Manufactured Housing Association for Regulatory Reform

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VIA FEDERAL EXPRESS AND ELECTRONIC SUBMISSION

Regulations Division
Office of General Counsel
U.S. Department of Housing and Urban Development
451 7th Street, S.W.
Room 10276
Washington, D.C. 20410-0500

Re: Regulatory Review of Manufactured Housing Rules -- Docket No. FR-6075-N-01

Dear Sir or Madam:

The following comments are submitted on behalf of the Manufactured Housing Association for Regulatory Reform (MHARR). MHARR is a Washington, D.C.-based national trade association representing the views and interests of producers of manufactured housing regulated by the U.S. Department of Housing and Urban Development (HUD) pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5401, et seq.) (1974 Act) as amended by the Manufactured Housing Improvement Act of 2000 (2000 reform law). MHARR was founded in 1985. Its members include mostly smaller and medium-sized independent manufactured housing businesses from all regions of the United States.[1]

I. INTRODUCTION

On January 26, 2018, HUD published a Notice and Request for Comment (Notice) in the Federal Register[2] seeking public comment regarding a HUD review "of all current and planned federal regulation of manufactured housing" pursuant to Executive Order (EO) 13771 ("Reducing Regulation and Controlling Regulatory Costs"), issued by President Trump on January 30, 2017 and Executive Order 13777 ("Enforcing the Regulatory Reform Agenda") issued on February 24, 2017. By the express terms of the HUD Notice, this review includes and embraces not only "all"

[1] All MHARR members are "small businesses" as defined by the U.S. Small Business Administration (SBA) and are "small entities" for purposes of the Regulatory Flexibility Act (5 U.S.C. 601, et seq.).

[2] See, 83 Federal Register No. 18, January 26, 2018 at pp. 3635, et seq.

extant and pending manufactured housing standards and enforcement regulations, but also "all current and planned *regulatory actions* affecting manufactured housing." (Emphasis added).

Because of the unique and highly integrated nature of the federal manufactured housing standards and enforcement regulations, the influence of revenue-driven contractors, and the propensity of the federal manufactured housing program, particularly over the past four years, to utilize pseudo-regulatory "interpretations" and other similar devices to alter or modify standards, regulations and/or enforcement practices, or create new mandates, policies, or practices, and insofar as the term "regulatory action," as incorporated within the President's January 20, 2017 order entitled "Regulatory Freeze Pending Review" specifically includes both agency "guidance documents" and "interpretation[s] of a statutory or regulatory issue,[3]" MHARR's comments in this matter will address (as further explained herein), extant and pending: (1) manufactured housing construction and safety standards;[4] (2) manufactured housing Procedural and Enforcement Regulations (PER);[5] (3) published "interpretive rules;" concerning the implementation of the 2000 reform law; (4) manufactured housing program "Standard Operating Procedures" (SOP) and operational memoranda enforced by HUD and/or its agents, including, but not limited to Primary Inspection Agencies (PIAs) and/or outside contractors; (5) formal and informal interpretations of such standards and/or regulations, including, but not limited to, extant and pending "Interpretive Bulletins" as defined by applicable law; (6) "field guidance memoranda" and other similar unilateral policy, practice, or procedural directives issued to state and/or private PIAs and State Administrative Agencies (SAAs) and/or manufacturers; (7) contracting and other enforcement-related matters that have vested illegitimate, discretionary enforcement authority in financially-motivated private contractors while undermining full and fair competition for program contracts; and (8) other aspects of the HUD manufactured housing program which impugn the remedial objectives of Executive Orders 13771 and 13777.

The comments set forth herein supplement, reiterate and, in certain instances, expand-upon previous written comments submitted by MHARR to HUD on June 7, 2017, concerning departmental implementation of EO 13771 and EO 13777 in relation to the regulation of HUD Code manufactured homes. Those previous comments are hereby incorporated herein by reference, as if restated in full.[6]

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[3] The term "regulatory action" is also broadly construed and defined in guidance specifically issued by the Office of Information and Regulatory Affairs (OIRA) pursuant to EO 13777. See, Memorandum M-17-21, "Implementing Executive Order 13771, Titled 'Reducing Regulation and Controlling Regulatory Costs,'" April 5, 2017, at section III, Q2-Q3: "'An EO 13771 regulatory action'" includes ... "a significant guidance document (e.g., significant interpretive guidance)" that is "disseminated to regulated entities or the general public that may reasonably be anticipated to: (i) lead to 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 [or] jobs." (Emphasis added). Each of the "regulatory actions" addressed herein has had a materially adverse effect on the manufactured housing industry, productivity within the industry, competition within the industry and with other sectors of the housing industry, job creation and retention within the manufactured housing industry, and the availability of affordable non-subsidized housing for lower and moderate-income Americans.

[4] See, 24 C.F.R. 3280.1, et seq.

[5] See, 24 C.F.R. 3282.1, et seq.

[6] See, Attachment 1, hereto.

II. BACKGROUND

Key to understanding the current and institutional failures of the HUD manufactured housing program -- as reflected in manufactured housing production levels that stand today at 46.8% of the 42-year annual production average since the inception of federal manufactured housing regulation in 1976[7] -- is the failure of the Department to fully and properly implement the program reforms of the Manufactured Housing Improvement Act of 2000.

Originally regulated at the federal level under the 1974 manufactured housing act (a law derived from and patterned upon the National Traffic and Motor Vehicle Safety Act of 1966), in a manner more akin to vehicles than housing, the evolution and progression of manufactured housing through the 1980s and 1990s led to the recognition -- by Congress and federal program stakeholders -- of the need to reform and modernize the original law to acknowledge and protect manufactured homes as legitimate, affordable "housing" at parity, for all purposes, with other types of housing. Thus, in December 2000, after 12 years of congressional hearings, studies and analysis – and based upon the recommendations of the National Commission on Manufactured Housing[8]– Congress, by unanimous consent in both houses, enacted the Manufactured Housing Improvement Act of 2000. This landmark legislation adopted key reforms to the original 1974 Act, designed to both recognize and continue the transition of federally-regulated manufactured homes from the "trailers" of the past, to modern, legitimate housing at parity with other types of homes. These reforms include, but are not limited to:

1. Specific congressional recognition of manufactured housing as "affordable" housing and mandatory HUD consideration of affordability in all decisions relating to the standards and their enforcement (section 602);

2. Creation of an independent, statutory consensus committee comprised of representatives of all program stakeholders with defined authority and procedures to consider, evaluate and recommend new or revised standards, enforcement regulations, interpretations and enforcement, and monitoring practices and policies no matter how denominated (section 604);

3. Presumptive Manufactured Housing Consensus Committee (MHCC) prior review of all program policies and practices of general applicability and impact (section 604(b)(6));

4. Mandatory appointment of a non-career manufactured housing program administrator as a statutory "responsibility" of the Secretary (Section 620);

5. Enhanced federal preemption, applicable to all state or local standards or requirements (section 604(d));

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[7] Manufactured housing production since the inception of federal regulation in 1976 – through 2017 – totals 8,325,445 homes, or an average of 198,225 homes per year, for 42 years. Total manufactured housing production in 2017 was 92,902 homes. While this number represents an increase from the total production of 81,136 homes in 2016 -- and prior years dating to 2008 -- it remains far below the longer-term historic industry norm.

[8] See, Final Report and Minority Report of the National Commission on Manufactured Housing, August 1, 1994.

