



March 22, 2023

VIA REGULATIONS.GOV

Alejandro Moreno
Acting Assistant Secretary
for Energy Efficiency and Renewable Energy
U.S. Department of Energy
1000 Independence Avenue SW
Washington, DC 20585

Re: Proposed Rule, Department of Energy; Energy Conservation Program: Energy Conservation Standards for Distribution Transformers (88 Fed. Reg. 1,722-1,859, January 11, 2023) Docket. No. EERE-2019-BT-STD-0018, RIN 1904-AE12

Dear Acting Assistant Secretary Moreno:

The U.S. Chamber of Commerce (“Chamber”) submits the following comments in response to the Department of Energy’s (“DOE”) proposed rule entitled Energy Conservation Program: Energy Conservation Standards for Distribution Transformers,¹ (the “Proposed Rule”) and the subsequently issued notice extending the comment period.² The Chamber agrees that improving energy efficiency on both the supply and demand sides can bring important benefits to business operations and the environment. As such, the Chamber generally supports the mission of the Office of Energy Efficiency and Renewable Energy to improve the energy efficiency of our homes, buildings, and industries, and agrees that the evaluation of efficiency standards applicable to distribution transformers, upon which all of these constituencies rely, has the potential to facilitate this goal. However, unique supply chain and other factors applicable to this class of products, including the already high-level of efficiency achieved by the installed base of distribution transformers, should counsel DOE to retain the existing distribution transformer efficiency standards at this time. The retention of the existing standards will serve to not unduly stress already limited transformer supplies, thereby supporting the ongoing energy transition and the enhanced electrification of our economy.

¹ 88 Fed. Reg. 1722, January 11, 2023

² 88 Fed Reg. 10856, February 22, 2023

These comments also address the Proposed Rule’s use of the social cost of greenhouse gas (“SC-GHG”) estimates.³ The Chamber supports the appropriate consideration of GHG emissions as part of cost-benefit analyses under the Executive Order 12866 process, where permissible under an agency’s statutory authority. Our comments complement, and incorporate by reference, the attached comments submitted by various trade associations in June 2021 in response to a May 2021 notice by the Interagency Working Group on the SC-GHG (“IWG”), which centered on the need for a robust and transparent IWG process.⁴ Here, the Chamber re-emphasizes the ongoing need for an open, transparent, and centralized IWG process and urges continued efforts to promote those values and urges DOE to consider not using the SC-GHG estimates in this rulemaking.

I. DOE’s Proposed Rule Fails to Give Due Weight to Market and Practical Factors that Undermine the Ascertained Benefits of Predicted Efficiency Gains

a. The Proposed Rule Will Worsen Already Critical Supply Chain Challenges.

The Chamber does not dispute that DOE possesses the authority and obligation to set minimum energy efficiency standards for numerous products, including distribution transformers, pursuant to the Energy Policy and Conservation Act (EPCA).⁵ However, EPCA does not require that efficiency standards be tightened regardless of the cost or other real-world implications that weigh against such a decision. In fact,

³ The SC-GHG estimates, which include social cost estimates for carbon dioxide (“SCC”), methane (“SCM”) and nitrous oxide (“SCN”), are intended to represent the economic impact of emitting a ton of the particular GHG in a given year. For purposes of these comments, the SC-GHG estimates refer to the interim SC-GHG estimates released in February 2021. *See* U.S. Gov’t Interagency Working Grp. on Soc. Cost of Greenhouse Gases, *Technical Support Document: Social Cost of Carbon, Methane and Nitrous Oxide Interim Estimates under Executive Order 13990* (Feb. 2021) (“2021 TSD”). The principles advanced in these comments would extend to any future SC-GHG estimates applied under any Final Rule with shortcomings similar to those of the interim SC-GHG estimates.

⁴ Comments by the Aluminum Association, American Chemistry Council, American Exploration & Petroleum Council, American Farm Bureau Federation, American Fuel & Petrochemical Manufacturers, American Gas Association, American Highway Users Alliance, American Iron and Steel Institute, American Petroleum Institute, American Public Gas Association, American Public Power Association, Associated Builders and Contractors, Associated General Contractors of America, Council of Industrial Boiler Owners, The Fertilizer Institute, Independent Petroleum Association of America, Interstate Natural Gas Association of America, National Association of Manufacturers, National Lime Association, National Mining Association, National Rural Electric Cooperative Association, Portland Cement Association, and the U.S. Chamber of Commerce, to the Office of Mgmt. & Budget, RE: Notice of Availability and Request for Comment on the “Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990” (June 21, 2021) (“June 2021 Coalition Comments”).

⁵ Pub. L. 94-163, 89 Stat. 871, enacted December 22, 1975.

