February 12, 2024

The Honorable Marcia Fudge
Secretary
U.S. Department of Housing and Urban Development
451 7th Street, S.W.
Washington, DC 20410
mhcc@homeinnovation.com

RE: Notice of Federal Advisory Committee Meetings: Manufactured Housing Consensus Committee (FR-6447-N-01)

Dear Secretary Fudge,

The Manufactured Housing Institute (MHI) is pleased to provide feedback to the Manufactured Housing Consensus Committee (MHCC) regarding the Notice of Federal Advisory Committee Meetings; Manufactured Housing Consensus Committee providing notice of the MHCC's meetings scheduled for February 15-16, 2024, to review and consider the Department of Energy (DOE) Notice of Proposed Rulemaking: Energy Conservation Program: Energy Conservation Standards for Manufactured Housing; Enforcement (the Enforcement Rule NOPR).

MHI is the only national trade association that represents every segment of the factory-built housing industry. Our members include builders, suppliers, retail sellers, lenders, installers, community owners, community managers, and others who serve our industry, as well as 50 affiliated state organizations. In 2022, our industry produced over 112,000 homes, accounting for approximately 12 percent of new single-family home starts. These homes are produced by 35 U.S. Corporations in 144 plants located across the country. MHI's members are responsible for close to 85 percent of the manufactured homes produced each year.

The MHCC should recommend that HUD not adopt either the DOE's Energy Efficiency Standards for Manufactured Housing (the Energy Rule) or the Enforcement Rule NOPR and instead undertake HUD's standard rulemaking process, including consultation with the MHCC, to implement energy efficiency standards tailored to the manufactured housing industry to be enforced pursuant to HUD's longstanding processes under the Manufactured Housing Construction Safety Standards (MHCSS). Specifically, the MHCC should request that HUD adopt into the MHCSS the superior energy standards recommended by the MHCC in the fall of 2022, with the enforcement of these standards through the longstanding HUD regime at 24 C.F.R. § 3282. The MHCC should also request that DOE withdraw the Enforcement Rule NOPR, as it would harm consumers and undermine HUD's 50-year exclusive jurisdiction and enforcement over manufactured housing construction and safety standards, including energy efficiency, through the MHCSS.

As set forth herein, the Enforcement Rule NOPR was promulgated as a litigation tactic rather than a meaningful and workable enforcement scheme. Despite DOE's suggestion to the contrary, the Enforcement Rule NOPR will increase costs of manufactured housing while simultaneously failing to provide any workable standards from which compliance with the Energy Rule can be measured. The Enforcement Rule NOPR undermines HUD's enforcement program and preemption over manufactured housing. Moreover, the Enforcement Rule NOPR exposes manufacturers to excessive civil penalties that cannot be calculated with any reasonable certainty. To ensure workable and uniform standards and enforcement for energy efficiency in manufactured housing, the MHCC should recommend that HUD not adopt either the Energy Rule or the Enforcement Rule NOPR and instead undertake HUD's standard rulemaking process, including consultation with the MHCC, to implement energy efficiency standards tailored for the manufactured housing industry to be enforced pursuant to HUD's longstanding processes under the MHCSS.

The result of the Energy Rule that will be made effective through the Enforcement Rule NOPR will be severe. Specifically, it will significantly increase the cost of a new manufactured home and will result in an estimated 50,000 fewer manufactured homeowners over the next decade. Relatedly, it will disqualify many borrowers from being able to obtain a loan under standard mortgage loan debt to income (DTI) requirements. In the end, the cost increase for manufactured homes will greatly exceed any actual energy savings under the Energy Rule.

1. <u>Like the Energy Rule, the Enforcement Rule NOPR Was Promulgated for Litigation Strategy.</u>

In 2007, Congress required DOE to establish standards for energy efficiency in manufactured housing "not later than 4 years after December 19, 2007." 42 U.S.C. § 17071(a). Over ten years later, when DOE had not yet established energy efficiency standards for manufactured housing, the Sierra Club sued DOE in the United States District Court for the District of Columbia in Civil Action No. 1:-17-cv-02700. Ultimately, DOE and the Sierra Club entered into a consent decree requiring DOE to establish energy efficiency standards by May 16, 2022.