6. Specific statutory directives to HUD to: (A) "facilitate the availability of affordable manufactured homes and to increase homeownership for all Americans;" and (B) "facilitate[e] the acceptance of the quality, durability, safety and affordability of manufactured housing within [HUD];"

7. Establishment of installation standards in all states, either under state law or through default federal standards, in conjunction with state-law enforcement or federal enforcement in states without state law installation programs (section 605);

8. Establishment of a federal dispute resolution program for states without a state law alternate dispute resolution program meeting specified criteria (section 623);

9. A prohibition on the use of any program revenues for any purpose not "specifically authorized" by the law as amended (section 620); and

10. Provisions requiring separate and independent contractors for all contract-based program functions including in-plant monitoring and inspections (section 620).

HUD, however, which has consistently sought to prevent and circumvent such reforms from the outset of the legislative process, has failed to fully and properly implement key aspects of the 2000 reform law, effectively leaving manufactured homes as second-class "trailers" for purposes of federal regulation, financing, zoning, placement, insurance and other purposes -- subject to overt and specific forms of discrimination that have undermined the availability of affordable manufactured homes and the ability of lower and moderate-income consumers to purchase and own a home that they can truly afford without a government subsidy. Ultimately, then, the HUD manufactured housing program, as established by law, is well-conceived and absolutely necessary. It is in the implementation of the laws enacted by Congress that HUD and the HUD program have failed.[9] Consequently, and in order to properly implement EOs 13771 and 13777 within the unique context of the federal manufactured housing program, the entire program – including all of its various aspects and practices – must be reviewed for compliance (or, more precisely, non-compliance) with the 2000 reform law, as well as the regulatory reform objectives and policies enunciated in EOs 13771 and 13777.

In relevant part, Executive Order 13777 provides:

"Section 1. Policy. It is the policy of the United States to alleviate unnecessary regulatory burdens placed on the American people.

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[9] HUD's failure to fully and properly implement key reforms of the Manufactured Housing Improvement Act of 2000 is comprehensively documented in February 1, 2012 written testimony submitted by MHARR in connection with a hearing by the House Subcommittee on Insurance, Housing and Community Opportunity on the "Implementation of the Manufactured Housing Improvement Act of 2000," portions of which are re-stated or otherwise incorporated herein. See, Attachment 2, hereto.

> Section 3 Regulatory Reform Task Forces *** (d) Each Regulatory Reform Task Force shall evaluate existing regulations ... and make recommendations to the agency head regarding their repeal replacement or modification, consistent with applicable law. At a minimum, each Regulatory Reform Task Force shall attempt to identify regulations that: (i) eliminate jobs or inhibit job creation; (ii) are outdated, unnecessary or ineffective; (iii) impose costs that exceed benefits; [or] (iv) create a serious inconsistency, or otherwise interfere with regulatory reform initiatives and policies.
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> (e) In performing the evaluation described in subsection (d) of this section, each Regulatory Reform Task Force shall seek input and other assistance, as permitted by law, from entities significantly affected by federal regulations, including ... small businesses ... and trade associations."

(Emphasis added).

In accordance with this directive, MHARR – a trade association representing small manufactured housing industry businesses "significantly affected" by HUD regulation and related "regulatory actions" -- asserts and maintains that significant elements of HUD's existing manufactured housing program, regulations and related "interpretations," directives, "guidance," and other similar pseudo-regulatory pronouncements (enforced against regulated parties by HUD and/or its regulatory contractors), as set forth and detailed below, are either outdated, inappropriate, unduly burdensome, not cost-effective, or are otherwise inconsistent with governing law. As a result, those elements of the HUD program, regulations and/or regulatory actions should be repealed or amended pursuant to EOs 13771 and 13777.

More specifically, as MHARR explained in its June 7, 2017 EO 13777 comments:

> "[W]hile the industry, as proven by quantifiable evidence, has achieved the vision of the original 1974 manufactured housing law – providing a safe, durable, quality home at an affordable price – the [federal manufactured housing] program, its structure and its fundamental regulatory policies ... continue to deny that objective reality, imposing ever-more stringent and costly regulatory demands, while the broader objectives of the [Manufactured Housing Improvement Act of 2000] – to advance the availability, affordability and utilization of manufactured housing ... have been and are being ignored, or have been distorted beyond recognition by HUD through specious alleged "interpretations." As a result, much of the good that Congress sought to accomplish through the 2000 reform law – particularly in terms of ending discrimination against manufactured housing and achieving parity between manufactured homes and other types of residential construction – has not been accomplished. This has not only harmed the industry in terms of lost production, technical advancement and its ability to compete with other types of housing, but more importantly, has hurt consumers and especially the lower and moderate-income families that rely on affordable, non-subsidized manufactured housing the most.

> The process mandated by EO 13777 provides HUD with both the opportunity and the administrative mechanism to restructure and re-prioritize the federal manufactured housing program to accomplish the key objectives of the 2000 reform law, insofar as the baseline goals of the original 1974 law have already been achieved. That restructuring should include the repeal or significant modification of the regulations and regulatory activities set forth below, as well as action to appoint a non-career program administrator in accordance with the 2000 reform law and to terminate the revenue-driven, "make-work," de facto sole-source monitoring contract and arrangement that has been in place since the inception of federal regulation more than 40 years-ago."

(Emphasis in original). (Footnotes omitted).

MHARR and its members (and, no doubt the entire manufactured housing industry) seek a federal manufactured housing program that, in partnership with the states, ensures both the safety and affordability of manufactured housing through cost-effective, reasonable, performance-based, preemptive regulation that does not discriminate against either manufactured housing, or manufactured homebuyers. At the same time, the federal program -- in accordance with the mandate of the 2000 reform law and in order to ensure the availability of affordable, non-subsidized manufactured housing for all Americans – should use its substantial statutory powers to ensure that state and local governments do not improperly or discriminatorily exclude manufactured homes or manufactured housing residents.[10] Each of these objectives would be significantly advanced by the actions described below which, in turn, would streamline HUD regulation "to reduce or eliminate costs and overall burden while ensuring that HUD can continue to meet its statutory responsibilities" under applicable law.[11]

III. COMMENTS

A. HUD SHOULD WITHDRAW AMEND OR EXPEDITE CERTAIN PART 3280 MANUFACTURED HOUSING STANDARDS

In accordance with the prime directive of EO 13777, for federal agencies to "evaluate existing regulations" in relation to the goals and objectives of fundamental regulatory reform as described therein and in EO 13771, MHARR maintains that – at a minimum – the following extant, pending or proposed federal standards, included or slated for inclusion in the HUD Manufactured Housing Construction and Safety Standards (24 C.F.R. 3280), should either be repealed, withdrawn, or implemented as set forth in detail below.

1. HUD'S FORMALDEHYDE EMISSIONS "HEALTH NOTICE" REQUIREMENT SHOULD BE REPEALED

Since 1994, the Part 3280 HUD Manufactured housing standards have contained mandatory limits for formaldehyde vapor emissions from certain construction materials

[10] See, discussion at section III(D)(2), infra.

[11] See, 83 Federal Register No. 18 (January 26, 2018) at p. 3636, col.2.

incorporated within manufactured homes (24 C.F.R. 3280.308),[12] as well as a requirement for a "health notice on formaldehyde emissions" to be "prominently displayed" in manufactured homes offered for lease or sale (24 C.F.R. 3280.309). From the time that these standards were implemented, until 2016, they were the only national, federal standards for formaldehyde emissions from specified building materials incorporated within residential structures.

In 2010 however, Congress adopted the Formaldehyde Standards for Composite Wood Products Act, which directed the U.S. Environmental Protection Agency (EPA) to establish formaldehyde standards for certain specified composite wood products, including plywood, particleboard and medium-density fiberboard that would be identical to standards already adopted and enforced on a state level by the California Air Resources Board (CARB), together with appropriate enforcement mechanisms. The same law, moreover, requires HUD to revise its own manufactured housing formaldehyde standards to "reflect" the EPA standards "not later than 180 days after the date of promulgation" of the EPA standards. (Emphasis added).