DOE must consider whether more stringent standards are technologically feasible and economically justifiable, and whether a strengthened standard would result in significant energy savings. In this instance, the current supply chain challenges affecting the overall domestic supply of distribution transformers strongly weighs against a standard that promises to exacerbate this situation.

The current shortage – and corresponding price increases – of distribution transformers is well-documented.⁶ However, the Proposed Rule would result in the exchange of one limited source of electric steel for another, more limited, source. The grain-oriented electrical steel (GOES) that is the most commonly used material for distribution transformer cores currently supports approximately 95% of new distribution transformer production. The amorphous steel cores that would be required for *all* new distribution transformers under the Proposed Rule only amount to about 5% of current distribution transformer production. While there are only singular domestic sources for each of GOES and amorphous steel, GOES is at least already produced in levels that support the majority of domestic transformer production. Thus, shifting all distribution transformer production to rely exclusively on amorphous steel will require a dramatic increase in capacity for such steel, which will take time and will further constrain already limited transformer supplies. In addition, any global supplement for domestic sources of amorphous core steel must come from Japan or China, thereby increasing, rather than reducing, the domestic electricity sector's reliance on inputs from China. This increased reliance would clearly conflict with strong public policy goals favoring the protection of the electric grid from components and materials sourced from adversarial nations.

Moreover, domestic goals to reduce carbon emissions through enhanced electrification are driving an ever-increasing demand for distribution transformers. In addition, grid expansion goals, the proliferation of distributed energy resources, and overall grid resilience needs are likely to each suffer if the distribution transformer supply chain is constrained further by an unnecessary tightening of transformer efficiency standards. Thus, until the current distribution transformer shortage is alleviated, it is critical that manufacturers continue to have the ability to source transformer cores made of either GOES or amorphous steel. DOE and the Administration should instead focus their efforts on strengthening domestic steel and distribution transformer capacity before venturing down a road that unnecessarily limits both, for minimal efficiency gains.

⁶ Walton, Robert. "Utilities Sound Alarm Over Distribution Transformer Shortage as Procurement Times Surpass 1 Year and Costs Triple." Utility Dive, December 19, 2022, <https://www.utilitydive.com/news/distribution-transformer-shortage-appa-casten/639059/>.

b. The Proposed Rule Ignores Real-World Impediments to the Required Use of Amorphous Steel Cores.

Notwithstanding the very real challenges faced by electricity providers in obtaining adequate stock of distribution transformers made with either GOES or amorphous steel cores to support the continued and expanded operations of the electricity grid, practical limitations further offset any perceived efficiency benefits, especially since GOES core distribution transformers are already highly efficient. In its preliminary analysis of the application of heightened efficiency standards to distribution transformers, DOE erroneously concluded that there would be no difference in installation costs between currently-used and more efficient transformer equipment.⁷ In the face of contrary evidence, the Proposed Rule doubles down on this mistaken conclusion by stating that approximately 5% of transformer installations may encounter increased costs resulting from the use of amorphous steel core transformers.⁸

In actuality, amorphous steel core transformers are both larger and heavier than their GOES core counterparts. For example, DOE cites a maximum weight of 1,440 lbs. for a 50 kVA pole mounted liquid-immersed distribution transformer.⁹ While not all installation circumstances will be identical, the replacement of GOES distribution transformers with those made of amorphous steel cores will often require the upgrading and/or full replacement of the brackets and poles supporting existing infrastructure. These replacements will be necessary to support both the increased physical dimensions and greater overall weight of amorphous steel core transformers. In addition, while DOE does recognize the potential for amorphous core transformers to not fit into preexisting underground vaults and other subsurface installations,¹⁰ the Proposed Rule disregards this potential, and the significant increased infrastructure replacement costs that would be incurred.

Moreover, the increased size and weight of amorphous steel core transformers will have industry-wide implications with respect to their storage, transportation, and installation. Larger transformers will consume more storage space on an individual basis than current GOES models, thereby reducing the number of units that can be held in reserve to support system restoration efforts. Along the same lines, larger and/or additional flatbed trucks will be needed to transport amorphous steel core transformers, thereby increasing the shipping costs and logistics associated with the

⁷ Proposed Rule, 88 Fed. Reg. at 1778.

⁸ *Id.*

⁹ *Id.*

¹⁰ Proposed Rule, 88 Fed. Reg. at 1785.

delivery of these transformers to their installation site. Furthermore, these larger and heavier transformers will exceed the lift capability of most line bucket trucks, instead requiring the use of larger cranes in combination with line bucket trucks to facilitate distribution transformer installations and replacements. All these increased costs ultimately drive up the cost of utility service for end-use customers and businesses, thereby adding to the overall inflationary pressures currently stressing the nation. The minimal efficiency gains projected by DOE to result from the Proposed Rule are simply not worth the significantly increased costs and logistical complications resulting from a full transition to amorphous steel core transformers.

