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April 13, 2011

U.S. Department of Energy
Mr. Daniel Cohen
Assistant General Counsel for Legislation, Regulation and Energy Efficiency
Office of the General Counsel
1000 Independence Avenue, SW
Washington, DC 20585

RE: Regulatory Burden RFI

Dear Mr. Cohen,

On behalf of the National Association of Home Builders (NAHB), I respectfully submit the attached comments in response to the U.S. Department of Energy (DOE) request for public comment on "Improving DOE Regulations," published in the Federal Register on Wednesday, Feb. 3, 2011. One of several initiatives aimed at reducing unnecessary regulatory burdens, promoting economic growth and job creation, and minimizing the impacts of government actions on small businesses, today's action is also intended to increase transparency, coordination and regulatory flexibility. As such, NAHB soundly supports these initiatives and suggests that these efforts could be even more effective if the Administration took a broader approach by also examining and updating the rulemaking process and increasing oversight to ensure that the established processes are properly and consistently followed. Our observations and suggestions for regulatory reform are followed by an overview of the specific regulations that we believe are ripe for immediate review.

NAHB is a Washington, D.C.-based trade association representing more than 160,000 members involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building products manufacturing, and all other aspects of the residential and light commercial construction industries. Known as "the voice of the housing industry," NAHB is affiliated with more than 800 state and local home builders associations (HBAs) located in all 50 states and Puerto Rico. NAHB's builder members will construct 80 percent of the new housing units projected for 2011. The more than 14,000 firms that belong to NAHB Remodelers comprise about one fifth of all firms that specify remodeling as a primary or secondary business activity. The NAHB Multifamily Council is comprised of more than 1,000 builders, developers, owners, and property managers of all sizes and types of condominiums and rental apartments. Clearly, NAHB's members touch on all aspects of the industry.

Further, more than 95 percent of NAHB members meet the federal definition of a "small entity," as defined by the U.S. Small Business Administration. The fact that such a large proportion of NAHB members are small businesses is directly relevant to the White House's efforts and the directive for each agency to seek public comment on federal regulations with a particular emphasis on those that impact small businesses. Clearly, with our members' broad experiences in obtaining permits and approvals, working with federal regulators, and

complying with the myriad regulations that touch the residential construction industry, NAHB is well positioned to provide useful input.

Finally, the deep recession that has pervaded all segments of the housing industry since 2008 continues to retard economic recovery in the United States. Home building alone represents between 12 percent and 15 percent of the nation's Gross Domestic Product, and without a revival in this critical industry it is hard to imagine a return to the solid, sustainable levels of growth that would provide the jobs our economy so desperately needs. The already-battered housing industry, however, cannot successfully face these challenges while weighed down by excessive regulatory burdens that do little to protect health, safety, or the environment.

These dire conditions clearly demonstrate the need for, and benefits of, ensuring that all existing and future federal regulations are carefully designed, promulgated, implemented, and enforced to achieve their intended benefits while minimizing the burdens on small business and others. Therefore, NAHB welcomes the opportunity to work with the Administration and Congress to make both existing and new regulations more efficient, cost effective and workable while maintaining their legitimacy and intent.

Housing plays a critical role in the life of every American family and the need to get this engine of economic growth back on track cannot be understated. NAHB appreciates the opportunity to provide comments on this important undertaking and is hopeful that the Administration's interest in, and oversight of, the regulatory process will provide an opportunity to once again make housing a priority.

If you have any questions or would like to discuss any of NAHB's recommendations, please do not hesitate to contact John Ritterpusch at (202) 266-8325.

Best regards,

James L. "Andy" Anderson

Andy Anderson

Chair, NAHB Construction, Codes & Standards Committee

Chip Dence

Chair, Energy Subcommittee

National Association of Home Builders

Recommendations for "Improving DOE Regulations"

DOE: Regulatory Burden RFI

NAHB Regulatory Affairs

4/1/2011

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I. Introduction

President Obama has taken a number of steps demonstrating his commitment to change not only substantive policies, but also the policy-making process. By revamping the Office of Management and Budget's (OMB) Office of Regulatory Information and Regulatory Affairs (OIRA), revisiting various Executive Orders (EOs), and revising rulemaking processes and standards, the President hopes to create a government that is more user-friendly, transparent, and open. On Jan. 18the President issued one new E.O. and two memorandums aimed at reducing unnecessary regulatory burdens, promoting economic growth and job creation, and providing relief from regulations that add costs but do not achieve intended results.

Executive Order 13563

The EO on "Improving Regulation and Regulatory Review" states, "[o]ur regulatory system must protect public health, welfare, safety and our environment while promoting economic growth, innovation, competitiveness and job creation." It specifically calls for regulations to be cost effective and cost justified, transparent, coordinated, flexible and science driven, and largely instructs the agencies to comply with EO 12866, which was issued in 1993 and has historically provided the blueprint for agencies to follow when considering and adopting rules. Like EO 12866, the new EO also directs the agencies to analyze existing rules and identify those that may be outmoded, ineffective, insufficient, or excessively burdensome and to modify, streamline, expand or repeal them in accordance with what has been learned. As a first step, it requires all covered agencies to develop a preliminary plan for how it will conduct such a review and submit it to OIRA within 120 days.

Because independent agencies are not required to comply with EOs issued by the President, on Feb. 2, the OIRA Administrator issued a guidance memorandum to all Executive Branch departments and agencies asking that these independent agencies voluntarily comply – particularly regarding the requirement to conduct the retrospective rules analysis.

Memorandum on Regulatory Flexibility, Small Business, and Job Creation

In recognition of the role that small businesses play in the economy, this new memorandum emphasizes the need to reduce burdens on small businesses whenever possible. Relying on the authority provided by the Regulatory Flexibility Act, the directive suggests that agencies, when initiating rulemaking that will significantly impact small businesses, to increase compliance flexibility through measures such as extended

compliance dates, simplification of reporting requirements, and partial or total exemptions.

Memorandum on Regulatory Compliance
Calling for more transparency and accountability in regulatory compliance, this memorandum directs the agencies to, within 120 days, develop plans to make information concerning their regulatory compliance and enforcement activities accessible, downloadable, and searchable online to the extent feasible and permitted by law. It also directs the agencies to share enforcement and compliance information across the government.

Since the president signed the new EO, several agencies have already heeded its advice. After repeated calls of concern from NAHB and others, for example, the Occupational Safety and Health Administration (OSHA) recently withdrew its proposed interpretation of the occupational noise standard and is reconsidering its potential rule on musculoskeletal injuries. Likewise, EPA decided to postpone the deadline for businesses to report greenhouse gas emissions.

NAHB is hopeful that these steps will, indeed, lead to streamlined requirements and reduced burdens on industry. We look forward to working with the agencies as they prepare their retrospective review plans and protocols and are particularly interested, once those reviews commence, to see some efficiencies introduced into the regulations that touch our industry. Like the President, we believe these efforts can go a long way toward reducing regulatory burdens, and in doing so, promoting economic growth, innovation, competitiveness and job creation.

II. The Presidential Directives are Timely

The President's recent initiatives seek to reduce unnecessary regulatory burdens on the nation's industries as one step toward promoting economic growth and job creation. Given their costs and challenges, the current state of the economy and the condition of residential construction industry, NAHB appreciates these reforms and believes now is the time to once again make housing a priority.

A. Deteriorating Economic Conditions Demand Action

The plight of the residential construction market and its impact on the overall health of the U.S. economy has been widely reported. A full understanding of the industry's economic challenges is particularly important in light of the President's directive under EO 13563 and the accompanying Presidential Memorandum on Regulatory Flexibility, Small Business, and Job Creation. As the President states, "[m]y Administration is firmly committed to eliminating excessive and unjustified burdens on small businesses, and to ensuring that regulations are

designed with careful consideration of their effects, including their cumulative effects, on small businesses."[1] NAHB could not agree more.

The stresses confronting the U.S. housing market, specifically those affecting the small businesses that comprise the vast majority of residential construction companies are real and widespread, including an increasing unemployment rate, lack of available financing for new construction projects, declining housing production levels, and declining home values and their collective impact on remodeling activity. Unfortunately, all of these factors contribute to the industry's dire economic condition, making the President's directive all the more vital.

Most recently in March 2011, the U.S. Department of Commerce reported the February new housing starts at 479,000 on an annualized basis, the second lowest on record dating back to 1959.[2] By way of comparison, during the period 2003-2006, the U.S. housing market averaged 1.2 million to 1.8 million housing unit starts annually. As a result of this decline, the U.S. Department of Labor in December estimated the housing industry's unemployment rate at 18.7 percent – more than double the national unemployment average of 9 percent.[3] Likewise, credit availability for acquisition, development, and construction (AD&C) loans continued to deteriorate in the fourth quarter of 2010. These loans fund not only new construction, but also the acquisition of property and the installation of essential infrastructure improvements such as roads and utilities, stormwater treatment systems, and the hiring of technical consultants, engineers, and attorneys – whose expertise is needed to navigate the complex federal environmental permitting processes.