On December 12, 2016, EPA published a final rule pursuant to this mandate, establishing, among other things, formaldehyde emission standards for the three specified types of composite wood products, which subsume all of the categories regulated under the HUD standards, and establish emissions limits that are more restrictive than the corresponding HUD standards.[13]

Insofar as the EPA formaldehyde emissions standards, currently slated for implementation nationwide on December 12, 2018,[14] apply to building materials utilized in all domestic residential construction, including manufactured homes, and impose requirements that exceed the current HUD standards, the formaldehyde "health notice" mandated by 24 C.F.R. 3280.309 -- which is not required for other types of homes by either the EPA standard or any other regulatory mandate that MHARR is aware-of (even though constructed of the same materials) -- would henceforth impose an unwarranted, unjustified and discriminatory burden on manufactured housing.

Recognizing this baseless regulatory burden, HUD, at the October 2016 meeting of the Manufactured Housing Consensus Committee (MHCC), offered a "preliminary working draft" of a proposed rule to amend the existing HUD formaldehyde emissions standards, by eliminating the formaldehyde "health notice" mandate of 24 C.F.R. 3280.309 and modifying 24 C.F.R. 3280.308 to simply cite the new EPA formaldehyde emissions standards. This proposal, with certain minor modifications, was accepted and approved by the MHCC.

Based on the promulgation and impending implementation of the EPA formaldehyde emissions standards for composite wood products utilized in all residential construction, the discriminatory "formaldehyde health notice" currently required by 24 C.F.R. 3280.309 should be repealed, as should the duplicative and unnecessary testing requirements of 24 C.F.R. 3280.406. Simultaneously, current section 24 C.F.R. 3280.308 should be amended, as recommended by the

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[12] The standard establishes a formaldehyde emission limit of .2 parts per million (ppm) for "plywood materials" and a limit of .3 ppm for "particleboard materials" based on a product test method set forth in 24 C.F.R. 3280.406.

[13] See, 81 Federal Register No. 238 (December 12, 2016) at p. 89674, et seq.

[14] See, 82 Federal Register No. 184 (September 25, 2017) at p. 23735, et seq.

MHCC, to incorporate by reference the relevant emissions limits and definitions of the final EPA formaldehyde standard and regulation.[15]

2. HUD SHOULD EXPRESSLY REJECT ANY FIRE SPRINKLER STANDARD

In October 2011, the MHCC voted to recommend to HUD a proposed "voluntary" standard for fire sprinklers in manufactured homes,[16] based on proposals submitted by both HUD and the Manufactured Housing Institute (MHI). HUD has subsequently indicated that such a standard is under development for publication and inclusion in the Part 3280 Manufactured Housing Construction and Safety Standards in the future. For the reasons set forth below – and previously enunciated by MHARR -- MHARR maintains that such a "voluntary" standard is precluded by the express language of the 1974 Act, as amended, and is unnecessary in any event.

The "voluntary" fire sprinkler standard pending at HUD, by its terms, would allow HUD Code manufacturers to select between the National Fire Protection Association's (NFPA) "13D Standard for the Installation of Sprinkler Systems" in manufactured homes, or certain prescriptive elements set forth in the proposed standard, at the election of the manufacturer. The 1974 Act, as amended, however, does not provide for – or authorize – the adoption of "voluntary," conditional, or provisional standards for manufactured homes, nor is any such standard – whether conditional or mandatory – authorized or warranted based on the predicate criteria of the 1974 Act, as amended.[17]

Fire resistance or prevention is unambiguously a "safety" issue. Thus, the existing HUD Code fire standards – which do not mandate or address the use of fire sprinklers -- are entitled "Fire *Safety*."[18]"Manufactured home *safety*," however, has a specific, defined meaning under the 1974 Act, as amended. The 1974 Act, as amended, defines "manufactured home safety" as the performance of a manufactured home in such a manner that the public is protected against any unreasonable risk of ... accidents ... or unreasonable risk of death or injury to the user" of the home. (Emphasis added). Putting aside the antiquated (vehicle-derived) reference to manufactured home "accidents," the essential prerequisite to the adoption of a federal manufactured home safety standard, accordingly, is the existence of an "unreasonable risk" of injury or death to the resident of a manufactured home. The existence of such an unreasonable risk, moreover, must be determined by HUD, as the agency charged by federal law with developing, maintaining and enforcing the federal manufactured housing standards.

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[15] MHARR notes that on May 15, 2017 it filed comments with EPA pursuant to EO 13777 seeking the repeal of "finished goods" labelling and record-keeping mandates contained in the December 12, 2016 final rule which overtly discriminate against HUD Code manufactured homes and would impose undue and unwarranted cost burdens on manufactured housing producers and particularly smaller manufacturers. See, Attachment 3, hereto.

[16] I.e., a federal sprinkler standard that would be triggered if "a manufacturer elects to install a fire sprinkler system or a state or local authority ... requires that a fire sprinkler system be installed for all detached single-family dwellings and manufactured homes." (Emphasis added).

[17] The adoption of a "voluntary standard" – which is not authorized by either the original 1974 Act or the 2000 reform law-- must be distinguished from the fact that the HUD Code is a compendium of minimum standards, under which manufacturers are free to offer options and features which exceed the minimum performance requirements of the Part 3280 standards.

[18] See, 24 C.F.R. 3280.201.

Under this definition, there either *is* an "unreasonable risk" of injury or death, as determined by HUD, or there is not. If there *is* an "unreasonable risk," HUD can adopt a federal standard to remedy or alleviate that risk. If, however, there is no "unreasonable risk" to be remedied or alleviated, HUD is without authority and cannot adopt a standard of any kind regarding that matter. In the case of fire sprinklers, HUD has never determined, or even claimed, that the absence of fire sprinklers in manufactured homes creates an "unreasonable risk" of injury or death to residents of homes that are produced in accordance with the existing HUD Code fire safety standards. To the contrary, the existing HUD fire safety standards – which, again, do not require or address the use of sprinklers – state that, if followed, they "will assure reasonable fire safety to the occupants" of HUD Code manufactured homes.[19](Emphasis added). This assertion, moreover, is fully supported by data and analyses compiled and published by NFPA in 2011 and 2013, which demonstrate that the rate of both the occurrence of fires and fire injuries in HUD Code manufactured homes[20] is lower than that of site-built and other types of homes,[21] and that the rate of fire deaths in manufactured homes is "comparable" to the rate of fire deaths in site-built and other types of homes.[22]

Given the absence of any supporting data showing the existence of an "unreasonable risk" of injury or death from fire in a manufactured home, there is no basis for such a finding by HUD and, therefore, no factual predicate – as required by applicable law – for the adoption of any type of federal fire sprinkler standard, either voluntary or mandatory. Consequently, there is no valid or legitimate statutory basis for the consideration of such a rule, making it "unnecessary" within the meaning of EO 13777, Section 3(d)(ii).

Moreover, documents filed with the MHCC in connection with its consideration of the proposed standard indicate that the additional cost of a fire sprinkler system for a double-section manufactured home under the proposed standard would range from $3,000 to $3,500, with additional costs of up to $3,000 for water connections and on-site inspections. Based on research by the National Association of Home Builders (NAHB) showing that for each additional $1,000 in regulatory costs, 347,901 households are excluded from the single-section manufactured housing market, and 315,385 households are excluded from the multi-section manufactured housing market, it is evident that such a standard would necessarily "eliminate jobs" and "inhibit job creation" within the meaning of EO 13777, Section 3(d)(i), and would "impose costs that exceed benefits."