II. The Chamber Urges DOE to Reconsider the Use of the SC-GHG Estimates in this Rulemaking

Addressing the challenge of climate change requires citizens, governments, and businesses to work together. The Chamber continues to leverage the innovation and the strength of American business to find sound and durable solutions that improve our environment, grow our economy, and leave the world better for generations to come. We offer these comments to respectfully raise vulnerabilities in the Proposed Rule associated with the use of the SC-GHG estimates along with actionable suggestions for DOE.

The SC-GHG estimates have been applied to various federal regulations, among other actions, that impose significant costs, including to companies represented by the Chamber. Use of the SC-GHG estimates in connection with these actions has resulted in estimates of hundreds of billions of dollars in reported climate-related benefits that are claimed to offset (in whole or in part) the costs of the actions. For this reason, the Chamber has a direct and substantial interest in ensuring that any SC-GHG estimates that are used in agency rulemakings, including the rulemaking process for the Proposed Rule, are the product of a sound, transparent, and inclusive process and are not misleading or inaccurate. In the Proposed Rule, DOE estimates the climate-related benefits to be \$8.66 billion at a three percent discount rate by applying the SC-GHG estimates in the agency's cost-benefit analysis.

Since the IWG issued the 2021 estimates, the federal government has acknowledged that a more complete and open process is required before the IWG issues any final SC-GHG estimates. This was most evidenced by IWG's public release of the Technical Support Document ("TSD") for its February 2021 interim SC-GHG

estimates,¹¹ after much prior criticism as to the lack of openness.¹² Thus, we are encouraged by planned updates to the IWG process, including additional public comment and peer review on the estimates, while also reserving judgment (until further details are provided) on the approach of such peer review.¹³ In addition, in February 2022, a federal district court issued a preliminary injunction that forbade the use of the interim SC-GHG estimates, relying in part on a number of concerns regarding the IWG process;¹⁴ but that injunction has since been stayed pending appeal by the Fifth Circuit.¹⁵ These developments only serve to underscore the need for continued efforts to improve the IWG process going forward and ensure final SC-GHG estimates that are technically sound and well-accepted among the regulated community.

The Chamber urges DOE to reconsider the use of the SC-GHG estimates in this rulemaking based on three core concerns. First, before DOE considers applying the SC-GHG estimates to the Proposed Rule (and, likewise, to any final rule resulting from this rulemaking), the SC-GHG estimates should be subject to a proper administrative process, including a full and fair public comment process, as well as a robust independent peer review. Second, there are statutory limitations on using the SC-GHG estimates, and we urge DOE to fully consider the applicable limits before applying the estimates. Third, the Chamber urges DOE to carefully consider whether the “major questions” doctrine precludes the application of the SC-GHG estimates in the Proposed Rule given the political and economic significance of the estimates.

¹¹ See White House, OMB, *Regulatory Matters: Social Cost of Greenhouse Gases*, <https://www.whitehouse.gov/omb/information-regulatory-affairs/regulatory-matters/#scghgs> (last visited Feb. 6, 2023).

¹² See June 2021 Coalition Comments, *supra* note 14, at 11–12.

¹³ Defs.’ Suppl. Brief at 23, *Louisiana v. Biden*, No. 2:21-cv-01074-JDC-KK (W.D. La. Jan. 21, 2022), ECF No. 90 (The IWG “intends to publish its proposed final estimates within the next two months. Upon publication of the proposed final estimates, there will be an additional comment period, as well as a scientific peer-review process. Based on the public comments and the results of peer review, the [IWG] then intends to publish Final Estimates later in 2022.”); see also Request for Nominations of Experts for the Review of Technical Support Document for the Social Cost of Greenhouse Gases, 87 Fed. Reg. 3,801 (Jan. 25, 2022).

¹⁴ Memorandum Ruling, *Louisiana v. Biden*, No. 2:21-cv-01074 (W.D. La. Feb. 11, 2022), ECF No. 98.

¹⁵ *Louisiana v. Biden*, No. 22-30087 (5th Cir. Mar. 16, 2022) (per curiam) (staying district court’s decision pending appeal). An application to vacate the stay was filed before the U.S. Supreme Court. *Louisiana v. Biden*, No. 21A658 (U.S. Apr. 28, 2022). The Court denied the stay application on May 26, 2022.

