other than those set forth in the standards and regulations promulgated pursuant to EISA and the APA. As MHARR has consistently maintained in the context of the existing HUD manufactured housing program, any such extraneous mandates would be invalid, void and non-binding in accordance with applicable law.

DOE energy standards that are not currently a component of Part 3280 would only serve to drastically increase those costs.[28]

Even worse, though, the enforcement regulations proposed by DOE would sidestep or vitiate newer provisions in Subpart I which were recommended by the MHCC and adopted by HUD to better protect the due process rights of regulated parties, eliminate baseless or frivolous claims and/or "investigations" and, at the same time, ensure the cost-effective protection of consumers.[29] Thus, while the proposed DOE enforcement regulations specifically address certain stages and aspects of DOE's anticipated enforcement and regulatory compliance process, they do not, by their own terms, incorporate crucial safeguards from the post-2013 reformed HUD Subpart I system including, but not limited to:

> (1) a specific threshold standard for inquiry and investigation (e.g., 24 C.F.R. 3282.403 (a), (b)(1) – regarding information that "likely" indicates the existence of a noncompliance or defect);
> (2) a "good faith" defense or safe haven for manufacturers (e.g., 24 C.F.R. 403(c)); or
> (3) a finding that a noncompliance or defect "exists or likely exists" as a threshold for any further action beyond an initial investigation (e.g., 24 C.F.R. 3282.405(b)(3).

In the absence of these safeguards, a DOE investigation and resultant manufacturer compliance burdens could be triggered by any single piece of information, regardless of its legitimacy or veracity, with manufacturers then forced into an investigatory regime with no fixed standards or burdens of proof (see, discussion above), where DOE can demand and subpoena[30] any documents that it wishes, virtually without limitation,[31]while pursuing claims that a manufacturer would apparently have the burden to disprove. Under this regime, manufacturers would (and will) be forced to conduct multiple overlapping investigations and respond to multiple overlapping document requests, at significant cost, without regard to the legitimacy, veracity or actionability of the allegations underlying any such demand for investigation or documents.

In summary, then, DOE's proposed enforcement regulations would establish an energy enforcement 'star chamber" with few or no limits on DOE's power to investigate manufacturers, demand documents and records, make findings related to compliance, and impose penalties, all

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[28] The DOE proposed regulations also – at a minimum – raise serious questions regarding the inter-relationship of section 460.306(a)(1)-(3), manufacturers must provide DOE with records already provided to HUD Design Approval Primary Inspection Agencies (DAPIAs) and Production Inspection Primary Inspection Agencies (IPIAs). Doe this mean that DOE will be second-guessing and, potentially, reversing DAPIA and/or IPIA determinations? Does it mean that DOE will sit as a "super" DAPIA or IPIA with respect to energy-related issues? And what degree of relation to the energy standards would need to exist for DOE to intervene or act as a "super" DAPIA/IPIA. Again, these are only some of the significant, cost-relevant questions posed by DOE's proposed enforcement regimen.

[29] See, 78 Federal Register, No. 190 (October 1, 2013) "Manufactured Housing: Revision of Notification, Correction and Procedural Regulations" at p. 60193, et seq.

[30] DOE, in its December 26, 2023 NPR, implicitly acknowledges its lack of direct subpoena authority under EISA: "DOE is … evaluating and considering its subpoena authority under EISA." See, 88 Federal Register, supra at p. 88846, col. 3.

[31] See, proposed section 460.306(c) and discussion supra related thereto.

without any fixed standards or procedures,[32]with the burden on manufacturers to prove compliance. Notwithstanding DOE's bald and baseless assertions that these procedures will have little or no cost to be netted against the alleged benefits of the May 31, 2022 standards, it is evident that the cost to manufacturers to comply with this system (and particularly to vindicate their rights in subsequent and ancillary proceedings) will significantly increase and expand the regulatory compliance burdens borne by manufacturers and the regulatory compliance costs ultimately paid by consumers.

The fact that DOE does not wish to go to the trouble to model and account for these additional costs, choosing instead to just fall back on the conclusory pre-hoc cost assertions contained in its May 31, 2022 "final rule" Federal Register notice,[33] is both telling and fully consistent with the pattern of deceit and duplicity that has characterized this rulemaking from the outset.

The reality is that DOE's proposed enforcement system will impose significant additional compliance costs on manufacturers and ultimately consumers -- in a market serving lower and moderate-income consumers -- millions of whom will be totally excluded from homeownership and all of its attendant benefits, contrary to the longstanding public policy of multiple administrations of both parties.

Furthermore, DOE's proposed civil penalty methodology is excessive, oppressive and beyond the means of many, if not most, smaller independent HUD Code producers.[34] Moreover, DOE neither shows nor provides any statutory grounds for levelling such penalties on a per diem basis, which would inevitably lead to extremely high penalties with correspondingly discriminatory impacts.[35]

III. CONCLUSION

For all of the foregoing reasons, as well as those set forth in prior MHARR comments regarding the DOE manufactured housing energy standards and their proposed enforcement, DOE's entire manufactured housing energy standards regime is fatally flawed, and should be withdrawn. This follows, in part, from the fact that DOE never troubled itself to fully understand the unique nature of comprehensively federally-regulated manufactured homes and the

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[32] Which DOE reserves the right to change without rulemaking in the Administrative Procedure Guidelines.

[33] See, 88 Federal Register, supra at p. 88849, col. 1: "... DOE tentatively concludes additional costs imposed by this proposed rule would be minimal. For this reason, the adoption of the enforcement procedures proposed in this document would not alter DOE's assessment in the May 2022 Final Rule of the costs resulting from the adoption of DOE'S energy conservation standards." (Emphasis added).

[34] See e.g., Id. at p. 88846, col. 2-3: "For example, if a manufactured home fails to comply with three standards in Part 460, the manufacturer has sold, imported or distributed in commerce 100 units of that model, and the retail list price of that model is $200,000, then the manufacturer will be subject to a civil penalty of up to $600,000 ($200,000 retail list price X 1% X 3 violation X 100 units).

[35] Proposed section 460.304(c) states: "For violations of section 460.302(a)(1), each day of noncompliance shall constitute a separate violation." There is, however, no section 460.302(a)(1) contained in the proposed rule. MHARR assumes that DOE meant to refer to section 460.304 (a)(1) (retention and access to manufacturer records). Regardless, though, this provision is baseless and unduly and disproportionately punitive.

manufactured housing program itself. Consequently, DOE should – and must – go back to very start, in full and proper coordination with HUD and the statutory federal regulator of manufactured housing construction and safety – and the statutory Manufactured Housing Consensus Committee to develop appropriate, cost-effective standards in full compliance with all relevant legislation for such homes and the millions of lower and moderate-income Americans who depend on manufactured homes for affordable, non-subsidized homeownership.

Sincerely,

Mark Weiss
President and CEO

cc: Hon. Marcia Fudge
Hon. Shalanda Young (OMB)
Hon. Tim Scott
Hon. Sherrod Brown
Hon. Patrick McHenry
Hon. Maxine Waters
HUD Code Industry Manufacturers, Retailers, Communities and State Associations