The existing HUD "fire safety" standards have been effective, as demonstrated by the NFPA data, and have achieved the statutory objective of assuring reasonable safety for manufactured housing residents without imposing undue cost burdens that would exclude hundreds-of-thousands of lower and moderate-income Americans (and potentially more) from all of the benefits of homeownership.

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[19] Id.

[20] I.e., manufactured homes produced since the advent of federal regulation in 1976.

[21] See, Manufactured Home Fires, National Fire Protection Association, July 2011 at p. 10 ("As in previous analyses, manufactured homes show a lower rate of fires per 1,000 occupied housing units.... Manufactured homes [also] have a lower rate of civilian fire injuries per 100,000 occupied housing units than other one or two-family homes....")

[22] See, Manufactured Home Fires, National Fire Protection Association, July 2011 (Errata Sheet)

Moreover, the existence of an express federal sprinkler standard (whether "voluntary" or mandatory) – as MHARR has consistently maintained -- is not needed in order to federally preempt state or local fire sprinkler standards for manufactured homes (as proponents of the proposed "voluntary" standard have asserted). While HUD, in the past, has claimed that an express federal standard under Part 3280 addressing *the same exact aspect of manufactured home performance* as a parallel and differing state or local standard is necessary in order to preempt state or local standards pursuant to section 604(d) of the 1974 Act, the Department's most recent preemption determination has implicitly rejected that position and has, instead, begun to implement the *enhanced* federal preemption mandated by Congress in the 2000 reform law.

Thus, in 2014, HUD's Office of General Counsel (OGC) preempted an effort by the State of Minnesota to require an onsite "Blower Door Test" -- pursuant to the International Energy Conservation Code (IECC) -- for all new residential construction, including manufactured homes. In a July 10, 2014 decision, issued by email to Minnesota state authorities,[23] OGC recites both the preemption provision as amended by the Manufactured Housing Improvement Act of 2000 -- with its mandate that preemption be "broadly and liberally" construed -- and the preemption provision of the HUD PER Regulations at 24 C.F.R. 3282.11. It then goes on to state: "The Blower Door Test is essentially *a standard requiring remedial actions above and beyond what is required by the federal standards*.... Thus, the Act and ... 3282.11(b) and (c) preempt Minnesota's enforcement of the IECC standard." (Emphasis added).

This decision is directly relevant to the preemption of state and/or local fire sprinkler requirements because of the "broad and liberal" nature of its preemption analysis, as mandated by section 604(d) of the 2000 reform law. Unlike past HUD preemption decisions which had focused almost exclusively on whether a state or local standard addressed the "same aspect" of manufactured home "performance" as a federal standard, the blower door decision does not even attempt to identify a federal standard addressing the "same aspect of performance" as the proposed state regulation. Instead, it simply finds -- as expected by Congress when it enacted the enhanced preemption of the 2000 reform law – that the state standard requires action "above and beyond what is required" by the "federal standards," collectively and viewed as a whole. In doing so, it *rejected* the state's argument that "when [the] federal standards are silent or do not address a specific code or standard ... the state is not superseding the Federal Standard and may enforce state standards."

The exact same preemption analysis applies – and should be applied by HUD -- to the federal manufactured home "fire safety" standards in relation to state and/or local sprinkler mandates.[24] Insofar as a state or local fire sprinkler mandate for manufactured homes would require action "above and beyond what is required" by the federal manufactured housing fire safety standards – which, as shown by the NFPA data, assure reasonable fire safety without the use of costly sprinklers – such standards are and should be preempted by the federal fire safety standards, regardless of the fact that the federal standards do not, in and of themselves, require the use of fire sprinklers.

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[23] See, Attachment 4, hereto.

[24] For a more complete analysis of the enhanced federal preemption mandated by the 2000 reform law, see, MHARR Issues and Perspectives, "Time to Enforce the Law on Federal Preemption," November 2017, Attachment 5, hereto.

Accordingly – insofar as fire sprinklers are not needed in order to assure the reasonable fire safety of manufactured housing residents, and a federal fire sprinkler standard (whether voluntary or otherwise) is not needed in order to federally preempt state and/or local fire sprinkler mandates, the "voluntary" fire sprinkler standard pending at HUD, should be expressly, affirmatively and definitively rejected by HUD pursuant to its EO 13771/13777 review of the Part 3280 manufactured housing standards.[25]

3. HUD SHOULD ADOPT STANDARDS FOR MULTI-FAMILY MANUFACTURED HOMES

On October 3, 2014, the HUD manufactured housing program administrator issued a memorandum to all Primary Inspection Agencies (PIAs) and State Administrative Agencies (SAAs) entitled "Manufactured Homes Designed, Built, or Sold for Other than Single Family Use." The memorandum instructed those entities that "manufacturers may not design or build manufactured homes labeled pursuant to the National Manufactured Home Construction and Safety Standards for multifamily or other non-single family residential use," and that "any manufactured home built under the federal program and bearing a HUD certification label may not be sold for purposes other than single-family use."[26]

In response to this baseless[27] effort to restrict the availability of affordable multi-unit manufactured homes for lower and moderate-income Americans, the MHCC undertook consideration of a proposed standard to modify the HUD standards to expressly provide for multi-family manufactured homes. Among other things, that proposed standard would: (1) specifically amend the definition of "dwelling" contained in 24 C.F.R. 3280.2 to state: "*Dwelling* means any structure that contains one to a maximum of three dwelling units, designed to be occupied for

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[25] In addition, and as is addressed in greater detail in section III(D)(2), infra, given the significant enhancement of federal preemption enacted by Congress in the 2000 reform law, HUD's pre-2000 reform law, January 23, 1997 "Notice of Staff Guidance" on federal preemption regarding manufactured housing (62 Federal Register No. 15, January 23, 1997 at p. 3456, et seq.) and its May 5, 1997 "Statement of Policy" concerning the preemption of zoning regulations and/or determinations by localities which exclude HUD Code manufactured homes (62 Federal Register No. 86, May 5, 1997 at p. 24337, et seq.) should either be withdrawn or substantially amended to reflect the broader scope, reach and applicability of federal preemption under the 2000 reform law in relation to its primary purpose of expanding the availability of affordable non-subsidized manufactured homes for all Americans.

[26] See, Attachment 6, hereto.

[27] While the HUD PER regulations, as cited by HUD in its October 7, 2014 memorandum, state (at 24 C.F.R. 3282.8(1)) that "mobile (sic) homes designed and manufactured with more than one separate living area are not covered by the standards and these regulations," neither the 1974 Act or the 2000 reform law affirmatively prohibit the design, manufacture, sale, or lease of multi-family manufactured homes. As MHARR noted in a November 12, 2014 communication to the HUD program administrator: "[T]he restriction exceeds relevant statutory authority. The statutory definition of 'manufactured home' contained in 42 U.S.C. 5402(6) states that a manufactured home is a 'dwelling,' but does not otherwise define a 'dwelling' or limit a 'dwelling' – either expressly or implicitly – to a 'single-family' home. Thus, there is no statutory support for the [24 C.F.R.] 3280.2 restriction of a 'dwelling unit' to occupancy 'by one family.' As the recent decision of the United States District Court for the District of Columbia in American Insurance Association v. Department of Housing and Urban Development (No. 1:13-cv-00966) makes abundantly clear, federal regulations may not exceed the scope of the underlying grant of authority from Congress." See, Attachment 7, hereto.

residential living purposes;" (emphasis added) and (2) establish new and additional Part 3280 standards specifically related to manufactured homes with multiple dwelling units.[28]

This proposal, as approved and recommended by the MHCC, was submitted to HUD for action pursuant to section 604(a)(5) of the 2000 reform law (42 U.S.C. 5403(a)(5)). Notwithstanding the 12-month deadline prescribed for HUD action on MHCC-recommended standards by that section, however, the Department has failed to either promulgate or otherwise act with respect to that proposal.[29]

Given the extremely beneficial impact that affordable, non-subsidized multi-family manufactured homes would have for lower and moderate-income American families,[30]and given the fact that such an amendment to the HUD Code standards would be fully consistent with existing law as set forth in the 1974 Act and the 2000 reform law, HUD should take immediate action to publish the MHCC-recommended provisions to authorize multi-dwelling unit manufactured homes as a proposed rule and to promulgate such a rule on an expedited time-frame.