III. DOE Should Ensure That the SC-GHG Estimates Follow Relevant Administrative Process Requirements and Office of Management and Budget Guidance Prior to Use in This Rulemaking

As further explained herein, DOE should not rely on the SC-GHG estimates in any decision-making related to the Proposed Rule including, but not limited to, such decisions as the chosen standards' stringency level because the IWG process for developing the estimates was not the product of a full and legally adequate administrative process. Any estimates of the SC-GHG need to be developed through a process consistent with the Administrative Procedure Act ("APA"), must be the product of a robust and independent peer review, must reflect the best available science and economics, and must conform to relevant guidance on information quality and regulatory analyses. However, the SC-GHG estimates in the Proposed Rule do not meet these requirements and thus suffer from material procedural defects, contrary to the APA and basic due process principles.¹⁶ The Chamber urges DOE to ensure that these procedural shortcomings are addressed fully before applying any SC-GHG estimates in a final rule.

First, DOE should not rely on the SC-GHG estimates in any decision-making related to the Proposed Rule including, but not limited to, such decisions as the chosen standards' stringency level because the IWG released the SC-GHG estimates without any prior notice and comment. The Chamber appreciates the comment period provided on behalf of the IWG in May 2021; however, the IWG has yet to respond to the public comments that were submitted on the notice.¹⁷ It is inappropriate to rely on and apply these SC-GHG estimates in any decision-making related to the Proposed Rule including, but not limited to, such decisions as the chosen standards' stringency level while this public process for considering relevant input and information is yet ongoing. Moreover, the IWG process lacked full transparency, which impaired the public's ability to comment meaningfully on the SC-GHG estimates. This lack of transparency extends to this comment period. DOE has provided no further record in this rulemaking regarding the IWG process, and thus the agency has not effectively communicated with the public on its work. Nor can the IWG's proposed *future* public comment or peer review process for final SC-GHG estimates remedy the error of applying the estimates in this rulemaking. Absent a clear understanding of the IWG process, the decisions that

¹⁶ See 5 U.S.C. § 706(2)(A) (reviewing courts shall hold unlawful and set aside agency decisions where they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

¹⁷ Off. of Mgmt. & Budget, Notice of Availability and Request for Comment on the "Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990," 86 Fed. Reg. 24,669 (May 7, 2021). The APA requires agencies to "consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015).

the IWG has made, and greater transparency, the public's ability to provide meaningful comments on the estimates in this rulemaking is impaired.

The Chamber further cautions that the limited process afforded to the public to comment on earlier SC-GHG estimates does not and cannot serve as an adequate substitute for the need to provide a full opportunity for public input on the current estimates in the Proposed Rule.¹⁸ The comment period on the 2013 social cost of carbon (SCC) did not reflect a meaningful opportunity for public comment at the time, was not accompanied by peer review, and did not provide public access to information underpinning the models' estimates.¹⁹ That comment period also predated the IWG's release of the social cost of methane ("SCM") and the social cost of nitrous oxide ("SCN") estimates, which were not independently subject to public input.²⁰ Comment periods on rules using previous estimates were similarly inadequate on a legal and policy basis, and should not be used as a model by DOE here when responding to these and other comments on the estimates used in the Proposed Rule.²¹

Second, DOE should refrain from relying on the SC-GHG estimates in any decision-making related to the Proposed Rule including, but not limited to, such decisions as the chosen standards' stringency level because the IWG has thus far failed to consider fully the recommendations of the National Academies of Sciences, Engineering, and Medicine ("NAS") regarding the IWG's process and methodology for developing a SCC for use in rulemakings. Five years ago, the NAS completed its review and issued recommendations, calling for a new framework for developing the estimates and multiple changes to the methodologies for calculating the SCC estimates.²² Consideration of the recommendations of the NAS is critical for any robust social cost analysis – and is in fact mandated by President Biden's executive order that directed

¹⁸ June 2021 Coalition Comments, 10-13 & n.27 ("The Chamber caution against reliance on comment periods dating back several years. An agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. Normally, an agency rule would be arbitrary and capricious if the agency entirely failed to consider an important aspect of the problem or offered an explanation for its decision that runs counter to the evidence before the agency. This means that an agency cannot ignore new and better data." (cleaned up) (citations omitted)); *see also Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1007 (D.C. Cir. 1997) (agencies "have an obligation to deal with newly acquired evidence in some reasonable fashion").

¹⁹ 78 Fed. Reg. 70,586 (Nov. 26, 2013).

²⁰ June 2021 Coalition Comments, 11-12.

²¹ *Id.*

²² National Academies of Sciences, Engineering, and Medicine. 2017. Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide. Washington, DC: The National Academies Press.

the IWG to develop revised SC-GHG estimates, E.O. 13990.²³ Yet, while the IWG has stated its intent to consider the recommendations of the NAS, these recommendations have not yet been incorporated into the estimates that DOE has applied to the Proposed Rule. Moreover, the prospect that the NAS recommendations may (or may not) be followed in the future is not a defensible basis for relying on the estimates in any decision-making related to the Proposed Rule including, but not limited to, such decisions as the chosen standards' stringency level. For DOE to proceed to apply the SC-GHG estimates without incorporating the recommendations of the NAS is a major deficiency in the Proposed Rule that must be addressed before concluding this rulemaking.