In addition, the National Association of Realtors reported that sales of existing homes declined by 9.6 percent in February while prices for these homes fell to the lowest level in nine years.[4] The Federal Housing Finance Agency also reported steep declines in its House Price Index, which covers more the six million sales of existing homes nationwide. The index showed an average home value decline of 5.7 percent (adjusted for inflation) for the fourth quarter 2010.[5] The problem of declining home values and negative equity for homeowners is even more pronounced on a year-over-year basis. For example, the Case-Shiller index has shown price declines for existing homes in the top 20 housing markets as high as 32 percent from peak to

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[1] 76 Fed. Reg. 3821, January 21, 2011.
[2] U.S. Census Bureau, *New Residential Construction In February 2011*, internet press release, retrieved on March 21, 2011, from http://www.census.gov/const/newresconst.pdf.
[3] U.S. Department of Labor, Bureau of Labor Statistics, *Employment Indicators and Industrial Production*, retrieved on March 28, 2011, from http://www.bls.gov/news.release/empsit.toc.htm.
[4] Zibel A. and Bater F., *Home Sales Remain Depressed*, Wall Street Journal, March 21, 2011, retrieved on March 21, 2011 from http://online.wsj.com/article/SB10001424052748703858404576214420245768508.html?mod=WSJ_hp_LEFTWhatsNewsCollection.
[5] Federal Housing Finance Agency, *Housing Price Index Falls 0.8 Percent in Fourth Quarter 2010; House Prices Decline in Most States.* February 24, 2011.

trough.[6] As a result, economists project that as many as 23 percent of all mortgage holders may owe more on their homes than they are worth.[7]

Homeowners with negative equity also raise the prospect of higher rates of so-called "strategic defaults," wherein these homeowners decide to stop paying their mortgage, which further adds to the estimated 1.95 million homes now in foreclosure.[8] Obviously, this lowers home values and further depresses the residential construction market. The problem of negative equity also adversely impacts homeowners seeking to remodel their homes. According to a survey conducted by the U.S. Federal Reserve Board of homeowners who refinanced their homes between 2001 and 2002 to take equity out in the form of cash, most spent that money on remodeling projects.[9] The researchers also found the cash value spent on professional remodeling was more than $25,000 per refinance.[10] The problem of declining home values and negative equity means reduced financing opportunities for homeowners who rely on home equity to secure financing for home renovation projects, and thus, fewer business opportunities for professional remodelers.

B. Existing Regulatory Overreach and Overregulation Must Be Curtailed

Residential construction is one of the most heavily regulated industries in the country. The time and costs of compliance not only impact a business's ability to thrive and grow, they can also negatively affect housing affordability and stifle economic development. As above, in these economic times, the decrease in production and loss of jobs within the industry also points to the need to reduce its regulatory burden.

For example, residential construction is one of the few industries in which a government-issued permit is typically required for each unit of production. The rules do not stop there, as a constricting web of regulatory requirements affects every aspect of the land development and home building process, adding substantially to the cost of construction and preventing many families from becoming homeowners. The breadth of these regulations is largely invisible to the home buyer, the public, and even the regulators themselves, yet nevertheless has a profound

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[6] S&P/Case Shiller Home Price Indices, retrieved on March 28, 2011, from http://www.standardandpoors.com/indices/sp-case-shiller-home-price-indices/en/us/?indexId=spusa-cashpidff--p-us---.

[7] CoreLogic, *New Corelogic® Data Shows 23 Percent Of Borrowers Underwater With $750 Billion Of Negative Equity Proposed Down Payment Rules Will Impact Already Hard-Hit States*, March 8, 2011, press release, retrieved March 30, 2011, from http://www.corelogic.com/uploadedFiles/Pages/About_Us/ResearchTrends/CL_Q4_2010_Negative_Equity_FINAL.pdf.

[8] RealtyTrac®, *Foreclosured Homes National Trends*. Retrieved March 25, 2011, from http://www.realtytrac.com/trendcenter/.

[9] Canner, G., Dynan, K., and Passmore, W., U.S. Federal Reserve Board's Division of Research, *Mortgage Refinancing in 2001 and Early 2002*, December 2002, page 473.

[10] Ibid.

impact on housing affordability and homeownership. These regulations stem from legislation including the Clean Water Act, the National Environmental Policy Act, the Endangered Species Act, the Energy Policy Act, the Occupational Safety and Health Act, the Fair Housing Act, and the Safe Drinking Water Act. Regulations imposed by state and local governments are even more numerous, covering zoning, earth moving, sediment and erosion control, land dedication, gas service, impact fees, tree preservation, long-term facility maintenance, public service impacts, transportation, setback requirements and burning restrictions.

While each of these regulations on its own may not be significantly onerous or problematic, builders and developers are often subject to a layering effect, where numerous regulations are stacked on top of one another. When 10 or more seemingly insignificant regulations are imposed concurrently, the cost implications, complexities and delays can be considerable. In fact, in a 1998 survey of NAHB's builder and developer members, 11.1 percent of respondents said that 10 or more government approvals or reviews were required before land could be developed.[11] The number of permits required has increased considerably. In fact, in some heavily regulated markets, the cost and time delays associated with obtaining permits and complying with the rules can add tens of thousands of dollars to the cost of building a modest single-family home. Likewise, because many regulatory agencies are not familiar with the home building process, including all aspects from financing to land acquisition, grading to infrastructure installation, foundation to framing, and roofing to landscaping, many regulations have been improperly developed and ill-applied, offering little assurance that the regulations are achieving their intended results. Finally, the overabundance of these regulatory policies tends to distort and cause inefficiencies in the market due to decreased competition. When there are fewer builders, land, design and construction costs increase, housing prices expand and profit margins are skewed.

President Obama's most recent initiatives recognize this problem and are intended, in part, to help get struggling industries back on their feet. In an effort to provide necessary relief to the residential construction industry, NAHB strongly urges the Administration to use this opportunity to make housing a priority. By focusing its retrospective review and oversight responsibilities for new rules on those policies that impact builders and developers, this Administration has an opportunity to create jobs and restore a broken segment of the economy. By examining the cumulative impacts and burdens placed by the myriad regulations – many of which are duplicative, overlapping, or contrary to one another, along with assessing their performance, NAHB is certain that the agencies will find sufficient room for efficiencies and streamlining.

[11] National Association of Home Builders, *The Truth About Regulatory Barriers to Affordable Housing*, 1998.

III. Small Business in Urgent Need of Relief

More than 80,000 pages of regulations appeared in the *Federal Register* in 2010 and a recent study found that the annual cost of federal regulation in the U.S. reached $1.75 trillion in 2008 – the equivalent of $15,586 per household. That compliance burden is much greater for small employers.[12] With the growing number and complexity of regulations, most of which impact small businesses in one way or another, and the continuing increase in unemployment and the loss of small businesses, steps must be taken to restore balance and make regulations more cost-effective without undermining their intent. As the Administration recognizes, reducing unnecessary regulatory burdens on the nation's industries will help to promote economic growth and job creation.

A. Small Firms Overly Burdened

A recent study funded by the U.S. Small Business Administration examined the proportional costs of federal regulations upon smaller firms (*i.e.,* firms with 20 or fewer employees) as compared to larger firms.[13] The study found that these firms pay 40 percent more in compliance costs per employee than firms with more than 500 workers.[14] The researchers found that this disproportionate compliance cost results from the fact that most federal environmental regulations impose identical recordkeeping, reporting, and compliance costs on all firms. Smaller companies cannot easily spread the compliance costs across a larger number of regulated activities and typically must rely on expensive outside professional consultants to help them demonstrate compliance with technical permitting and reporting requirements. In fact, President Obama specifically highlighted the current economic conditions confronting small businesses in his *Memorandum on Regulatory Flexibility, Small Businesses, and Job Creation* as a primary reason why federal agencies must ensure federal regulations are in fact cost effective. Specifically, the President stated: "[i]n the current economic environment, it is especially important for agencies to design regulations in a cost-effective manner consistent with the goals of promoting economic growth, innovation, competitiveness, and job creation."[15]

NAHB has seen firsthand the economic impact of federal environmental regulations on small construction and remodeling firms. For example, compliance costs under EPA's stormwater program, which requires small builders working on single building lots to develop, track, and update technical stormwater pollution prevention plans are typically significantly higher for those businesses that build fewer than 25 homes per year. Likewise, NAHB's remodeler members have reported increased compliance costs associated with training, certification, and

[12] Crain, N.V. and Crain, M.W., *The Impact of Regulatory Costs on Small Firms*, September 2010, page iv, retrieved on March 24, 2011, from http://www.sba.gov/advocacy/853/2016.
[13] Ibid, page 8.
[14] Ibid, page 9.
[15] 76 Fed. Reg. 3828, January 21, 2011.

recordkeeping requirements under EPA's Lead, Renovation, Repair, and Painting Rule because smaller entities find it difficult to include those costs in their planning and overhead calculations.

In addition to the costs and efforts associated with individual requirements, the cumulative burdens associated with multiple, duplicative, and onerous regulation are overwhelming. Again using the example of stormwater management, many builders and developers must understand, apply for, and operate pursuant to multiple stormwater rules from state and local entities as well as federal regulators, even though they are all aimed at reaching the same end result. Each regulating entity exacts a toll. To make matters worse, EPA is currently considering yet another stormwater management rule. In addition to the burdens and confusion, these permits are rarely harmonized and their conditions are constantly changing, making it nearly impossible for these small businesses to be in full compliance, even though their activities result in no pollutant discharges.

Small businesses continue to be targeted by all levels of government. While reducing or eliminating burdens at the federal level is a desirable and important first step, the Administration cannot overlook the challenges that will continue to remain if the cumulative impacts from all sides are not considered.