On May 16, 2022, DOE issued its notice of final rulemaking for the Energy Rule. In its haste to comply with this litigation deadline, DOE failed to abide by its statutory mandate to consult with HUD in the rulemaking process. In its first proposed rule in 2016, DOE acknowledged that "[t]est procedures are necessary to provide for accurate, comprehensive information about energy characteristics of manufactured homes and provide for the subsequent enforcement of the standards." 81 FR 78734. However, after the 2016 proposed rule was withdrawn and replaced in 2021, DOE stated that it "has not included test procedures or compliance and enforcement provisions in this SNOPR" and "does not intend to address test procedures or compliance and enforcement provisions in this rulemaking." 86 FR 44756.

HUD convened the MHCC to meet on October 18-19, 2022 and November 15-16, 2022 to "propose recommended changes to the [MHCSS] that align with the [Energy Rule]." 87 FR 57712. Among other issues with the Energy Rule, the MHCC stated:

- HUD, by statute, is the body responsible for the development and enforcement of manufactured housing standards.
- The MHCC has reviewed the DOE [Energy Rule] and has determined DOE circumvented the standards development process prescribed in EISA which requires cost justification and consultation with HUD.
- **The MHCC previously recommended that DOE include the substantial cost of testing, enforcement, and regulatory compliance in its costing analysis. The final rule did not consider these costs. . .**

See MHCC Working Document Submitted to HUD attached hereto as Exhibit 1.

Given these fundamental flaws, the MHCC was not able to fully align the MHCSS and the Energy Rule, so it did not recommend wholesale adoption of the Energy Rule into the MHCSS. Rather, the MHCC recommended modifications to the MHCSS "based largely on the [Energy Rule]" but that "increase energy efficiency while maintaining affordability and consumer options." Exhibit 1. The MHCC opined that "[t]he recommended changes implemented into the MHCSS allow for testing, enforcement, and regulatory compliance within HUD's existing framework which helps minimize costs to manufacturers and ultimately consumers. However, there may still be a gap in enforcement between HUD's final standards and DOE's final rule, which may need to be resolved." Exhibit 1.

The Energy Rule was initially set to become effective on May 31, 2023. On February 14, 2023, MHI filed a lawsuit against DOE in the United States District Court for the Western District of Texas, Civil Action No. 1:23-cv-00174 (the Litigation). *See* Litigation Complaint attached hereto as Exhibit 2. In the Litigation, MHI asserted that DOE's failure to consider the costs associated with testing, compliance, and enforcement of the Energy Rule rendered its life-cycle cost calculation incomplete and inaccurate. Weeks later, on March 23, 2023, DOE published a Notice of Proposed Rulemaking to delay implementation of the Energy Rule until 60 days after creation of final enforcement standards for Tier 1 homes and until July 1, 2025 for Tier 2 homes. 88 FR 17745.

On December 26, 2023, DOE issued the Enforcement Rule NOPR. Hamstrung by its previous refusal to include the cost of testing, compliance, and enforcement in the Energy Rule, and contrary to the statements from its 2016 proposed rule which stressed the necessity of testing procedures, the Enforcement Rule NOPR stated it "is not proposing to require manufacturers to conduct any testing of manufactured homes, require manufactured homes to be inspected prior to sale to consumers, or require manufacturers (or any third-party agency) to certify compliance with DOE's energy conservation standards." 88 FR 88848. Rather, the Enforcement Rule NOPR purports to require manufacturers to maintain records required under the MHCSS and submit the same to DOE as evidence of compliance with the Energy Rule. The Enforcement Rule NOPR states that because "the documentation required to maintain by [] this proposed rule is already subject to separate, existing maintenance requirements imposed by HUD . . . this proposed rule would not impose any new, additional costs beyond those already required by separate requirements." 88 FR 88848.