Third, the SC-GHG estimates also conflict, without appropriate explanation, with longstanding Office of Management and Budget ("OMB") guidance on information quality and economic analyses; consequently, we are concerned that any reliance on the estimates in this rulemaking would be arbitrary and capricious.²⁴ The estimates fail to follow OMB's "Final Information Quality Bulletin for Peer Review," which requires "influential scientific information," such as the modeling inputs and assumptions underlying the estimates, to be subject to rigorous peer review.²⁵ Further, the lack of a formal uncertainty analysis and the improper characterization of uncertainty with the SC-GHG estimates deviate from OMB's final "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies" pursuant to the Information Quality Act.²⁶ Such analysis is necessary to inform a full and adequate peer review and to enable rational agency decision-making concerning the potential use of the SC-GHG estimates.²⁷

As noted, the EPA, on behalf of the IWG, initially announced a contractor-led peer review of the SC-GHG estimates in early 2022. However, while the Chamber

²³ Exec. Ord. 13990 of Jan. 20, 2021, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7,037, 7041 (Jan. 25, 2021) (Sec. 5 (iii) Methodology states: "In carrying out its activities, the Working Group shall consider the recommendations of the National Academies of Science, Engineering, and Medicine as reported in Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide (2017)."

²⁴ See *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (agency's failure to follow its own guidance documents is arbitrary and capricious).

²⁵ Off. of Mgmt. & Budget, Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2,664 (Jan. 14, 2005).

²⁶ Off. of Mgmt. & Budget, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8,452 (Feb. 22, 2002); Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554.

²⁷ 5 U.S.C. § 706.

commends plans for a peer review, there are questions as to how robust and independent that review may be, as limited information has been made available to the public concerning the process and EPA's particular role.²⁸ Those concerns have only been increased as EPA independently acted outside of the IWG process to publish new estimates via its External Review Draft,²⁹ ahead of or in place of any updates from the IWG and in conjunction with their Supplemental Proposed Rule, Environmental Protection Agency: Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources; Oil and Natural Gas Sector Climate Review (EPA Methane Supplemental Notice).³⁰ This decision raises new and wholly avoidable concerns, as EPA has created the appearance that it has usurped the IWG's role in issuing independent estimates and taking the lead on the peer review of IWG's updated SC-GHG estimates on behalf of the IWG and the agencies.³¹ Our presumption—based on prior precedent and stated in Executive Order 13990—was that further iterations of the SC-GHG estimates would be published for peer review by the IWG directly under a separate OMB docket. For these reasons and those discussed further in our comments on the EPA Methane Supplemental Notice,³² we recommend that DOE continue to disregard the EPA External Review Draft and continue to defer to the IWG's process for updating the SC-GHG estimates.

Lastly, the IWG's selected discount rates and presentation of global estimates for the SC-GHGs diverge from OMB's Circular A-4.³³ For instance, the IWG based the SC-GHGs solely on global effects of emissions, while Circular A-4 unambiguously directs agencies to "focus on benefits and costs that accrue to citizens and residents of the United States" and, where appropriate, separately report global effects of a regulation.³⁴ Consistent with the direction in Circular A-4, tabulating separately both

²⁸ 87 Fed. Reg. 3,801 (Jan. 25, 2022).

²⁹ See EPA, Supplementary Material for the RIA for the Supplemental Proposed Rulemaking, NSPS and EG for Existing Sources: Oil and Natural Gas Sector Climate Review-EPA External Review Draft of Report on the Social Cost of Greenhouse Gases: Estimates Incorporating Recent Scientific Advances (Docket ID No. EPA-HQ-OAR-2021-0317) (Document ID EPA-HQ-OAR-2021-0317-1549) (Dec. 6, 2022), <https://www.regulations.gov/document/EPA-HQ-OAR-2021-0317-1549>.

³⁰ 87 Fed. Reg. 74,702 (Dec. 6, 2022).

³¹ See 87 Fed. Reg. 3,801 (Jan. 25, 2022).

³² US Chamber of Commerce Comments on EPA's Methane Supplemental Notice, https://downloads.regulations.gov/EPA-HQ-OAR-2021-0317-2301/attachment_2.pdf

³³ See Off. of Mgmt. & Budget, Circular A-4: Regulatory Analysis (Sept. 17, 2003) ("OMB Circular A-4"), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf (providing OMB's guidance to federal agencies on the development of regulatory analysis as required under E.O. 12866); see also, <https://www.whitehouse.gov/omb/information-for-agencies/circulars/>.