B. President's Memorandum Directs Change

Recognizing the regulatory burdens suffered by small businesses and the need to reduce their impacts, President Obama simultaneously issued EO 13563 and the *Memorandum on Regulatory Flexibility, Small Business, and Job Creation*, which directs the agencies to fully consider the needs of, and impacts of their actions on, small businesses. For example, the Memorandum states: "[e]ach agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations." To do so, the Memorandum directs all federal agencies, when proposing new regulations, to include regulatory flexibilities for small businesses such as extended compliance dates, simplified reporting requirements, or even regulatory exemptions. Furthermore, the Memorandum states, "whenever an executive agency chooses, for reasons other than legal limitations, not to provide such flexibility to a proposed or final rule that is likely to have a significant economic impact on a substantial number of small entities, it should explicitly justify this decision not to do so in the explanation that accompanies that proposed or final rule."[16]

Clearly, the Memorandum is intended to remind the federal agencies of their statutory obligations under the RFA and under EO 13563 to fully consider and afford regulatory

[16] 76 Fed. Reg. 3828, January 21, 2011.

flexibilities to small businesses. Moreover, the Memorandum goes a step further to mandate that whenever a federal agency fails to provide flexibility to small businesses under a proposed or final rule, it must justify why it did not do so. The Memorandum clearly recognizes the crucial role small businesses play in any future economic recovery and instructs all federal agencies to ensure their existing and future regulations are done in a cost-effective, innovative, and flexible manner so as not to stifle economic growth among small businesses.

IV. Retrospective Regulatory Review Crucial

Today's action is in direct response to EO 13563 and the *Presidential Memorandum on Regulatory Flexibility, Small Business, and Job Creation*. Although all federal agencies subject to the Regulatory Flexibility Act and EO 12866 are already required to conduct periodic reviews of existing regulations, this new directive is intended to streamline the process and make sure it is done. These reviews have long been a hallmark of the federal rulemaking process. Indeed, if one never analyzes or assesses the efficacy or effectiveness of a regulation, what assurance does the public have that resources are being used wisely or that government actions are necessary or meeting their intended goals? NAHB is pleased that the Administration is emphasizing this need. When preparing their retrospective review plans, the agencies should start with existing review processes and guidance, and then to tailor them to meet the mandates of EO 13563. Importantly, these reviews should include not only significant regulations, but should be expanded to also require review of existing guidance documents and policy statements. We also provide a number of suggestions regarding prioritizing rules for review and data needs.

A. Executive Order 13563 Calls for Review

EO 13563 calls on each federal agency to examine its current rulemaking process for new rules and to conduct a retrospective examination of existing significant regulations. Much of the EO simply reaffirms the principals of the federal rulemaking process that were established almost 20 years ago by President Clinton under EO 12866, Regulatory Planning and Review,[17] which directed all covered federal agencies[18] to submit all significant proposed and finalized rules to OIRA for centralized review. During the OIRA review process, significant rules are to be examined to, among other things, ensure that the cost/benefit ratio is acceptable, the rule is in fact required under federal law, and that there is a compelling public need (*i.e.,* protection of public health, environment, or national security). It also requires federal agencies to demonstrate to OIRA's satisfaction that they selected the least burdensome option and maximized public

[17] 58 Fed. Reg. 51735, October 4, 1993.
[18] Under E.O. 12866 not all federal agencies were covered, as it exempted some "independent regulatory agencies" from certain provisions. "Independent regulatory agency" is defined under 44 U.S.C. §3502(4) and includes the Federal Reserve System, Commodity Futures Safety Commission, Consumer Products Safety Commission, Federal Housing Finance Agency, Federal Deposit Insurance Corporation, and several others.

benefits when they selected the proposed or final rule.[19] In general, federal agencies cannot publish proposed or final significant rules in the Federal Register without OIRA's concurrence that the federal agency has met its obligations under EO 12866.[20]

In addition to the procedural requirements, both EO 12866 and EO 13563 establish requirements for federal agencies to conduct periodic reviews of existing significant rules.[21] EO 13563 specifically directs the agencies to prepare and submit within 120 days a plan to OMB that explains how the agency will periodically review all "significant rules." As part of this review, the agencies must determine if any such regulations should be modified, streamlined, expanded, or repealed to make the agency's regulatory programs more effective or less burdensome in achieving its regulatory objectives.[22] The term "significant regulatory action" is defined under EO 12866, Section 3(f) as a rule likely to result in an annual economic impact of $100 million or more, create serious inconsistencies with other federal actions, materially alter federal grants or budgetary actions, or raise novel legal or policy issues. Every year, about 200 significant regulations are finalized. In 2010, there were 224 major rules at various stages at the agencies.[23]

The requirement to perform retrospective reviews is not new, but President Obama's new emphasis provides an opportunity to ensure that the agencies are following the correct processes and completing the necessary analyses. In theory, these reviews are intended to allow the agencies an opportunity to determine if the regulation is still cost effective and/or meeting its intended goal(s). The reviews also afford agencies the opportunity to reduce the regulatory burden on individuals, industries, and state and local governments because the original rule might be outmoded, ineffective, or unnecessary because of changed circumstances.[24]

The retrospective review of existing federal regulations is one of the principal regulatory review mechanisms aimed at achieving cost-effective federal regulation. The intent of the retrospective review requirements found in EO 12866, the Regulatory Flexibility Act, and now EO 13563 is to encourage federal agencies to periodically re-examine existing federal regulations after some period of time to consider revising, reducing, or even eliminating existing regulations where warranted. One of the most widely acknowledged shortcomings of the current federal rulemaking process is when federal agencies conduct the required costs-benefit analysis of individual regulations, those analyses are performed during the proposed rulemaking stage of the process and therefore are based on assumptions concerning their costs and feasibility. This

[19] 58 Fed. Reg. 51735, October 4, 1993, Section 1.
[20] 58 Fed. Reg. 51735, October 4, 1993. Section 8 (states no federal agency shall publish in the Federal Register a regulatory action without complying with all requirements under E.O. 12866, including waiting for the Administrator or OIRA to notify the federal agency that OIRA has completed its review of the proposed or finalized rule).
[21] 58 Fed. Reg. 51735, October 4, 1993, Section 5; 76 Fed. Reg. 3821, January 21, 2011, Section 6.
[22] 76 Fed. Reg. 3821, January 21, 2011, Section 6(b).
[23] Crews, W. and Young, R., *Regulation Without Representation*, Investor's Business Daily, February 8, 2011.
[24] 76 Fed. Reg. 3821, January 21, 2011, Section 6(b).

problem was recently discussed by Michael Greenstone, President Obama's Chief Economist on the Council of Economic Advisers, who noted: "[t]he single greatest problem with the current system [regulatory review] is that most regulations are subject to a cost-benefit analysis only in advance of their implementation. This is the point when the least is known and any analysis must rest on many unverifiable and potentially controversial assumptions."[25]

This shortcoming also leaves both the federal agencies and small businesses unsure of a rule's ultimate feasibility. While section 5 of EO 12866 and section 610 of the RFA were intended to close this gap, few rules have been reviewed, and the RFA's requirement does not extend to regulations impacting larger firms or society as a whole. Furthermore, a 2007 GAO report examining outcomes of various agencies' retrospective reviews (both mandatory and discretionary)[26] found few, if any, mandatory reviews resulting in any changes to existing rules.[27] In fact, GAO found that only one out of 14 section 610 reviews of EPA regulations conducted between 2001 and 2006 resulted in a substantive change to the regulation. Moreover, EPA staff reported that not only did section 610 reviews not lead to change, but that they typically resulted in EPA validating the need for the regulation.[28] EPA staff also reported to GAO that, by comparison, discretionary reviews, such as OMB's Manufacturing Regulatory Reform initiative of 2003, were far more likely to result in regulatory changes than non-discretionary reviews. GAO's report clearly demonstrates that the federal agencies are far less likely to make substantive changes to existing regulations during mandatory retrospective reviews than during discretionary reviews. The question raised by GAO's report – why are discretionary reviews far more likely to result in substantive changes than mandated reviews – remains to be answered.

B. The Regulatory Flexibility Act and E.O. 13272 Mandate Periodic Evaluation

RFA section 610 requires federal agencies to conduct a periodic "review of the rules issued by the agency which will have a significant economic impact upon a substantial number of small entities."[29] Likewise, EO 13272, *Proper Consideration of Small Entities in Agency Rulemaking*, directs agencies to "thoroughly review draft rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations,

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[25] Office of Management and Budget, Office of Information and Regulatory Affairs, *Draft 2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities,* page 55, retrieved on March 28, 2011, from http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/Draft_2011_CBA_Report_AllSections.pdf.

[26] Mandatory reviews are conducted under EO 12866 and RFA §610, while discretionary reviews might be conducted in response to rulemaking petitions

[27] U.S. Government Accountability Office, *Reexamining Regulations: Opportunities Exists to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-791, July 2007, page 51.

[28] Ibid, page 86.

[29] 5 U.S.C. §610.

as provided by the [Regulatory Flexibility] Act."[30] Although the section 610 requirement has been in place since 1980, agency compliance has been spotty at best.[31]

Similar to the EO 13563 directive to conduct a retrospective analyses of existing rules, the purpose of the section 610 and EO 13272 reviews is to afford agencies an opportunity to assess the effectiveness and impacts of existing rules on small businesses and to determine whether the rules should be continued without change, or should be amended or rescinded to better reflect current conditions or better meet the objectives of the underlying law. Unlike EO 13563, which applies to all "significant" regulations, the RFA and EO 13272 are limited to only those regulations that have a significant economic impact on a substantial number of small businesses. Due to the similarity in scope and purpose, however, NAHB believes the lessons learned and processes followed under these directives have great relevance.