B. HUD SHOULD WITHDRAW, AMEND OR EXPEDITE CERTAIN EXTANT OR PENDING PART 3282 MANUFACTURED HOUSING REGULATIONS

In accordance with the directive of EO 13777, for federal agencies to "evaluate existing regulations" in relation to the goals and objectives of fundamental regulatory reform as described therein and in EO 13771, MHARR maintains that – at a minimum – the following extant, pending or proposed federal regulations, included or slated for inclusion in the HUD Manufactured Housing Procedural and Enforcement Regulations (24 C.F.R. 3282), should either be repealed, withdrawn, or implemented as set forth in detail below.

1. SUBPART I OF THE PER REGULATIONS SHOULD BE AMENDED TO CONFORM WITH APPLICABLE LAW

Subpart I of the Part 3282 Procedural and Enforcement Regulations is the single most significant driver of unnecessary regulatory compliance costs within the federal manufactured housing program. As currently structured, it is a quagmire of redundant and pointless paperwork, needless "investigations" and reports, and multiple layers of document "reviews" – none of which are affirmatively required by statute -- by both third-party inspectors and HUD's 40-year, revenue-driven, "make-work" "monitoring" contractor, which in 2014 was paid 127% more for each home than it did when the industry was producing far more homes. With no expiration date or statute of limitations and, effectively, no severity threshold (at least for its initial stages), it represents a constant and ongoing regulatory uncertainty that cannot be predicted, accounted-for, or budgeted-

[28] See, Attachment 8, hereto (Proposed multi-dwelling unit manufactured housing standard).

[29] 42 U.S.C. 5403(a)(5)(A), (B) states, in relevant part: "The Secretary shall either adopt, modify, or reject a standard, as submitted to the Secretary by the consensus committee ... not later than 12 months after the date on which a standard is submitted to the Secretary...."

[30] The extreme and growing need for affordable housing and homeownership – and particularly non-subsidized housing and homeownership opportunities, as are provided by HUD Code manufactured housing – is demonstrated and underscored by HUD's 2017 Worst Case Housing Needs report to Congress, which shows a resurgence in worst-case housing needs (i.e., Americans "who pay more than one-half of their income to rent, [or] live in severely inadequate conditions, or both") to near-record levels.

for in any meaningful way, thus aggravating its cost impact on manufacturers and ultimately consumers, who pay more but derive little if anything in the way of benefits.

At the same time, Subpart I's ambiguous and often open-ended mandates, even after the adoption of certain reforms in 2013,[31] remain an invitation for abusive and inconsistent enforcement, including increasingly subjective, arbitrary and costly demands imposed on manufacturers by the revenue-driven program "monitoring" contractor in the absence of proper oversight by -- and accountability to – HUD. Quantifiable evidence, though, demonstrates that Subpart I has outlived any conceivable usefulness to manufactured homebuyers and should be: (1) restructured, to adhere strictly to the express terms of section 615 of the 1974 Act; and (2) de-emphasized and de-prioritized as an element of the federal program.

At its core, Subpart I is an antiquated throwback to times when manufactured homes were viewed as a type of specialty vehicle rather than a permanent residence and dwelling. As with much of the original federal manufactured housing law, section 615 of the National Manufactured Housing Construction and Safety Standards Act of 1974 -- which provides the statutory basis for Subpart I -- was derived from the National Traffic and Motor Vehicle Safety Act of 1966. The entire concept of a "recall," however, is foreign to the housing industry and inappropriate and unnecessary for structures that are designed – and used – for permanent occupancy. Moreover, significant elements and aspects of the Subpart I regulations are either not affirmatively mandated or required by section 615 of the 1974 Act, or materially exceed the authority provided by that section.

HUD's Subpart I regulations (as contrasted with section 615 of the 1974 Act) require manufactured home producers to investigate and document virtually any piece of "information," regardless of its facial credibility, that could indicate the possible existence of a "defect" or standards non-conformance in a manufactured home.[32] In a small number of cases it requires notice to consumers and, in rare cases, correction of more serious defects, up to and including replacement of the home. This mechanism, however, is, for the most part, a costly exercise in paper-shuffling and red tape that benefits HUD's entrenched 40-year, revenue-driven, "make-work" "monitoring" contractor, but today adds little or nothing to the multiple layers of protection that homeowners already have as a result of: (1) multi-tiered in-plant manufacturer and Production Inspection Primary Inspection Agency (IPIA) home inspections; (2) third-party Design Approval Primary Inspection Agency (DAPIA) design and quality control approvals; (3) state and federal manufactured housing dispute resolution (DR) programs; (4) manufacturer home warranties; (5) component supplier warranties; (6) manufacturer and/or retailer consumer satisfaction programs; and/or (7) contract, tort, or statutory consumer protection claims that may be available under state law -- and that is without even considering the additional multi-layered protections available to

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

[32] Section 615 includes no such "investigation" mandate, nor does it, therefore, require the investigation of any and all information possibly or likely indicating the existence of a "defect" or "non-compliance." Nor does section 615 require or authorize a multitude of other mandates contained in the Subpart I regulations, including, but not limited to: (1) "class" determinations; (2) "periodic" record reviews; (3) monthly service record reviews; (4) multiple IPIA concurrences; (5) notification or correction of a defect in an appliance; and (6) presumptive inclusion of homes in a class unless affirmatively excluded, among other things.

homebuyers under the state and federal installation programs adopted as a consequence of the 2000 reform law.

By forcing manufacturers to: hire additional employees and use additional man-hours to "investigate" every conceivable scrap of information; to create and review paperwork; to pay for more IPIA time to review and assess that paperwork; and by generating more make-work billing hours for the program monitoring contractor to review those reviews, Subpart I adds substantially to the bottom-line cost of manufactured homes, and, therefore, per se, excludes significant numbers of Americans from the benefits of home ownership, while benefitting only the federal program's revenue-driven "monitoring" contractor.

The National Commission on Manufactured Housing (Commission) – chartered by Congress in 1990 to examine all aspects of the federal program and recommend improvements – recognized the cost, futility and flawed concept of Subpart I. In its August 1994 Final Report, the Commission, comprised of representatives of all stakeholders in the federal program, recommended a significant curtailment of Subpart I that would have eliminated notification "of defects alone" regardless of the existence of any alleged "class," while requiring investigation and potential consumer notification and correction only for "serious defects," defined as "any nonconformance with [the] national manufactured home construction and safety standards that results in a defect in the performance, construction, or material of a manufactured home that constitutes a safety hazard or that affects the home to the extent that it becomes unsafe or otherwise unlivable." The Commission would thus have limited the scope and reach of Subpart I to "safety hazards," and to "serious" safety hazards, at that. Just as importantly, in recommending a significantly scaled-back Subpart I, the National Commission took pains to note that "improper installation," at that time, was "a more frequent source of defects than manufacturing or "design errors."