Because the Energy Rule failed to include any costs associated with testing, compliance, or enforcement in its life-cycle cost calculation, DOE had no choice but to create an enforcement program that it says would not impose additional costs. The Enforcement Rule NOPR's reliance on HUD's regulations and paperwork to ensure compliance with its Energy Rule is unusual at best. Moreover, the Enforcement Rule NOPR appoints the DOE's Office of General Counsel as responsible for overseeing enforcement of energy efficiency standards in manufactured housing. 88 FR 88846. And, as set forth below, the Enforcement Rule NOPR will result in substantial costs, unworkable standards that undermine HUD's enforcement program for manufactured housing, and exposure to vague and excessive civil penalties. All of these irregularities stem from DOE's hurried rulemaking process aimed primarily at avoiding litigation rather than creating a meaningful and workable enforcement program for energy efficiency standards in manufactured housing.

2. <u>The Enforcement Rule Will Cause Substantial Cost Increases</u>.

The Enforcement Rule NOPR states that because "the documentation required to maintain by [] this proposed rule is already subject to separate, existing maintenance requirements imposed by HUD . . . this proposed rule would not impose any new, additional costs beyond those already required by separate requirements." 88 FR 88848-49. This is false. Currently, the MHCSS and the Energy Rule are not aligned. Even if the MHCSS and Energy Rule were brought into alignment, they would not remain aligned. DOE is required to update the Energy Rule within one year of the promulgation of the latest version of the International Energy Conservation Code (IECC), which occurs every three years. HUD does not have any similar mandate to update the MHCSS with regularity. HUD's rulemaking tempo is a product of its consultation with the MHCC. As such, even if steps were taken to align the MHCSS and Energy Rule during the present IECC cycle, the two standards would be updated at different times resulting in prolonged periods of misalignment.

The Enforcement Rule NOPR requires manufacturers to provide to DOE their Design Approval Primary Inspection Agency (DAPIA) records required under 24 C.F.R. § 3282.203(g) and 24 C.F.R. § 3282.361(b)(4), approved quality assurance manual required under 24 C.F.R. § 3282.361(c)(3), records related to Sub-Part I determinations required under 24 C.F.R. § 3282.417, and records of on-site construction required under 24 C.F.R. § 3282.608. However, none of these records are designed to demonstrate compliance with the Energy Rule, which materially differs from the MHCSS. HUD cannot require manufacturers to build homes to the Energy Rule, so these records do not necessarily reflect compliance with the Energy Rule. The Enforcement Rule NOPR does not (and cannot) require manufacturers to change forms required under the MHCSS to reflect the Energy Rule.

Because HUD records do not reflect designs, inspections, and testing unique to the Energy Rule, manufacturers would have to change their quality assurance manuals, DAPIA designs, and Sub-Part I programs to conform to the Energy Rule. Most manufacturers keep 50 to 100 different home models in production at any given time, so these documents will have to be modified for each model. Thereafter, DAPIAs, IPIAs, HUD, State Administrative Agencies (SAAs), and the Institute for Building Technology and Safety (IBTS) would have to approve the changes and factory personnel must be retrained to the new designs, manuals, and programs. However, HUD cannot require DAPIAs, IPIAs, SAAs, or IBTS to undergo training on the Energy Rule or fund any training on the Energy Rule. Likewise, DOE cannot interfere with current contracts between manufacturers and DAPIAs and IPIAs required under MHCSS. 24 C.F.R. § 3282.202.

Simply stated, for the Enforcement Rule NOPR to have any meaning whatsoever, substantial expense must be incurred to change longstanding design and quality assurance documents tailored to the MHCSS for every manufactured home model in production. These costs must be borne by manufacturers and passed on to consumers. Without incurring these costs, the Enforcement Rule NOPR leaves manufacturers unequipped to demonstrate compliance with the Energy Rule.

3. <u>The Enforcement Rule NOPR Provides No Workable Standards and Undermines HUD's Enforcement Scheme and Preemption</u>.