Recognizing the disproportional compliance costs that can accrue to smaller firms, Congress established the RFA §610 review process to require federal agencies, when reviewing existing regulations, to consider the following five factors:

1. Complexity of the rule;
2. Continued need for the rule;
3. Nature of complaints or comments received from small businesses concerning the rule's implementation;
4. Extent to which the federal rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State, and local governmental rules; and
5. Degree to which technology or economic conditions have changed.[32]

Under the RFA, agencies must notify the public when rules are to be reviewed under the §610 process by publishing a notice in the Federal Register. Federal agencies have ten years from the effective date of a rule to conduct the RFA §610 review. Once the agency has commenced a RFA §610 review, it has one year to complete it, including providing an opportunity for public comment, and publishing the results of the review in the Federal Register. To ensure that all agencies follow the correct processes, the SBA has issued guidance that discusses what questions should be asked and what examinations should be included in a proper review. NAHB concurs with SBA's guidance and urges the agencies to, at a minimum, use this guidance as a template when developing their retrospective review plans.

For example, under RFA §610, federal agencies must conduct the review within ten years of the rule's original promulgation.[33] For some rules, however, it may make sense to conduct the

[30] 67 Fed. Reg. 53461, August 16, 2002.
[31] See U.S. Government Accounting Office, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-791, July 2007 and U.S. General Accounting Office, *Regulatory Flexibility Act: Agencies' Interpretations Vary*, GAO/GGD-99-55, April 1999.
[32] 5 U.S.C. §610(b) (2009).

reviews earlier or more often if there have been significant strides in technology or if an affected industry sector has suffered severe economic distress. Likewise, as OIRA Administrator Cass Sunstein recognized in a February 2011 clarification memo, [34] many federal agencies, including EPA, already are required by Congress under RFA §610 or their various statutes to conduct periodic reviews of existing regulations. In these instances, the two requirements should be coordinated to the extent possible to avoid redundancy and duplication. It is clear from the many initiatives taken over the years that there exists a need and a desire to minimize the economic impact that regulations place on small businesses. NAHB is hopeful that today's efforts will, indeed, meet this goal and thereby invite new innovation, competitiveness, and job creation.

C. NAHB's Suggestions for Conducting Retrospective Reviews

All federal agencies have statutory obligations under RFA §610 and administrative requirements under EO 12866 to conduct periodic reviews of existing regulations. Many are also directed by specific statutes to conduct similar reviews. For example, EPA is mandated under several federal environmental statutes such as the Clean Water Act, Clean Air Act, and Safe Water Drinking Act to conduct periodic review of existing regulatory standards.[35] Given these requirements, a logical first step in developing a retrospective review plan is to study these existing processes to determine what is working and why. NAHB suggests it may provide a useful starting point and/or guidepost as the agencies develop their plans. We particularly point to, and urge the use of, the SBA's *Section 610 of the Regulatory Flexibility Act: Best Practices for Federal Agencies*.[36] NAHB also offers some specific suggestions on factors to consider when prioritizing review of existing regulations, how best to engage the public during the retrospective review process, and elements that should be included in the reviews themselves.

1. Identification of Candidate Regulations for Retrospective Review

- At a minimum, each agency should begin with a list of all of its significant regulations, guidance documents and policy statements, dates of promulgation and dates of prior reviews, if applicable.
- Agencies are then urged to take a two-step approach, like the one outlined in the *EPA Protocol for the Review of Existing National Primary Drinking Water Regulations*, which includes an initial technical review of all significant regulations followed by an in-depth technical evaluation of those regulations identified as potential candidates for revision.[37]

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[33] 5 U.S.C. §610(a) (2009).
[34] Office of Management and Budget, Office of Information and Regulatory Affairs, *Memorandum For The Heads Of Executive Departments And Agencies, And Independent Regulatory Agencies*, February 7, 2011, page 6.
[35] U.S. Governmental Accountability Office, *Re-examining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-791, 2007, page 86.
[36] Available at http://archive.sba.gov/advo/r3/r3_section610.pdf.
[37] U.S. Environmental Protection Agency, Office of Water, *EPA Protocol for the Review of Existing National Primary Drinking Water Regulations*, EPA 815-R-03-002, June 2003, p. 6, retrieved on March 9, 2011, from

- Recognizing resource constraints, the agencies could also take a phased approach.
- While it may be beneficial to review all regulations within a specific program area at the same time (*e.g.,* air or water) so that the agency is better equipped to look at competing or duplicative regulations across a program area, this approach is not recommended. The burdens on the program offices would be too great. Instead, the agency should group the regulations by affected entities and conduct its review and evaluation of opportunities to reduce burdens, streamline, or better harmonize requirements across programs based on who must comply with the rule. This approach also allows the agency to better understand, evaluate, and address cumulative impacts, as oftentimes it is not the costs and burdens of individual regulations that are problematic, but the additive nature of the rules, particularly as they apply to heavily regulated industries like residential construction.
- Once the regulatory review process is in place, each agency must revisit a certain number of regulations every year. Under this approach, the agency will be able to plan ahead and secure and put in place the resources and personnel needed to conduct the required comprehensive reviews.

2. Criteria for Prioritizing Regulations for Review

There are a number of considerations that agencies make when determining which regulations to review. As such, agencies must take an objective approach and must not be allowed to shy away from reviewing certain regulations because they may be politically or publically sensitive, difficult to quantify or analyze, or are otherwise undesirable candidates. Specific criteria that should be considered include:

- **Number of affected entities**. This metric should include both direct and indirect effects, including those who must comply as well as those who must administer any regulation. Agencies should also track those industry sectors most affected by regulation so the most heavily regulated sectors can be easily identified and the regulations affecting that sector reviewed and streamlined.
- **Businesses of affected entities**. It is important that the agencies look at the various industries affected by regulation and examine their sizes, locations, and the number of people they employ. Agencies must address the broad list of affected businesses and an emphasis should be placed on those that have been particularly impacted by the economy or other mishap, and that have a proven track record of creating jobs.
- **Costs, benefits, and the cost/benefit ratio**. Costs must include both the costs of compliance to the regulated entities, as well as the costs to the governmental entity (federal, state, or local) to administer the program. Ideally, this review would also include a sector-specific analysis, which could look at cost pass-through, examine profits or profit margins, measure the financial health of entities, and/or compare relative

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http://water.epa.gov/lawsregs/rulesregs/regulatingcontaminants/sixyearreview/first_review/upload/support_6yr_protocal_final.pdf.

impacts on small versus large entities. Recognizing the difficulty of identifying and monetizing benefits, each agency must be very clear in describing how the benefits were calculated and what assumptions or unknowns exist within the data. NAHB also believes that looking at the cost/benefit ratio can be a useful tool to prioritize projects.

- **Level of risk that the regulation addresses**. This could be based on pollutant addressed, toxicity, impact/health effects, scope, etc., so that regulations that address higher-risk issues are priorities. Such an approach would be consistent with EO 12866, which states, "[i]n setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction."
- **Availability of new data or information**. The underlying data upon which a rule is based is one of the most important components of a rulemaking and the subsequent implementation of the rule. New data could indicate a higher or lower risk, demonstrate the value of best practices, or demonstrate the true costs of implementation. Because new information can significantly impact the achievability, efficacy, cost or value of a regulation, its existence should be a key factor in determining which rules are to be examined.
- **Existence of duplicative regulations**. The constant melding and interrelatedness of government programs and the lack of coordination between and within agencies leads to regulatory overlap. For example, while the Department of Energy retains oversight over energy policy and product ratings, but the Environmental Protection Agency runs the ENERGY STAR® program. In addition, efforts are often taken at the federal, state, and local government levels to address identical or similar issues. For example, several states have their own versions of the National Environmental Policy Act (NEPA) or state endangered species laws. These duplicative, inconsistent, or overlapping requirements waste time and money as affected entities must go through similar processes multiple times, but the end results are rarely significantly different. Recognizing this, EO 13563 specifically directs the agencies, in developing regulatory actions and identifying appropriate approaches, to promote coordination, simplification, and harmonization. Thus, the retrospective review process provides an opportunity for the federal government to better align it rules within its own ranks and with those at the state and local level, and NAHB urges it to do so.
- **Significant changes in technology, cost, or best practices**. Regulation can be a driver of technology and innovation, but changes can also happen organically or due to market forces. In some instances, however, the innovation expected is not available. For example, in 2009, EPA finalized the Lead: Renovation, Repair and Painting Rule predicated on the development of new technology prior to its implementation.[38] Unfortunately, the lead-based paint test kit integral to the cost-effectiveness of the rule was not developed as expected. As a result, regulated parties were left with significantly

[38] 73 Fed. Reg. 21692, April 22, 2008.

more expensive methods for lead paint testing than originally estimated. NAHB suggests that the lack of technology in this case would be a sufficient reason for review. Likewise, as resources become scarce or demand increases, prices and costs can change dramatically. Or, if one element of a process is forced to change due to a new regulation or new technology, other parts of the process are forced to change, again driving up costs. In considering changes in technology, cost, or best practices, the agencies are strongly urged to rely on the regulated community to help identify potential impacts.

- **Impact of other/newer statutes or regulations.** Sometimes new laws or rules are adopted that effectively supersede existing regulations, but the regulations may remain on the books. Likewise, new rules could obviate the need for, or benefit of, the target regulation.

3. Integrating Existing Requirements into Retrospective Review Requirements

- As above, each agency is urged to start with a comprehensive list of all of its existing requirements to conduct retrospective reviews and a list of all significant regulations that are already affected by those requirements. The agency must then assess those review requirements to determine if they cover the same elements that are expected to be covered pursuant to the review required by EO 13563. For example, section 610 reviews are only conducted for rules that have significant impacts on small businesses, while EO 12866 and EO 13563 reviews apply to all significant regulations.