Ultimately, while the Manufactured Housing Improvement Act of 2000 did not specifically modify section 615, it did enact mandatory nationwide installation regulation and alternate dispute resolution, and those key changes -- as anticipated by Congress and the National Commission -- have fundamentally altered the landscape of consumer protection under the federal law and federal program, as confirmed by the most recent HUD data regarding dispute resolution referrals. Yet, HUD today persists in maintaining and even intensifying the Subpart I of the bygone "trailer" era, imposing new and more costly mandates -- even to the point of altering an MHCC Subpart I reform proposal, at the final rule stage (in 2013), to require expensive, labor-intensive "monthly" IPIA Subpart I record reviews regardless of manufacturer performance.

Given the underlying purpose of the 2000 reform law – to complete the transition of manufactured homes from the "trailers" of yesteryear to legitimate "housing" for all purposes, at all levels of government – Congress affirmatively mandated either state or federal regulation of the installation of every new manufactured home, thus definitively addressing the single largest cause of manufactured home "defects" as determined by the National Commission during nearly two years of hearings. Similarly, by instituting a system of alternate dispute resolution – under either federal or state authority – for issues manifesting during the first year following the initial sale, the 2000 reform law addressed a source of persistent consumer complaints regarding "finger-pointing" between manufacturers, retailers and installers, while providing an additional positive

incentive for those regulated parties to effectively resolve consumer complaints affecting new homes.

The results of these changes, for consumers, have been significant. Again, according to HUD information, the number of referrals to dispute resolution in both the federal system for "default" states and representative state systems – which provide a de facto "barometer" for the overall level of consumer complaints – have been minimal.[33] This objective evidence necessarily confirms two key metrics: (1) that manufacturers are producing homes which fully comply with the federal construction and safety standards; and (2) that defects, when they rarely do occur, are being addressed and resolved in a timely and responsive manner by the industry. Consequently, "reasonable" consumer protection as mandated by the 1974 Act, as amended, has been achieved under the HUD standards, and the program's continuing prioritization – and expansion – of Subpart I mandates is baseless.

Yet, HUD continues to expand and intensify costly Subpart I activity while -- flush with cash from its 156 % label fee increase in 2014 – it creates more "make-work" functions for the program contractor, including, among other things: (1) its baseless mandate for "monthly" (rather than "periodic") Subpart I paperwork reviews overseen by the contractor; and (2) IPIA Subpart I concurrences for non-conformances and related contractor reviews – within a Subpart I system that the Oregon SAA, in a 2002 memorandum provided to the MHCC, emphasized "does little to assist homeowners with everyday problems" and is "a costly and cumbersome process for manufacturers … which produces few timely results."

Eighteen years after the enactment of the 2000 reform law, there is a profound and growing disconnect between the facts demonstrating the superior performance of post-2000 law HUD Code manufactured homes and the direction of the HUD program, with ever more costly, time-consuming and unnecessary paperwork and red-tape (and corresponding focus on minutiae), all redounding to the benefit of its entrenched, 40-year, revenue-driven, "make-work" "monitoring" contractor.

The key changes made to the law in 2000 based on the recommendations of the National Commission – i.e., nationwide installation regulation and dispute resolution – have drastically lowered consumer complaint levels and have created an environment where the costly, harsh and arbitrary mandates of Subpart I can and should be significantly curtailed pursuant to EOs 13771 and 13777 to reduce costs and related regulatory compliance burdens for manufacturers.

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[33] During a lengthy presentation at the April 7-9, 2015 HUD meeting with SAAs, PIAs, manufacturers and others, HUD's dispute resolution contractor disclosed data concerning the federally-administered dispute resolution (DR) program for default states and the state-based DR programs in two "representative" states, Texas and Virginia. That data -- which is consistent with information obtained from HUD in response to a September 2012 MHARR Freedom of Information Act (FOIA) request, indicating an extremely low number of DR referrals within the federal system – is nonetheless startling. According to the data presented, between 2008 and 2014, of the 123,174 HUD Code manufactured homes placed in 23 federally-administered "default" states, only 24 homes -- or .019% -- were referred to federal dispute resolution (then being administered by HUD). Of those 24 referrals, only 3 – or .002% -- were found to actually qualify for DR resolution. Meanwhile, in both Texas and Virginia, the DR referral rate in 2014 was only marginally higher – an identical 1.4% in both states – and still miniscule in comparison to the number of homes delivered and placed in those jurisdictions.

2. HUD'S ON-SITE COMPLETION RULE SHOULD BE WITHDRAWN AND RETURNED TO THE MHCC

HUD, in September 2015, issued a final rule establishing regulations (24 C.F.R. 3282, Subpart M) for the completion of certain manufactured homes at the site of installation. The so-called "on-site" construction rules – effective March 7, 2016 – ostensibly supplanted costly and time-consuming "Alternate Construction" (AC) regulations and procedures that have heretofore been applied to the completion of certain more limited aspects of construction at the home-site.[34]

A new program for the on-site completion of manufactured homes under procedures that would be faster, more flexible and more economical than the cumbersome AC process was among the earliest issues the industry brought to the MHCC and was the subject of a comprehensive MHCC recommendation submitted to HUD. The on-site regulations ultimately promulgated by HUD, however, are a bureaucratic morass of costly paperwork, record-keeping and red tape that completely undermines the objectives underlying the original MHCC proposal and will eliminate the price and construction flexibility advantages that HUD Code manufactured housing could otherwise offer to consumers in competition with site-built, modular and other types of residential construction, through readily available mortgage-type financing.

One of the central reforms of the Manufactured Housing Improvement Act of 2000 was its matching directives to HUD to: (1) "facilitate the availability of affordable manufactured homes" and (2) to "facilitate[e] the acceptance of the quality, durability, safety and affordability of manufactured housing within the Department" itself. For these statutory directives to have any meaningful market impact for American consumers of affordable housing, they must be read, among other things, as a statutory command to HUD to enable and empower manufactured homes to compete on an equal, non-discriminatory, free-market basis with other segments of the housing industry. And it is only through that unconstrained ability to compete and the corresponding freedom from unreasonable, unnecessary or excessive market or governmental restraints, that the public (and especially lower and moderate-income homebuyers) can realize the full benefits of affordable, non-subsidized manufactured homes, as Congress intended when it adopted the 2000 reform law.

Facilitating this kind of open and robust free-market competition to unlock an important new market segment for manufactured housing, while allowing consumers to take full advantage of all the unique attributes and benefits of HUD Code manufactured housing, was a key motivation driving the industry's effort to develop and implement new on-site construction regulations to take the place (in most instances) of the existing – and extremely cumbersome, costly and time-consuming – HUD "Alternate Construction" process. And, in fact, a new program for on-site completion of manufactured home construction under procedures that would be faster, more flexible and more economical than the burdensome AC process, while providing expanded access to non-chattel consumer financing, was among the earliest issues brought to and considered by the Manufactured Housing Consensus Committee -- initially in 2003. Following extensive, thorough and painstakingly detailed debate within the MHCC, a consensus recommendation was submitted to HUD, finally leading to a proposed on-site construction rule, published in June 2010.

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[34] See, 24 C.F.R. 3282.14 regarding alternate construction of HUD Code homes.