³⁴ OMB Circular A-4 at 15.

the domestic and global SC-GHG would provide additional information on the effectiveness of agencies' GHG-related actions with regard to the U.S. population and offer further context for decision making. Circular A-4 remains the governing guidance for any government regulatory cost-benefit analysis. In this Proposed Rule, DOE inappropriately labels the results of the agency costs-benefit analysis as "national" benefits and costs despite the majority of the benefits derived from the SC-GHG estimates accruing outside of the United States.

While the administration has announced a review of and potential revisions to Circular A-4, it still presently reflects active guidance for the IWG, and DOE, when conducting regulatory cost-benefit analyses.³⁵ Circular A-4 also directs agencies to apply 3 percent and 7 percent discount rates to future benefits and costs calculations in agency cost-benefit analysis; however, DOE applies just the 3 percent discount rate from the SC-GHG estimates, creating inconsistent application of discounting. Accordingly, the Chamber urges DOE to reconsider its reliance on the SC-GHG estimates in the Proposed Rule and to ensure that the rule comports with Circular A-4 in all relevant respects.

The Chamber understands that the IWG is in the process of revising the estimates. For this rulemaking, DOE should await these revisions instead of relying on the flawed SC-GHG estimates for any decision-making related to the Proposed Rule including, but not limited to, such decisions as the chosen standards' stringency level. Moreover, before DOE considers applying any revised estimates, whether in a proposed or final rulemaking, DOE should ensure that the procedural shortcomings and basic principles of due process discussed above have been addressed. If the IWG were to issue corrections or final SC-GHG estimates prior to DOE issuing the final rulemaking, then DOE should issue a notice in this rulemaking that incorporates and solicits comments on the updated estimates, to allow for public comment prior to issuing the final rulemaking.

IV. DOE Should Acknowledge Statutory Limits to its Reliance on the SC-GHG Estimates

Aside from the procedural considerations discussed above, the Chamber urges DOE to acknowledge the statutory limits to its reliance on the SC-GHG estimates in this rulemaking. Notwithstanding calls to expand the use of the SC-GHG estimates, the

³⁵ Modernizing Regulatory Review, 86 Fed. Reg. 7,223, 7,223 (Jan. 26, 2021) (The Director of OMB "should provide concrete suggestions on how the regulatory review process can promote public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations" and "recommendations should include proposals that will ensure regulatory review serves as a tool to affirmatively promote regulations that advance these values.").

estimates were originally designed for use in regulatory impact analyses under E.O. 12866 and are not appropriate for use in other contexts.³⁶ An in-depth discussion of the appropriate parameters for the application of the SC-GHG estimates is included in the trade associations' June 2021 comments to the IWG. For purposes of these comments, the Chamber's focus on those limitations relates to an agency's consideration of the SC-GHG within the rulemaking context.

The Chamber supports the appropriate consideration of GHG emissions in regulatory cost-benefit analyses under E.O. 12866, but such consideration, to the extent it affects agency decision making, must be statutorily authorized and, moreover, must never exceed the boundaries of all relevant statutory authorizations and other provisions. Agencies cannot add new factors in a rulemaking, such as reliance on the SC-GHG estimates, in instances that Congress has not authorized the Agency to consider.³⁷

Generally, federal agencies conduct cost-benefit analyses for "economically significant" regulatory actions pursuant to E.O. 12866.³⁸ While the Chamber supports the principles of E.O. 12866 and cost-benefit analyses for regulatory actions, the application of the SC-GHG estimates in any agency decision making ultimately hinges on the nature and scope (if any) of the agency's statutory authority to consider GHG emissions. Moreover, given broad assumptions underpinning the SC-GHGs (*e.g.*, assumptions regarding the global socio-economic impacts projected through 2300), the

³⁶ U.S. Gov't Interagency Working Grp. on Soc. Cost of Carbon, *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis – Under Executive Order 12866*, at 1 (Feb. 2010), <https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/for-agencies/Social-Cost-of-Carbon-for-RIA.pdf> ("The purpose of the 'social cost of carbon' (SCC) estimates presented here is to allow agencies to incorporate the social benefits of reducing carbon dioxide (CO₂) emissions into cost-benefit analyses of regulatory actions...."); *see* June 2021 Coalition Comments, 23-26. *See also e.g.*, U.S. Chamber of Commerce, *Comments regarding Notice of Availability and Request for Comment on the "Federal Acquisition Regulation (FAR) – Minimizing the Risk of Climate Change in Federal Acquisitions;"* 86 FR 57404 (Oct. 15, 2021) and 86 FR 69218 (Dec. 7, 2021) (Jan. 13, 2022), <https://www.uschamber.com/environment/notice-of-availability-and-request-for-comment-on-the-federal-acquisition-regulation-far-minimizing-the-risk-of-climate-change-in-federal-acquisitions>.