- Likewise, each agency should examine how often the various reviews are required. To be prudent, NAHB believes that all agency regulations should be reviewed at least once every five years, or even more often if new information or circumstances arise. If the existing review processes cover all of the elements of EO 13563 and occur at least once every five years, NAHB submits that those existing reviews should suffice. If the reviews cover different elements or only a portion of the factors covered by EO 13563, a separate and thorough review must occur. Likewise, if the existing review is conducted at an interval of less than once every five years, EPA must complete a separate examination. Because various review processes already exist, NAHB sees no reason not to use those existing review plans and processes as a starting point. Agencies are also urged to harmonize all of their review processes to the extent practicable so that the process is predictable and public can better understand and participate.

4. Regulatory Review Requirements

- Each agency must adopt a robust review process that fully considered all aspects of the rule. Like the analyses required prior to adopting new rules, the retrospective review should include:
    - **Updated cost/benefit analysis.** A thorough and careful economic analysis is one of the most important components in informing sound environmental policies. Accordingly, any retrospective review should contain a comprehensive and robust economic analysis, including descriptions of the potential social benefits and social costs of the regulation (*i.e.,* benefits and costs that cannot be monetized), and a determination of the potential net benefits of the rule (including those that are not monetized). Because a number of guidelines already exist to assist the agencies in completing such an analysis,[39] it is not necessary to create a new process, but it is imperative that the agencies follow those requirements, which means sufficient oversight must also be provided.
    - **Updated impact analysis.** In addition to examining the effect of the given regulation on the economy of a given area, each agency must also complete secondary, sector-specific, and cumulative impact assessments to determine the total regulatory costs and burdens imposed on all impacted sectors, including any impacts that may accrue to state or local governments in their administration of the regulation.
- The agencies must also collect data on regulation's performance. Retrospective reviews of existing regulations can be hindered by the lack of quantifiable data. Unfortunately, few federal agencies have identified what data is needed. A recent GAO report examined retrospective regulatory reviews conducted by nine different federal agencies between 2001 and 2006[40] and reported that most retrospective reviews suffered because the federal agencies did not, during the rule's development, identify what data sources would be needed or used to fairly evaluate how successful a regulation's performance was in practice. As a result, GAO found that federal agencies and stakeholders could not determine how effective an existing regulation was. Therefore, NAHB believes an essential element of each agency's evaluation of existing regulations is a clear explanation of how the agency will evaluate existing regulations and what data sources will be used to evaluate their performance.
- Agencies are urged to include the public early and often in the review process. As their activities are often the focus of regulation, who better understands the challenges and details, or the costs and successes of regulation than those who are regulated? In addition, each agency is urged to develop a recurring five-year schedule that outlines the timing for its review of each significant regulation (*e.g.,* rules reviewed in year 1 would

[39] See, for example, the Office of Management and Budget's *Circular A-4,* issued in 2003, which provides recommendations to federal agencies on the development of economic analyses supporting regulatory actions and EPA's *Guidelines For Preparing Economic Analysis*, EPA 240-R-10-001, December 2010.
[40] U.S. Governmental Accountability Office, *Re-examining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-791, July 2007, page 49.

also be reviewed in years 6 and 11). The initial schedule should also be released for public comment, as should any revision thereto. The schedule should be revisited at least yearly, at which time the agency could also solicit feedback on the review process.

- The agencies should be required to provide OMB with annual reports that identify which regulations were analyzed, the information that was studied, the findings, any changes or revisions made, and any next steps. OMB should then use this information, along with similar information concerning any new rules promulgated within the year, to publish an annual report that is disseminated to the agencies, Congress, and the general public to explain the number of major and minor rules produced by each agency, the costs and benefits of each, and the steps taken or flexibility provided to ease burdens on small businesses.

V. Enhancing Public Participation Opportunities Essential

While most agencies emphasize and tout the importance of, and need for, public participation in the rulemaking process, the public often gets short shrift when it comes to evaluating alternatives, estimating impacts or directing outcomes. Indeed, the simple use of the *Federal Register* as the primary mechanism to notify stakeholders of government activity is the first problem. Recognizing these challenges, efforts have been made throughout the years to revise and improve the public process, but the results have been mixed and most have resulted in calls for reform. In addition to the other deficiencies cited above, the July 2007 GAO also report found that the lack of public participation in the retrospective review process was a barrier to the usefulness of the reviews.[41]

In an effort to change course and realize real improvement, EO 13563 specifically calls for regulations to be based on "the open exchange of information and perspectives among State, local land tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole."[42] Similarly, although the RFA specifically directs agencies, when contemplating any rule which will have a significant impact on a substantial number of small entities to engage those entities to participate in the rulemaking, the EO tells agencies to actively seek the views of those who are likely to be affected before issuing a notice of proposed rulemaking. This requirement is further explained in Cass Sunstein's memorandum, which states, "[s]ection 2 thus seeks to increase participation in to regulatory process by allowing interested parties the opportunity to react to (and benefit from) the comments, arguments, and information of others during the rulemaking process itself." He also noted that "[o]ne goal is to solicit ideas about alternatives, relevant costs and benefits (both quantitative and qualitative), and

[41] U.S. Government Accountability Office, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-791, July 2007, page 43.
[42] 76 Fed. Reg., 3821, January 21, 2011, Section 2.

potential flexibilities."[43] Finally, both EO 12866 and EO 13563 require federal agencies notify the public of upcoming significant rules and afford the public sufficient period of time for the public to submit comment on significant rules when proposed.[44,45]

While NAHB appreciates these efforts, we remain skeptical of their implementation. The Feb. 13, 2011 *Federal Register* notice clearly is a step in the right direction, but we believe much more can be done. To date, agencies have been responsible for their own outreach and demonstrating compliance. Additional oversight by a third party could better ensure that the public has a fair and meaningful opportunity to participate. Similarly, most citizens are not aware of the existence of the *Federal Register*, much less review it on a daily basis. Similarly, and as noted in the EO, while increased internet access may be helpful to facilitate greater participation, the agencies must take broader based approaches that include a number of steps and outreach mechanisms to reach a broad spectrum of the public. Finally, NAHB believes that regular communication with trade groups, interest groups, governmental entities and others can provide a vast network through which the agencies can reach interested and affected stakeholders. We further believe that the agencies should make more effort to, as OIRA has suggested, "seek the views of those who are likely to be affected by the rulemaking, even before issuing a notice of proposed rulemaking.[46]

VI. Additional Regulatory Process Reforms Necessary

As above, there already exist myriad processes and reviews designed to ensure that new federal regulations are warranted, required by law, science-driven, cost-effective, impose reasonable burdens and achieve their intended results. Given that adhering to the rules in the initial rulemaking stage has proven difficult for most agencies, NAHB strongly urges the Administration to not only require retrospective analyses of existing rules, but to revisit the existing rulemaking process mandates and increase oversight to ensure those processes are consistently followed. Because many of the regulatory discrepancies originate in failures or omissions during the initial rulemaking process, it only makes sense to shore up those requirements to reduce problems down the road. Indeed, retrospective regulatory review is less urgent when agencies collect data, conduct necessary analyses, and adhere to the existing rulemaking processes, tenets, and administrative guidance when promulgating rules in the first place.

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[43] Office of Information and Regulatory Affairs, *Memorandum For The Heads Of Executive Departments And Agencies RE: E.O. 13563*, February 2, 2011, page 2, retrieved on March 28, 2011, from http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf.
[44] 58 Fed. Reg. 51735, October 4, 1993, Section 3 (d).
[45] 76 Fed. Reg. 3822, January 21, 2011, Section 2 (b).
[46] Office of Information and Regulatory Affairs, *Memorandum For The Heads Of Executive Departments And Agencies, And Of Independent Regulatory Agencies RE: E.O. 13563*, February 2, 2011, page 2, retrieved on March 28, 2011, from http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf.

A. Better Data and Rule Justification Necessary

Concurrent with the various efforts to improve the rulemaking process, the Obama Administration has sought to improve the transparency, quality and legitimacy of the data and information upon which regulations are based. NAHB applauds these initiatives, but remains concerned that the vigilant oversight and agency commitment necessary to ensure that these ideals are met have not yet been put into place.

To ensure the consistent use of high quality data and information in government decision-making, federal information quality requirements were adopted by Congress in §515 of the 2001 Treasury and General Government Appropriations Act.[47] The Information Quality Act was supplemented by OMB's Information Quality Guidelines, which served as a model for each agency's implementing guidelines. Under OMB's Information Quality Guidelines, "influential information" (*i.e.,* information having or likely to have important public policy or private sector impacts) must include sufficient "transparency" about data and methods such that the analytic results are "reproducible" by a qualified member of the public. Also, influential information concerning risks to human health, safety, or the environment must meet the new more stringent standard of quality from the 1996 Safe Drinking Water Act.[48]

Under this requirement, the agencies are required to use only the "best available, peer reviewed science" and "best available methods."[49] For this reason, they must ensure that any technical or scientific studies or information used in developing the any new regulation meets this data quality standard. Most agencies also operate pursuant to policies that generally require independent peer review of all scientific or technical work products that are used to support significant rulemakings. Although both the Information Quality and Peer Review policies have been in place for years, it is not clear that they are being consistently followed.

In response, the President in March 2009 introduced the *Memorandum on Scientific Integrity* and explained that, "more than ever before, science holds the key to our survival as a planet and our security and prosperity as a nation. It's time we once again put science at the top of our agenda and worked to restore America's place as the world leader in science and technology."[50] This Memorandum established steps designed to improve the use of good science and instructed the Director of the Office of Science and Technology Policy to develop recommendations for Presidential action designed to guarantee scientific integrity throughout the executive branch.