The Enforcement Rule NOPR provides no guidance as to how DOE will interpret and apply documents required to be maintained under the MHCSS to determine compliance with the Energy Rule. It provides no standards, measurements, testing procedures, interpretive materials, or safe harbors. The Enforcement Rule NOPR has no provisions for testing and compliance, but rather is only an enforcement program through potential civil penalties. As set forth above, in their current form, MHCSS documents will not demonstrate compliance with the Energy Rule. Therefore, manufacturers will have to guess as to how DOE will determine compliance with the Energy Rule based on submission of MHCSS documents. This guesswork will continue all the way through the administrative law process set forth in the Enforcement Rule NOPR for civil penalties.

In contrast to the Enforcement Rule NOPR, 24 C.F.R. § 3282 sets forth robust testing, compliance, and enforcement provisions that result in every home bearing a HUD label certifying its compliance with the MHCSS. 24 C.F.R. § 3282 has multiple layers of inspections and quality assurance through HUD, IPIAs, SAAs, and IBTS. The HUD label provides manufacturers persuasive evidence of compliance with the MHCSS both in regulatory and civil litigation settings. Here again, the HUD label will not serve as a certification of compliance with the Energy Rule. The Enforcement Rule NOPR has no corresponding label or certification and it provides no objective methods by which to determine or challenge compliance. The Enforcement Rule NOPR's lack of testing and compliance standards opens the door for subjective determinations of non-compliance with the Energy Rule. Where the Energy Rule and MHCSS overlap, this lack of certification undermines HUD's enforcement and preemption. This, in turn, exposes manufacturers to administrative and civil liability based on a subjective determination of non-compliance.

In sum, the Energy Rule NOPR's dearth of standards and certification undermines HUD's enforcement and preemption program and exposes manufacturers to unnecessary liability.

4. DOE Relies on a 1% Civil Penalty That is Arbitrary and Capricious.

The Enforcement Rule NOPR relies heavily on EISA's civil penalty "in an amount not exceeding 1 percent of the manufacturer's retail list price of the manufactured housing." 42 U.S.C. § 17071(c). However, most manufacturers do not utilize a "manufacturer's retail list price," which is not a term of art in the manufactured housing industry. EISA appears to have taken this terminology from a Monroney Label for cars. But the retail price of manufactured homes are dependent on a number of factors such as transportation distance, site improvements, time in inventory, and financing. Therefore, manufacturers will not be able to anticipate what amount of civil penalty may be imposed for a purported violation of the Energy Rule. And as set forth above, manufacturers will have no safe harbors or objective criteria for complying with the Energy Rule or challenging a determination of non-compliance.

5. Summary.

If the Enforcement Rule NOPR becomes final, a manufacturer's avenue toward complying with the Energy Rule would be to (1) undergo substantial expense to modify their DAPIA designs, quality assurance documents, and Sub-Part I programs; (2) blindly hope that the DOE Office of General Counsel interprets and applies the Energy Rule the same way as the manufacturer; and (3) wait to appeal a civil penalty of up to 1% of a non-existent manufacturer's retail list price. All a manufacturer will have to protect itself are documents demonstrating compliance with the MHCSS that is not currently aligned with the Energy Rule and will be updated at different times. This is an unworkable situation that will cause massive amounts of expense and uncertainty that will increase the cost of manufactured homes for consumers.

To ensure workable and uniform standards and enforcement for energy efficiency in manufactured housing, the MHCC should recommend that the Enforcement Rule NOPR be withdrawn. It should also recommend that HUD not adopt either the Energy Rule or the Enforcement Rule NOPR and instead undertake HUD's standard rulemaking process, including consultation with the MHCC, to implement energy efficiency standards tailored for the manufactured housing industry to be enforced pursuant to HUD's longstanding processes under the MHCSS. Specifically, the MHCC should request that HUD adopt into the MHCSS the superior energy standards recommended by the MHCC in the fall of 2022, with the enforcement of these standards through the longstanding HUD regime at 24 C.F.R. § 3282.

Sincerely,

Lesli Gooch

Lesli Gooch, Ph.D.
Chief Executive Officer