That MHCC consensus recommendation, consistent with the original objectives of all program stakeholders, was designed to take full advantage of the price and construction flexibility offered by HUD Code construction to enable the industry to compete more effectively with other segments of the housing industry – including site-built homes and the rental housing industry -- through homes eligible for readily-available mortgage-type financing, and thereby provide beneficial new opportunities for consumers of affordable housing. The MHCC recommendation, however, upon reaching HUD, was transformed into a distorted, convoluted caricature of pointless paperwork, needless record-keeping, red-tape and duplicative, costly, multi-layered "inspections," that has undermined the site-completion market and has pushed manufacturers into the more costly modular housing market in order to meet the needs of consumers seeking site-completed amenities.

Specifically, under the final rule, as detailed by HUD at the January 2016 MHCC meeting, HUD Code manufacturers are responsible for 18 new and separate actions to engage in the on-site completion of one or more homes,[35] and that number reflects only the steps that would need to be taken before the 100% inspection of all such homes on-site by the manufacturer and the manufacturer's IPIA (or IPIA designee), subject, in turn, to oversight by HUD's 40-year, revenue-driven, "make-work" "monitoring" contractor. Nor does it reflect the multitude of new functions – including substantial new paperwork and record-keeping mandates – that IPIAs and DAPIAs would be responsible for, with significant corresponding costs passed-along to manufacturers and, ultimately, consumers. In addition to creating this time-consuming and costly bottleneck in the delivery of homes to consumers, leading to needless but predictable disputes -- the HUD final rule is also over-reaching and over-broad in scope, applying to routine finishing items that were not previously subject to the AC system and have previously been completed with little fanfare, cost, regulatory involvement, or -- most importantly – problems for the homebuyer.

Significantly, HUD, during a presentation regarding this rule at the MHCC's January 2016 meeting, indicated that it had failed to specifically quantify or consider costs related to the requirements of the final rule, contrary to section 604(e)(4) of the Manufactured Housing Improvement Act of 2000. Based on this acknowledgment by HUD and recognizing that the HUD final on-site rule represents a gross distortion of the concept it originally envisaged, the MHCC unanimously adopted a resolution calling on HUD to defer enforcement of the rule for 12 months, while the MHCC reviewed its mandates and related costs for possible revisions. HUD, however, ignored these -- and other repeated requests -- for a deferral of the site-completion rule, and has instead moved forward, demanding full compliance with the final rule.

Based on the foregoing, the on-site construction rule adopted by HUD, rather than enhancing the ability of affordable manufactured homes to compete with site-built structures within the free-market, instead stymies any such competition by subjecting manufactured homes to excessive, overly costly, and discriminatory mandates. As a result, it unnecessarily constrains the affordable housing choices available to Americans, it unnecessarily constrains the growth and

[35] Among the new mandates included by HUD in the final on-site rule (that differ from the proposed rule), are a mandate for "at least monthly" reviews of manufacturer records by in-plant IPIA inspectors. See, 24 C.F.R. 3282.416(a)(4). HUD has never demonstrated, as required by applicable law, any objective need for "at least monthly" reviews – which were formerly conducted on a "periodic" basis, like SAA record reviews (see, 24 C.F.R. 3282.416(b)), which continue to be made on a "periodic" basis, nor has HUD apparently, considered the cost or cost-impact of such time-intensive and personnel-intensive reviews, as required by statute.

evolution of the manufactured housing industry and, as a result, unnecessarily inhibits job growth within the manufactured housing industry, contrary to EOs 13771 and 13777.

The existing rule, therefore, should be repealed and replaced with an amended rule developed and recommended by the MHCC that provides for the on-site completion of manufactured homes in accordance with the federal standards with a minimum of additional regulatory compliance burdens.[36] At the same time, the MHCC should be tasked with developing recommendations to revise HUD's regulations and related procedures concerning the "Alternate Construction" (AC) of manufactured homes in order comply with the purposes and objectives of both the 2000 reform law and EOs 13771 and 13777, to ensure affordability and the availability of manufactured homes for American consumers. This should also include a new requirement in PER section 3282.14(a)(3), that any "conditions" imposed by HUD on an AC[37] be directly related to the modification(s) authorized by the AC and not for unrelated purposes or matters, as such unrelated "conditions" have been abused by HUD (and/or HUD contractors) in the past.

3. HUD SHOULD ADOPT REVISED REGULATIONS FOR INCREASED PAYMENTS TO STATE ADMINISTRATIVE AGENCIES

Pursuant to a recommendation of the MHCC, HUD, on December 16, 2016, published a rule in the Federal Register to amend its current regulations governing payments to State Administrative Agencies (SAAs). Pursuant to the proposed rule, HUD's PER regulations would be amended to "allow for payments to states of (1) $9.00 for each transportable section of new manufactured housing that is located in that state, and (2) $14 for each transportable section of new manufactured housing that is produced in that state."[38] Insofar as the states, under the enforcement structure established by Congress pursuant to the 1974 Act, as amended, are intended to be full partners with HUD, MHARR, in comments filed on February 14, 2017,[39] supported this proposed rule and its increased funding for states participating in the HUD manufactured housing program.

More than a year later, however, HUD has failed to publish a final rule incorporating this increase in state funding, which is essential to ensure continued state participation in the federal manufactured housing program.[40] At the same time that HUD has starved the state SAAs of needed revenue, HUD has substantially increased funding for its entrenched, revenue-driven contractors, which do not operate with anything close to the level of accountability and responsibility that characterize the SAAs and their activities. Accordingly – and in order to avoid the withdrawal of additional states from the HUD program, with their essential activities assumed by unaccountable,

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[36] The repeal and replacement of the existing rule should include the repeal of a related HUD compendium of "Frequently Asked Questions" regarding the on-site regulations, which has been used as a device to impose HUD (and/or contractor) interpretations that alter the meaning and impact of various aspects of the regulations without compliance with applicable procedural safeguards.

[37] See, 24 C.F.R. 3282.14(a)(3): "... the Secretary may issue a letter stating that no action will be taken under the Act based upon specific failures to conform to the standards or these regulations, provided that certain conditions are met."

[38] See, 81 Federal Register No.242 (December 16, 2016) at p. 91083 et seq.

[39] See, Attachment 9, hereto.

[40] At least one major production and shipment state – Michigan – has already dropped-out of the federal program, in part for funding reasons, while this proposed rule has been pending without action by HUD.

revenue-driven contractors -- MHARR urges HUD to complete this rulemaking, which would advance the objectives of EOs 13771 and 13777, on an expedited basis, and to issue a final rule on this matter during 2018.

4. HUD SHOULD ADOPT PROPOSED REVISIONS TO DISTINGUISH BETWEEN MANUFACTURED HOMES AND RVs

On February 9, 2016, HUD, pursuant to a recommendation of the MHCC, published a proposed rule to amend the current exemption from federal regulation for certain recreational vehicles (RVs) set forth in the Part 3282 PER regulations. Under the proposed rule, the RV exemption (including a new specific reference to "park model" recreational vehicles) would be removed from 24 C.F.R. 3282.8 and re-codified at 24 C.F.R. 3282.15. In addition, the proposed rule would delete current PER size specifications used to define and determine whether or not a particular structure is an exempt RV or a regulated manufactured home and replace that dimensionally-based definition with one focused on the designed use of the structure.