³⁷ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider....").

³⁸ Exec. Ord. 12866 of Sept. 30, 1993, Regulatory Planning and Review, 58 Fed. Reg. 51,735, 51,740 (Oct. 4, 1993) (Sec. 3(f)(1) defines "significant regulatory action" as a rule likely to result in "an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.").

SC-GHG may not provide a useful tool for use in every regulatory impact analysis even if they are revised and improved as suggested herein.

The Chamber recognizes that certain statutes have been interpreted to require or allow an agency to consider the effect of GHG emissions in rulemakings.³⁹ However, absent a clearly articulated statutory basis for an agency's application of the SC-GHG estimates, and absent a consistent, predictable rationale to govern future agency decisions relating to such applications, that agency's decision-making may be considered arbitrary and capricious. Thus, to the extent that the SC-GHG estimates are affecting DOE's decision in this rulemaking, the Chamber recommends DOE not only make clear its independent statutory authority for applying the SC-GHG estimates in the rulemaking, but articulate the principles that will allow private parties to predict future applications of such estimates in domains governed by the particular statutory provisions that are at issue here. Accordingly, DOE should clearly and thoroughly explain its view as to how and why it intends to use and consider the SC-GHG estimates in making decisions – both in this rulemaking and in future regulatory actions – pursuant to 42 U.S.C. § 6295(o)(2)(B)(i), the provision of the Energy Policy and Conservation Act (EPCA) that authorizes DOE to establish the new and amended energy conservation standards of the kind that are proposed here. *Cf. supra* n.31. No such explanation is present in the Proposed Rule, triggering the concern that any final rule based on the Proposed Rule would be arbitrary and capricious absent further explanation in a supplemental proposal.

³⁹ See e.g., *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172 (9th Cir. 2008) (holding that NHTSA had to consider monetized effects of GHG emissions in fuel economy standards). We further note that in *Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654 (7th Cir. 2016) the Court upheld DOE's use of the SCC to calculate environmental benefits in setting energy efficiency standards for commercial refrigeration equipment. However, neither the court nor DOE explained why estimation of environmental benefits was germane to DOE's evaluation of whether *energy* conservation efforts were cost justified. Indeed, the Energy Policy and Conservation Act (EPCA) sets forth specific factors that DOE must evaluate as part of its determination that the Proposed Rule is economically justified. 42 U.S.C. § 6295(o)(2)(B)(i). None of those factors reference environmental benefits, emissions reductions, or the SC-GHG estimates. We recognize that the Proposed Rule suggests in some places that DOE's evaluation of the SC-GHG estimates is limited to the Executive Order 12866 review process. However, the SC-GHG estimates are inseparable from other environmental benefits that DOE does consider part of its EPCA evaluation. DOE prominently discusses the SC-GHG estimates and associated climate benefits through the preamble including in the "Synopsis of the Proposed Rule," "National Benefits and Costs," "Emissions Analysis," "Monetizing Emissions Impacts," and "Conclusion" sections of the preamble, confirming that they remain influential to DOE's tentative conclusion that the Proposed Rule would be cost justified under EPCA.

V. The Agency Should Consider Whether the “Major Questions” Doctrine Precludes its Application of the SC-GHG Estimates to the Proposed Rule

In light of the “major questions” doctrine, DOE should consider whether, because the SC-GHG estimates are of such major economic and political significance, DOE should await direction from Congress before proceeding with its application of the estimates in this rulemaking. Indeed, many members of the Chamber have supported legislation aimed at advancing innovative technologies and solutions needed to effectively reduce GHG emissions. However, at the same time, the Administration should not embark on efforts to expand the application and treatment of the SC-GHG estimates to effectively serve as a uniform price or fee on global GHG emissions, acting ahead of Congress.

Through the “major questions” doctrine, the Supreme Court has established guardrails on any administrative action that has sweeping implications across our country and economy.⁴⁰ This doctrine is clear: the Court “expect[s] Congress to speak clearly when authorizing an agency to exercise powers of ‘vast ‘economic and political significance.’”⁴¹

Here, notwithstanding support by the Chamber for different forms of GHG pricing, the fact remains that there is currently no U.S. federal law authorizing a GHG tax or emissions fee. A potential U.S. carbon pricing scheme has been subject to much debate in Congress for more than a decade and continues to this day. Yet, the SC-GHG estimates have been used to monetize the effects of global climate change as a way to justify GHG emissions reduction rules, which some argue reflects a de facto tax or fee on GHGs. In this context, the SC-GHG estimates are certainly of vast economic significance. Indeed, in rulemakings in which the SC-GHG estimates have been applied, agencies have relied on the estimates to claim hundreds of billions of dollars in monetized global climate change impacts.⁴² These rulemakings affect numerous sectors of the U.S. economy, including companies represented by the Chamber. The list of affected sectors likely will grow, as the IWG has signaled plans to expand the use of the estimates.