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[47] P.L. 106-554.
[48] 42 U.S.C. 300g-1(b)(3)(A) and (B).
[49] See, for example, U.S. Environmental Protection Agency, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity, of Information Disseminated by the Environmental Protection Agency*, EPA/260R-02-008, October 2002, p. 22.
[50] White House, *Fact Sheet on Presidential Memorandum on Scientific Integrity*, March 2009, retrieved on March 28, 2011, from http://www.whitehouse.gov/the-press-office/fact-sheet-presidential-memorandum-scientific-integrity.

On Dec. 17, 2010, John P. Holdren, Assistant to the President for Science and Technology and Director of the Office of Science and Technology Policy, issued a Memorandum to the Heads of Executive Departments and Agencies. The Memorandum offers further guidance as to how the Administration's policies on scientific integrity were to be implemented and recognized that:

> Science and technological information is often a significant contributor to the development of sound policies. Thus it is important that policymakers involve science and technology experts where appropriate and that the scientific and technological information and processes relied upon in policymaking be of the highest integrity. Successful application of science in public policy depends on the integrity of the scientific process both to ensure the validity of the information itself and to engender public trust in Government.

The memo further explained that agencies should develop policies that: ensure a culture of scientific integrity; strengthen the actual and perceived credibility of government research; facilitate the free flow of scientific and technological information; and establish principles for conveying scientific and technological information to the public.[51] NAHB could not agree more.

Meanwhile, as the agencies were developing their plans for implementing these goals, President Obama issued EO 13563, which specifically states, "[o]ur regulatory system must … be based on the best available science." It further devotes an entire section to Science, which reads, "Consistent with the President's Memorandum for the Heads of Executive Departments and Agencies, 'Scientific Integrity' (March 9, 2009), and its implementing guidance, each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions."[52] NAHB applauds these actions and believes proactive steps are necessary to ensure appropriate justification for the Government's activities. Indeed, without valid science, there is no way to determine if a regulation is necessary, cost-effective, or performing as intended.

As a starting point, NAHB suggests that each agency develop minimum standards for what is considered credible and objective science. Likewise, many of the conflicts over data can be resolved with the implementation of protocols for data collection and monitoring on a national level. Any such process should follow the agency's IQA guidelines, which typically require the use of the "best available science" that relies on "peer-reviewed studies with data collected by standard and accepted methods." Standard operating procedures could be developed to accompany collection and monitoring templates and guidelines provided to ensure that all staff is

[51] Holdren, John P., *Memorandum for the Heads of Executive Departments and Agencies on Scientific Integrity*, December 17, 2010, retrieved on March 28, 2011, from http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf.
[52] 76 Fed. Reg. 3822, January 21, 2011, Section 5.

following a consistent methodology. Likewise, all information should be recorded in a similar manner and uploaded to a national database that is publically available and searchable.

The collection and evaluation of data is the cornerstone to developing and implementing meaningful and legitimate regulation. Standardized data collection, analysis, and peer review protocols could go a long way toward meeting the objectives of transparency and objectivity, but can only do so if they are implemented consistently. We are hopeful that the President's initiatives will signal a new era of accountability and that the White House will ensure proper oversight to ensure agency compliance.

B. Limit Use of "Non-legislative" Rules

Over time, the agencies have used a variety of mechanisms to inform the public and to provide direction to their staffs, including interpretative rules, guidance documents, policy statements, manuals, circulars and memoranda. While these "non-legislative" rules can be useful in interpreting laws, highlighting how a mandate might be enforced, and are not meant to have binding legal effect, as a practical matter they often do, because they have all the constraining power of the law. Such rules create a real concern for the regulated community because not only do they add new regulatory requirements, they often are exempt from notice and comment by the Administrative Procedure Act (APA) as either "interpretive rules" or "general statements of policy." As such, the agencies are strongly urged to curtail the use of "non-legislative rules."

In an effort to avoid the APA requirements, agencies often issue guidance documents that they claim are non-binding, non-final agency actions, but which are actually "for all practical purposes 'binding,'" like a final agency rule.[53] For example, EPA issued the guidance document "Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Bay Watershed," which could lead Municipal Separate Storm Sewer Systems (MS4s) and state permitting authorities to believe that EPA will deem invalid any permit that includes the word "practicable." Aside from running counter to the Clean Water Act's requirement that MS4s "reduce the discharge of pollutants to the maximum extent practicable,"[54] the guidance document suggests that it is binding for all practical purposes. In that sense, these types of guidance documents are arguably subject to the APA's notice and comment requirements and the EPA has violated those statutory requirements many times over by issuing voluminous amounts of guidance.[55]

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[53] *Appalachian Power Company v. EPA*, 208 F.3d 1015, 1021-24 (D.C. Cir. 2000) (rejecting EPA's statement that its action was intended as a non-final, non-binding guidance document where the guidance directed state permitting agencies to include certain monitoring terms in permits).

[54] 33 U.S.C. § 1342(p)(B)(iii).

[55] 5 U.S.C. § 551(4) (a rule includes "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ."); *id.* at § 552(a)(1)(D) (requiring the agency to publish notice of substantive rules of general applicability, interpretative rules, and policy statements); *id.* at § 553 (providing the requirements for notice-and-comment rulemaking).

Similarly, OSHA issued what it calls its "Multi-Employer Citation Policy," through which OSHA inspectors are instructed to issue hazard citations to employers on the jobsite even if their own employees are not at risk and even if they did not create the alleged hazard.[56] Because the Occupational Safety and Health (OSH) Act governs the employer-employee relationship and only applies to an employer and his or her employees, this policy effectively expands the employers' responsibilities, but does so without notice and comment and with no opportunity for judicial review. The policy is a legislative rule and it should have gone through the notice and comment procedures required by the OSH Act and the APA.[57]

While some guidance is akin to rulemaking, some is issued to instruct or inform the public about agency procedures, and some is directed to agency employees. The guidance or policy memoranda tell agency employees what to do in various circumstances. Assuming the staff obey the documents, the public will be unable to get their permits, licenses, approvals, or whatever they seek from the agency until the staff are convinced the guidance has been satisfied. Though the guidance in this instance seems less like policy and more like administration, consequences can flow to the public just as if the instructions had come through a rule. In these instances, the mandatory nature of the guidance results in regulatory consequences to the public.

For example, the Fish and Wildlife Service (FWS) has advised people living in the range of the endangered Quino Checkerspot Butterfly that they should survey – under a specified protocol – their property for the presence of the butterfly before applying for an Incidental Take Permit. At no time did FWS say that permits were conditioned on performing the specified survey, nor did FWS say it would not issue a permit unless the survey protocol was followed. However, there is no indication that FWS has ever accepted a survey that did not follow the protocol. Clearly, this purported guidance is not advice; it is a fiat. An applicant must follow the prescribed protocol or relinquish any chance of getting a permit.

Similarly, the U.S. Army Corps of Engineers (Corps), in administering the Clean Water Act §404 wetlands permitting program, creates Regulatory Guidance Letters to advise permittees about the program.[58] The Corps claims the letters "are used only to interpret or clarify existing regulatory program policy," but it admits the letters are mandatory in the Corps' district offices.[59] Further amplifying the fact that the guidance is a de facto regulation, the Corps states that it "incorporates most of the guidance provided by RGL's (sic) whenever it revises its permit

[56] U.S. Department of Labor, Occupational Safety and Health Administration, Multi-Employer Citation Policy, Directive Number CPL 02-00-124, December 10, 1999.
[57] *General Electric Co. v. EPA*, 290 F.3d 377, 382-83 (D.C. Cir. 2002) (an agency action is a legislative rule when it "appears on its face to be binding, … is applied by the agency in a way that indicates it is binding, …or [binds] agency itself with the 'force of law.'"); *American Mining Congress v. MSHA,* 995 F.2d 1106, 1112 (D.C. Cir. 1993) (specifying the standard for distinguishing between legislative and interpretive rules);.
[58] 33 C.F.R. § 320-330.
[59] 62 Fed. Reg. 31492 June 9, 1997.

regulations."[60] Therefore, the "guidance" must have been mandatory all along; incorporating the terms into regulations is merely a name change.

In an effort to increase the quality and transparency of agency guidance practices and the significant guidance documents produced through them, in January 2007, OMB issued its Final Bulletin for Agency Good Guidance Practices.[61] Specifically, the Bulletin states that "[t]he purpose of Good Guidance Practices (GGP) is to ensure that guidance documents of Executive Branch departments and agencies are: Developed with appropriate review and public participation, accessible and transparent to the public, of high quality, and not improperly treated as legally binding requirements." While the Bulletin provides promise to remove some of the uncertainties and problems associated with guidance documents, it only applies to those deemed "significant." Furthermore, in 2009, Peter Orszag, then Director of OMB, issued a Memorandum for the Heads and Acting Heads of Executive Departments and Agencies regarding Guidance for Regulatory Review, which reiterated the Administration's commitment to having OIRA review all significant proposed or final agency actions, including significant policy and guidance documents.[62] Again, while a step in the right direction, neither one of these initiatives applies broadly enough or demands sufficient oversight to ensure agency compliance or deter misuse.

The above-described examples highlight the pitfalls associated with the use of "non-legislative" rules to sidestep the open exchange of information among government officials, experts and those most likely to be impacted by the rule. Because such unlawful rules often result in the unnecessary forfeiture of substantial costs and time to small business owners, the agencies must better ensure the guidance they develop and rely on does not blur the lines between general interpretation and mandatory requirement.

