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April 18, 2023

The Honorable Kevin Kiley
Chair
Committee on Education and the Workforce,
Workforce Protections Subcommittee
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Alma Adams
Ranking Member
Committee on Education and the Workforce,
Workforce Protections Subcommittee
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Virginia Foxx
Chair
Committee on Education and the Workforce
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Robert "Bobby" Scott
Ranking Member
Committee on Education and the Workforce
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairs and Ranking Members:

I am writing on behalf of the National Association of Home Builders of the United States (NAHB) regarding the U.S. Department of Labor's (DOL) forthcoming rulemaking for determining independent contractor status under the Fair Labor Standards Act (FLSA).

NAHB is a Washington, D.C.-based trade association that represents more than 140,000 members who are involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Residential construction remains an industry of independent entrepreneurs, with close to 80% of homebuilders and specialty trade contractor firms being self-employed independent contractors.¹

NAHB is concerned that the proposed rule will negatively impact the cost of housing. 96.5 million households already cannot afford a new median priced home. Further, NAHB's "Priced-Out" estimates found that an increase of \$1,000 in the median home price would make 140,436 more households unable to qualify for a new home mortgage.² The practice of utilizing specialty independent contractors in building homes has been a staple of residential construction for decades, notably because this business model keeps costs low for the general contractor – and, as a result, the homeowner – and provides the specialty subcontractor with an entrepreneurial opportunity for growth, expansion and an ability to pursue the American dream.

The current 2021 independent contractor rule of a sharper "economic reality" test is clear and concise, and offers predictability to businesses trying to determine a worker's status under the FLSA as an employee or an independent contractor and provides useful guidance to workers on whether they are correctly classified as employees or independent contractors. The home building industry is predicated on the ability for contractors to compete efficiently and optimally price a home, which depends on the degree to which overall costs are certain and predictable, and this process provides a proven model to maintain predictability and minimize unwarranted

¹ Natalia Siniavskaia, Ph.D., National Association of Home Builders, *Home Building Census*, July 1, 2021, <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-home-building-census-july-2021.pdf>.

² Na Zhao, Ph.D., National Association of Home Builders, *NAHB Priced-Out Estimates for 2023*, March 2023, <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2023/special-study-nahb-priced-out-estimates-for-2023-march-2023.pdf>.

costs for the homeowner. In further support of this position, please see NAHB's December 13, 2022 Comment Letter in response to the agency's Notice of Proposed Rulemaking on its Employee or Independent Contractor Classification Under the FLSA.³

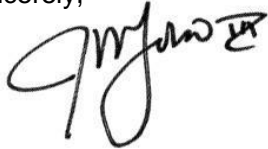
Moreover, there is a key difference between these relationships within residential and other sectors of the construction industry and employer-worker relationships in other industries in the modern economy – the opportunity for entrepreneurialship and business expansion among these subcontracted firms. These businesses have the opportunity not only to choose where, when and with whom they work, but also to expand their specialty firms with the hiring of staff to meet the increasing needs of his or her business.

DOL's latest proposed rulemaking upends this sharper test and introduces a greater chance for subjectivity, inconsistency and confusion among affected entities by grading six factors (not including the seventh "additional factors" category stated in the proposal) with no predetermined weight, as opposed to two of five established factors holding greater weight in the 2021 rulemaking. The proposed changes would greatly disrupt the current contractor-subcontractor relationship within residential construction, with the burden and resulting cost increases falling on the consumer.

NAHB appreciates the opportunity to provide these comments and hopes you will find them valuable. NAHB welcomes the opportunity to engage further with the Workforce Protections Subcommittee and the Committee on Education & the Workforce to help its Members and staff fully understand the indispensable role independent contractors play in the residential construction industry. Please contact me if you have any questions or require any additional information.

Thank you for considering our views.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Tobin III", with a stylized flourish at the end.

James W. Tobin III

³ 87 Fed. Reg. at 62,218.