Similarly, the estimates are of vast political significance. In the first instance, the SC-GHG Technical Support Document states that the estimates include “the value of

⁴⁰ *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

⁴¹ *Id.* at 2605.

⁴² *See e.g.*, Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emission Standards, 86 Fed. Reg. 74,434, 74,498 (Dec. 30, 2021) (“EPA estimates the monetized benefit of these GHG reductions through 2050 at \$31 billion to \$390 billion across a range of discount rates and values for the social cost of greenhouse gases....”).

all climate change impacts” across the globe.⁴³ Taking on a measure of “all” the impacts of global climate change is incredibly significant for agencies, including those on the international level. The political significance is more acute, considering that President Biden has characterized global climate change as an “existential threat” and called for a “whole-of-government” approach to addressing the issue.⁴⁴

At the same time, as the U.S. has rejoined the Paris Climate Agreement—a decision that the Chamber supported—and global leaders have engaged in discussions regarding a potential carbon border adjustment mechanism, which is another form of carbon pricing aimed at reducing global emissions. For such a mechanism to be applied in the U.S., Congress would need to enact appropriate legislation.

On the domestic front, after years of inaction on carbon pricing, Congress has considered multiple bills that would price carbon into various sectors of the economy. This suggests Congress is considering whether to exercise its authority in this space and, notably, is doing so with the Administration’s endorsement. That should be the principal forum for determining policy of this magnitude.

Lastly, as discussed in the Chamber’s June 2021 comments, the SC-GHG estimates reflect a series of subjective choices about potential impacts of GHG emissions well into the future that are used to inform the inputs and assumptions into the models that calculate the SC-GHG estimates. While limited information is publicly known about the deliberations of the IWG, the variation in the estimates across administrations indicate these choices may involve policy judgments that require an express delegation of authority from Congress.⁴⁵

Even the most modest change in certain seemingly technical choices, such as whether to account for domestic or global impacts or the appropriate discount rate to apply when considering impacts on future generations, can lead to dramatically different results in the ultimate estimates,⁴⁶ which underscores the importance of these

⁴³ 2021 TSD at 2.

⁴⁴ The White House, Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies (Apr. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/>.

⁴⁵ See *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (“Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice.”).

⁴⁶ The SCC under the Trump Administration was an average of \$7 per ton, while the interim SC-GHG is an average of \$51 per ton. Compare U.S. Gov’t Accountability Off., *Social Cost of Carbon: Identifying a*

decisions and what should be considered a legislative choice, instead of one made by the IWG or DOE with this rulemaking.

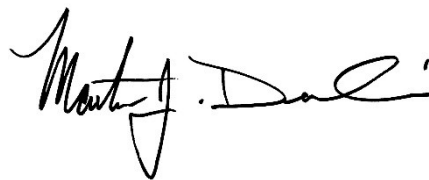
Collectively, congressional and international actions and deliberations on GHG pricing reinforce the political and economic significance associated with the SC-GHG estimates and foreshadow potential challenges to the estimates under the “major questions” doctrine. In view of this, the Chamber cautions against DOE’s use of the SC-GHG estimates for justifying actions to address global climate change absent congressional direction and recommend that DOE carefully consider how its use of the SC-GHG estimates may implicate the “major questions” doctrine.

VI. Conclusion

For the reasons discussed above and based on the arguments incorporated by reference in the attached comments, we strongly suggest that DOE ensure that the recommendations herein are addressed before proceeding with the finalization of this rulemaking, which should ultimately decline to increase the stringency of distribution transformer efficiency standards.

We hope DOE finds these comments useful for its decision-making process in this rulemaking. If you have any questions or need additional information, please contact Heath Knakmuhs, Vice President and Policy Counsel, Global Energy Institute, at hknakmuhs@uschamber.com. We thank you for your consideration of these comments and further extend our offer to assist DOE in this effort.

Sincerely,

A handwritten signature in black ink that reads "Marty Durbin". The signature is written in a cursive, flowing style.

Marty Durbin
President
Global Energy Institute
U.S. Chamber of Commerce

Federal Entity to Address the National Academies' Recommendations Could Strengthen Regulatory Analysis, GAO-20-254 (June 2020), <https://www.gao.gov/assets/gao-20-254.pdf>, with 2021 TSD at 5.