One solution would be for the President or OMB to issue criteria under which agencies must regard interpretations, decisions, guidance, or policy as rules. Second, would be to expand the requirement of the GGP to apply to all guidance that does not clearly fit into those categories that are undoubtedly instructional or clarifying in nature. Similarly, like the required retrospective analysis of regulations, each agency should also be required to conduct retrospective analyses of their guidance documents, complete with opportunities for public comment.

C. Improve Compliance with RFA/SBREFA

[60] Ibid.
[61] 72 Fed. Reg. 3432 January 25, 2007.
[62] Office of Management and Budget, *Memorandum for the Heads and Acting Heads of Executive Departments and Agencies RE: Guidance for Regulatory Review*, March 4, 2009, retrieved on March 30, 2011, from http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf.

Improving the way the agencies conduct the required reviews of proposed regulations under RFA, as amended by the Small Business Regulatory Enforcement Fairness Act, would result in far more efficient regulations and reduced compliance costs for small businesses. Unfortunately, agencies often either fail to comply with the RFA by ignoring the statutory obligation to convene a small entity review panel or convene a panel, but fail to provide Small Entity Representatives sufficient information concerning the proposed rule to allow them to evaluate regulatory options or provide alternatives. These examples point to the shortcomings in implementing the RFA's statutory requirements and highlight the need for improvement.

The RFA requires each federal agency to either certify an upcoming rule will not have a significant economic impact on a substantial number of small entities or prepare an initial regulatory flexibility analysis (IRFA) explaining the agency's rationale for the regulation and its potential economic impacts on small businesses. The purpose of the IRFA is for the federal agency to identify, describe, and evaluate the impact of the proposed rule on small businesses. It must include:

1. Description by the federal agency of the reasons why this rulemaking is being considered;
2. Clear description of the objectives and legal basis for the proposed rule; and
3. Description and estimate of the number of small businesses that will be regulated under the proposed rule.[63]

The RFA further requires that whenever an agency prepares an IRFA, the agency must notify the SBA Chief Counsel and convene a small entity review panel.[64] The purpose of the review panel is for small business representatives, working with professional staff from SBA, OIRA, and the agency, to review the information about the upcoming rule and its economic impact on small businesses and to explore alternatives or revisions that could reduce the regulatory burdens. Once the panel is convened, it is critical that panel members have access to detailed information on the upcoming rule's requirements and costs because the agency and members of the small entity review panel must complete their review of the IRFA and the proposed rule within 60 days.

Unfortunately, this process is not always followed. For example, during a recent small entity review panel for a federal regulation covering stormwater discharges from developed sites, EPA failed to provide sufficient detailed information about the upcoming rule.[65] As a result, NAHB members serving as Small Entity Representatives (SERs) were unable to estimate compliance costs or identify ways to reduce the regulatory burden upon small businesses. Several SERs provided written comment that the lack of information made providing meaningful input difficult

[63] 5 U.S.C. §603(b) (2009).
[64] 5 U.S.C. §609(b) (2009).
[65] EPA's stormwater rule was identified in the December 2010 Unified Agenda notice as "Stormwater Regulations Revisions To Address Discharges From Developed Sites." See 75 Fed. Reg. 79851, December 20, 2010.

and noted that the agency's failure to provide sufficient information was a violation of SBREFA. Despite these concerns, EPA concluded the small entity review panel in December 2010.

This failure highlights one of crucial shortcomings of the RFA/SBREFA process. That is, when agencies are unprepared to provide small entity review panelists with the information and data necessary to evaluate the costs and compliance obligations, the process breaks down. Not only do the participants question the value of their participation, which has been effectively truncated and marginalized, but the entire regulatory program loses its legitimacy and clearly undermines Congress's intent.

NAHB's experiences highlight a reoccurring limitation of the current RFA process – namely that the federal agencies often view compliance as largely a procedural function during the federal rulemaking process and not – as Congress intended – an opportunity to reduce the burden of regulations on small businesses. Overall, the current implementation of the RFA suffers from two problems. First, agencies lack accountability in their obligation to provide sufficient clarity on regulatory proposals and background information (such as compliance costs) to allow SERs – who have volunteered to serve on SBREFA panels – to provide input. Second, SBA and OIRA, which have an oversight function in the SBREFA process, must stop action agencies from initiating the 60-day RFA review when insufficient information exists for small entities to meaningfully participate. NAHB believes one solution to these issues would be for OIRA to use its existing oversight authority granted under EO 12866 to compel federal agencies to fulfill their RFA responsibilities by refusing to allow the publication of a non-compliant rules.[66]

Federal agencies can also violate the RFA by refusing to convene the required small entity review panels for rules that are subject to RFA requirements. When proposing a rule, agencies have three choices: (1) to prepare an IRFA to examine the impact on small business; (2) certify that the future rule will not result in a significant economic impact on a substantial number of small entities (SISNOSE); or (3) claim that an IRFA is unnecessary because of a prior related rule.[67] If an agency is compelled or decides to prepare an IRFA, the RFA requires the agency to convene a small entity review panel to review the draft IRFA and any other prepared materials related to the rulemaking prior to publication in the *Federal Register* of the IFRA or proposed rule.[68] Despite this mandate, however, agencies do not always necessarily follow the RFA's statutory requirements.

EPA, for example, recently promulgated two "significant rules" concerning the disturbance of lead paint in pre-1978 housing, which EPA has recognized will have a significant economic impact on small businesses. EPA prepared both draft and final IRFAs and publicly

[66] 58 Fed. Reg. 51743, October 4, 1993, Section 8.
[67] 5 U.S.C. §605 (2009).
[68] 5 U.S.C. §609(b) (2009).

acknowledged that each rule individually would have an annual economic impact on the U.S. economy of well over $100 million and that both rulemakings would result in a SISNOSE. Despite these findings, EPA decided not to convene small business panels as mandated under the RFA. [69]

Instead, EPA took the position that it had convened a small business review panel a decade earlier for a similar rulemaking.[70] While that may be true, times have changed and the business structure, economy, technology, and other factors have changed significantly, thereby warranting a new panel. Even EPA's own RFA guidance clearly states that it must convene a small entity review panel under the RFA whenever it issues an IRFA for a proposed rule.[71] NAHB contends EPA violated the RFA by failing to convene a small business review panel to review the IRFAs prepared for each of these rules and has already alerted EPA of the discrepancies. This example, however, is intended to point out the flaws in the existing process and the need for additional oversight. Clearly, improving compliance with the RFA is one element that should be included in each agency's rulemaking plan.

VII. NAHB's Recommended Candidates for Immediate Regulatory Review

DOE has requested public comment both on the process that should be followed in conducting retrospective reviews, as well as suggestions for the initial list of regulations the agency should review first.[72] Given the plight of the U.S. economy and the residential construction industry, NAHB is hopeful that DOE will seriously consider the reviewing and revising the following regulations and policies.

A. Legislation to require all new homes and commercial buildings to reach aggressive increases in model energy codes (International Energy Conservation Code (IECC) or ASHARE 90.1) have been debated for years. Most recent pushes would require 30% and 50% jumps above the 2006 edition of the IECC by 2010 and 2014 respectively. These targets, although arbitrary, have become ingrained in Washington policy circles and repeatedly promoted as a de facto requirement by special interests, building products manufacturers, and DOE.

   Although the House has passed bills twice (first in August '07 and again in June '09) to date, the Senate has **never** agreed to the proposed thresholds. Accordingly, any activity by DOE to initiate these goals through agency action is outside the scope of any mandate by Congress.

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[69] 74 Fed. Reg. 55506, October 28, 2009; 74 Fed. Reg. 25038, May 6, 2010.
[70] 75 Fed. Reg. 25061, May 6, 2010; 74 Fed. Reg. 55520, October 28, 2009.
[71] U.S. Environmental Protection Agency, *Final Guidance for EPA Rulewriters: Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act*, November, 2006, retrieved on March 28, 2011, from http://www.epa.gov/sbrefa/documents/rfaguidance11-00-06.pdf .
[72] 76 Fed.. Reg., 9989, February 23, 2011.

Like Congress, so far NAHB has opposed these proposed code changes and legislation that promote these unattainable and costly thresholds. NAHB's opposition is rooted in three key related issues that the association believes have yet to be adequately addressed in any broadly-debated proposal, despite repeated efforts by the association to bring broader understanding of these issues.

The first is that the proposals are part of an efficiency strategy that is plainly misdirected. Simply stated, DOE's declared goal of significantly improving efficiency within the building sector and the agency's policy targets are alarmingly incongruent. An overall reduction in energy consumption within the building sector simply cannot be achieved with a myopic focus on new construction. Logically, any effort to meaningfully reduce energy use in buildings must first focus on improving the performance of the vast number of existing buildings that already cannot match the performance of any new building that is simply meeting existing codes. Older buildings far outnumber buildings that are added each year. Further, the replacement of existing buildings by new buildings is a decades-long cycle – a cycle slowed further by the present economic and financing challenges the building sector now faces. To date, no DOE policy or legislative initiative has been enacted that would adequately address the comparatively poor energy efficiency of the existing building stock.

The second issue is that the thresholds empirically raise "per square foot" costs for the newest, most energy-efficient homes only. The impact of this is twofold. First, it relegates lower- and moderate-income families, those who are most greatly impacted by the cost of utilities, to older, less-efficient housing stock where the economic impact is compounded by the poor energy performance of the home. Second, a confirmed lack of adequate consideration for energy efficiency by appraisers and lenders means that meeting these thresholds can become the deciding factor in making a business decision of whether to build a new home or not, a fact that can also dramatically impact the rate at which new buildings replace older, less efficient buildings.

The third issue is that DOE has thus far demonstrated limited vision and flexibility in how a building can accomplish the 30% improvement threshold, a fact that significantly and negatively impacts one's ability to achieve the intent of the threshold in an economically viable manner. All features of a building that can improve energy efficiency (e.g., high-performance HVAC, lighting, etc.) should be given due consideration in reaching a stated performance goal. However, DOE has consistently chosen to limit the scope of the agency's policy initiatives to focus solely on the building envelope (e.g., windows, walls, etc).

B. This 30% improvement threshold is also the focus of a current FOIA request to DOE by NAHB. During the 2012 IECC code development hearings, DOE submitted a code-change proposal to increase the minimum energy code threshold by 30% above the 2006 IECC for new homes. At these same hearings, the agency

systematically rejected other proposals that also promised to improve performance by the same 30%, notably one by NAHB.

Following the failure of its alternative proposal, NAHB asked DOE to provide information on the methodology and criteria used by DOE to calculate energy performance gains, so that NAHB (and others in the regulated community) could replicate DOE's calculation methods and evaluate other compliance paths for achieving the 30% increase.

To date, DOE has refused to provide sufficient information to justify the agency's position. A Timeline of NAHB's FOIA Request and the Related 2012 IECC Development Schedule is provided below:

Timeline of NAHB's FOIA Request and the Related 2012 IECC Development Schedule[73]

EVENT	DATE
IECC Code Committee Hearings: Government and industry stakeholders (including DOE and NAHB) debate proposals to amend the 2012 IECC. DOE claims that its proposal will improve energy savings by 30% above the 2006 IECC.	Oct. 24 – Nov. 11, 2009
NAHB Files a FOIA Request: NAHB files a FOIA request to DOE's Office of Energy Efficiency and Renewable Energy (EERE) and the Pacific Northwest National Laboratory (PNNL) for the methodology for calculating energy savings from new IECC editions, including: • The methodology for evaluating energy savings from the 2006, 2009, and 2012 IECC editions (including all underlying assumptions and computer simulation model files); • The methodology and assumptions to evaluate energy savings from 15 specific variables; and • The full equation to calculate energy savings from new IECC editions.	Apr. 12, 2010
DOE/PNNL Release Report Estimating Energy Savings from their 2012 IECC Proposal: DOE/PNNL release a report claiming that their proposed 2012 IECC changes will improve energy savings by 30.6% above the 2006 IECC. The May 2010 Report excludes the full energy savings analysis, an equation, and the underlying assumptions.[74]	May 2010
DOE Denies NAHB's FOIA Request: DOE claims it searched all its files and	June 7,

[73] The entries related to the 2012 IECC development schedule will appear in shaded boxes.

[74] *See* Z.T. Taylor, R.G. Lucas, *An Estimate of Residential Energy Savings From IECC Change Proposals Recommended for Approval at the ICC's Fall, 2009, Initial Action Hearings* (May 2010), *available at* http://www.energycodes.gov/IECC2012/documents/residential-savings-estimate.iecc-2012-proposals.6-may-2010.pdf (May 2010 Report).

EVENT	DATE
"located no responsive documents."	2010
DOE Backtracks and Transfers Request to PNNL: DOE later admits that it searched only EERE's files (not all DOE files) and "did not locate any records that are responsive to the request." DOE plans to transfer NAHB's request to DOE's Oak Ridge, TN Office (ORO) to oversee a search of PNNL's records.	June 25, 2010
DOE Assigns New FOIA Number to NAHB's Request: DOE officially transfers NAHB's FOIA request to ORO and assigns a new tracking number.	June 28, 2010
Deadline for Public Comment on IECC Proposals: The deadline to submit public comments on the proposed changes to the 2012 IECC passes without any response to NAHB's FOIA request.	July 1, 2010
NAHB Appeals EERE's Records Search: NAHB appeals EERE's records search because publicly available information (including the May 2010 Report) suggests that EERE has records responsive to NAHB's request.	July 14, 2010
OHA Denies NAHB's Appeal of EERE's Records Search: DOE's Office of Hearings and Appeals (OHA) denies NAHB's appeal of EERE's records search, because PNNL (not EERE) has responsive records.	Aug. 9, 2010
PNNL Estimates Response Fees and Asks for Narrowed Request: PNNL estimates that it will need up to 50 hours (and about $3000) to compile the "hundreds and hundreds" of files (including computer model input and output files). PNNL asks NAHB to narrow its request based on a list of available documents.	Aug. 18, 2010
NAHB Narrows Request: Based on the document list (and the impending IECC code hearings), NAHB limits its request to the 2012 IECC edition calculations (including all computer model files), information regarding only 5 underlying assumptions, and the full energy savings equation.	Aug. 31, 2010
PNNL Revises Estimate and NAHB Agrees to Pay Fees: PNNL estimates up to 32 hours and $2,196.11 to compile a response to NAHB's request.	Sept. 9, 2010
DOE/PNNL Supply Only Two Spreadsheets: DOE/PNNL produce only two Excel spreadsheets and claim that there are no other "responsive records."	Sept. 15, 2010
Industry Coalition Requests the Methodology: An industry coalition (including NAHB, APA, BOMA, VSI, and WDMA) requests the methodology from Secretary Steven Chu and urges DOE to follow an open, transparent, and collaborative code development process.	Sept. 20, 2010
NAHB Requests Confirmation that the Two Spreadsheets Constitute DOE's Complete Response. DOE never responds.	Sept. 23, 27 & 28, 2010
NAHB Asks Congress to Request the Information: NAHB asks members of energy-related congressional committees to request the energy savings calculation methodology from DOE.	Oct. 1, 2010
NAHB Appeals PNNL's Records Search: NAHB's appeal highlights emails from PNNL indicating that there are "hundreds and hundreds" of responsive documents, including computer simulation model files.	Oct. 13, 2010
DOE Responds to the Industry Coalition Letter: EERE claims that the industry coalition's request parrots NAHB's FOIA request and that DOE provided all responsive information.	Oct. 19, 2010

EVENT	DATE
ICC Hearings Finalize the 2012 IECC Edition: The International Code Council (ICC) holds hearings to finalize the 2012 IECC and adopts DOE's IECC proposals.	Oct. 24 – Nov. 11, 2010
OHA Remands NAHB's FOIA Request to ORO/PNNL: OHA discovers that PNNL erased computer simulation model files to save storage space, but failed to produce other responsive records; specifically, PNNL has an "intermediate template file" that bridges computer simulation model files between computer programs. OHA orders PNNL to extract non-proprietary information from the intermediate template file and produce information relevant to NAHB's FOIA request.	Nov. 19, 2010
ORO/PNNL Processing Remanded Request: NAHB has not yet received additional information from the remanded request.	

As the previous table demonstrates, NAHB has sought unsuccessfully through this Freedom of Information Act (FOIA) request to obtain information on the formulas and methodologies it uses to determine the percentage of energy savings resulting from proposed changes to model codes and standards.

DOE's refusal to comply with NAHB's FOIA request for a detailed explanation of the basis for their proposal leaves NAHB and the building industry unable to accurately compare the efficiency stringency of similar industry proposals. DOE, as an active and vocal advocate for increases in energy efficiency, is no longer serving as an impartial technical advisor and resource for the construction of energy efficient buildings, but has usurped what was formerly an open consensus process that relied on the input of the entire industry.

All the while, DOE has adopted and aggressively pursued the goal of 30 percent energy savings and plans to pursue a goal of achieving an increase in savings of 50 percent by 2015 without a legislative mandate to do so. And overreaching the regulatory bounds established by Congress.

Moreover, DOE, in order to be open and transparent, needs to publish in the Federal Register its criteria and methodology for evaluating the economic justification and technical feasibility of changes to the energy efficiency provisions, including the formulas for calculating energy savings and the anticipated payback period to residential and commercial building owners.

In fact, DOE should perform this analysis prior to supporting or opposing **any** proposed change or amendment to a national model energy conservation code or standard using an established criteria and methodology in order to evaluate the economic impact, technical feasibility, and energy savings that would result.

C. Another regulatory issue that needs to be highlighted is DOE promulgating rules without going through the formal rule making process. A specific example of this is rule covering the vented gas fireplace, which DOE has successfully banned effective April 16, 2013.

The Hearth, Patio and Barbecue Association (HPBA), which represents manufacturers, distributors, and retailers of decorative vented gas fireplaces, correctly states that "DOE adopted its ban on decorative vented gas fireplaces without notice or opportunity for comment, and without any consideration of the adverse impact the ban would have on the gas fireplace industry".

It is a serious breach of Executive Order 13563 for DOE to adopt a ban on an appliance without any announcement of a public comment period or offering rigorous and thorough analysis of the need for such action. This is a troubling precedent, not just for decorative vented gas appliances, but any other products under DOE's purview. DOE must be responsive to the industries it serves and at the same time responsible to the authority under which it governs itself. These types of actions run contrary to its Congressional mandate, and, with a potential for devastating impact on an industry that includes dire economic and employment consequences for manufacturers, suppliers, and other related businesses.

Finally, transparency on DOE's part has not been forthcoming on these issues, and shows an unwillingness to coordinate with industry, except within the confines of its own cadre of special interest groups. DOE has breached its regulatory boundaries, ignored the cost impact to the small businesses that are the backbone of the housing industry, and have been less than transparent on how they achieve their proposed claims.

These above conditions necessitate ensuring that all existing and future federal regulations are carefully thought through; open to the scrutiny and input of all affected industries, balanced within the construct of being technologically feasible and economically justifiable, and with a concern for minimizing the burdens on small business and others. Therefore, NAHB welcomes this dialogue with DOE to insure both existing and new regulations are more efficient, cost effective and workable while fully capturing their purpose and intent.