MHARR, in comments filed on April 6, 2016,[41] supported the adoption of this proposed regulation, stating:

> "MHARR believes that the HUD proposed rule takes the appropriate approach to this matter: (1) by resolving potential uncertainty regarding the scope and parameters of the RV exemption on a regulatory – rather than statutory – basis; (2) by maintaining the "designed use" conceptual basis of the MHCC consensus recommendation; and (3) by maintaining the primary operational language of the MHCC consensus recommendation, with appropriate technical, editorial and conforming modifications.
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> Further, the proposed rule, by additionally requiring that RVs claimed to be exempt from HUD regulation must be certified by their manufacturer as compliant with either the NFPA 1192-15 standard for conventional RVs or the ANSI A119.5-15 standard for park model RVs -- and, for park model RVs, display a mandatory notice stating, among other things, that the unit is "not for use as a primary residence or for permanent occupancy" -- will provide a supplemental level of consumer protection to ensure that the modifications do not unintentionally result in a class of unregulated de facto homes that would expose consumers to significant safety risks and home value issues. By including these provisions, the rule provides additional objective grounds for HUD enforcement – in addition to any applicable state or local enforcement activity -- in the event of false certifications or other misuse of such RVs."

Again, though, more than two years later, HUD has failed to publish a final rule to implement these revisions, which would address and clarify a continuing subject of confusion

[41] See, Attachment 10, hereto.

and uncertainty, affecting a significant number of diverse stakeholders and government officials at the state and local level. Accordingly, MHARR urges HUD to complete this rulemaking – which would advance the objectives of EOs 13771 and 13777 – in an expeditious manner.

C. HUD SHOULD WITHDRAW ITS 2010 "INTERPRETIVE RULE" REGARDING THE STATUTORY ROLE OF THE MHCC

The Manufactured Housing Consensus Committee, as recommended by the National Commission on Manufactured Housing, was established by Congress as the centerpiece program reform of the 2000 law. The MHCC was designed to have presumptive authority to review and comment on virtually all HUD actions affecting the federal standards and enforcement regulations, and their interpretation, and to develop its own standards and enforcement proposals.[42] The 2000 law thus includes specific statutory mandates as to the types of matters that must be brought before the MHCC (i.e., proposed new or revised standards or enforcement regulations, interpretations, and changes to enforcement-related policies and practices) and when those matters must be brought to the MHCC (i.e., in advance, or be deemed "void" under section 604(b)(6)). It also establishes specific substantive (i.e., section 604(e)) and procedural requirements (i.e., section 604(a)) for MHCC consideration of those matters, as well as actions the Secretary must take with regard to MHCC recommendations (i.e., sections 604(a)(5) and 604(b)(3)-(4)), which can only become operative with the approval of the Secretary.

HUD, however, has consistently attempted to limit and/or erode the substantive role of the MHCC through an unduly narrow interpretation of the 2000 reform law. First, in a May 7, 2004 opinion letter, HUD interpreted the 2000 law to limit the review and comment authority of the MHCC solely to the federal standards and those enforcement regulations that "seek to assure compliance with the construction and safety standards." Thus, by unilateral interpretation of the 2000 reform law, HUD sought to emasculate the statutory authority of the MHCC to consider and address crucial program matters such as regulations related to the program user fee, payments to the states, program budgeting, the use of contractors and the use of separate and independent contractors, among others things, together with a host of other decisions, policies and practices affecting the cost and availability of manufactured housing, but not constituting a formal standard, regulation or Interpretive Bulletin.

Subsequently, on February 5, 2010, HUD issued an "interpretive rule," without prior notice or opportunity for public comment, which effectively divested the MHCC of nearly all its authority under section 604(b)(6) of the 2000 reform law, to review and comment on a wide range of HUD actions involving enforcement policies and practices that do not fall under the formal Administrative Procedure Act (APA) definition of a "rule."[43]

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[42] This expansive view of the authority and jurisdiction of the MHCC was embraced by all the program stakeholder groups represented on the MHCC (see, February 17, 2004 MHCC letter to HUD Secretary Alphonso Jackson, paragraph 2 and related August 11, 2004 MHCC Resolution) and the entire manufactured housing industry (see, June 1, 2004, Coalition to Advance Manufactured Housing, "Analysis of HUD's Interpretation of the Role and Authority of the Manufactured Housing Consensus Committee" generally and at pp.7-8).

[43] See, 75 Federal Register No. 24, February 5, 2010, "Federal Manufactured Home Construction and Safety Standards and Other Orders: HUD Statements That Are Subject to Consensus Committee Processes."

In addition to these sham limitations on the role of the MHCC, HUD has also sought to manipulate the composition of the MHCC to achieve the substantive results that it prefers. In addition to appointing single-issue advocates to the MHCC, and individuals with no "background and experience" in manufactured housing, as required by the 2000 reform law,[44]HUD, for nearly a decade, has totally excluded collective industry representation on the MHCC, at the same time that it has appointed multiple collective-consumer organization representatives. This not only constitutes overt discrimination against the industry – denying it the benefit of its collective and institutional memory, knowledge, know-how and expertise within a uniquely complex regulatory system and framework – but lacks any substantive or supporting basis in applicable law or policy.

Through all of these actions, HUD has effectively excluded from MHCC consensus review and comment, significant program decisions concerning enforcement, inspections and monitoring (such as its entire program of expanded in-plant regulation and the delegation of de facto governmental authority to its program monitoring contractor) which substantially impact the cost and affordability of manufactured housing for consumers – contrary to the letter of the 2000 reform law and to the ultimate detriment of consumers and other program stakeholders.

HUD has claimed, in support of these actions, that "as a private advisory body not composed of federal employees, the MHCC does not have HUD's responsibilities for public safety and consumer protection." Thus, according to HUD, "the Department must ... remain free of the MHCC process to make program decisions that would not be considered rules under the Administrative Procedure Act." This issue, however, was fully addressed during the legislative process leading to the 2000 reform law and is precisely why the MHCC issues recommendations that do not have the force of law unless they are approved by the Secretary and promulgated through notice and comment rulemaking.

Since the power of the MHCC is statutorily confined to recommendations, the law is very broad in identifying the types of HUD actions that must be brought to the MHCC for prior review and comment. In addition to standards, enforcement regulations and interpretations of both, as addressed by sections 604(a) and 604(b) respectively, the "catchall" section of the 2000 reform law, 604(b)(6), was designed to ensure that virtually all quasi-legislative actions of the Department -- as contrasted with quasi-judicial enforcement activities -- whether characterized as a "rule" or not, to establish or change existing standards, regulations and inspection, monitoring and enforcement policies or practices, would be subject to review, consideration and comment, prior to implementation, by the MHCC. This section, which deems any such action "void" without prior MHCC review, was specifically included in the law – and broadly stated -- as a remedy for past abuses where major changes to enforcement procedures and the construction of the standards were developed behind closed doors and implemented without rulemaking or other safeguards.

The 2000 reform law, consequently, addresses the claims made in HUD's 2004 opinion letter by limiting the power of the MHCC to recommendations, not by severely limiting the actions subject to MHCC review as HUD claims. Moreover, to construe section 604(b)(6) to apply only to formal rules – as in HUD's 2010 "interpretive rule" -- makes no sense, because such rules are, by definition, already subject to rulemaking and public comment anyway under the Administrative Procedure Act ("APA"). Further, such a construction, effectively construing section 604(b)(6) to simply be a restatement of sections 551 and 553 of the APA, violates basic cannons of statutory

[44] See, 42 U.S.C. 5403(a)(3)(B)(i).

construction. Given that Congress, in enacting the 2000 reform law, is presumed to have been aware of the relevant, pre-existing APA sections, such a construction: (1) improperly renders section 604(b)(6) mere surplusage; (2) fails to give (the common and ordinary) meaning to every word and provision of the 2000 reform law; and (3) fails to broadly and liberally interpret a clearly remedial statutory provision.

Both the plain language of the relevant provisions and the structure of section 604, show that section 604(b)(6) was designed to ensure a broad opportunity for stakeholder review and comment on program actions through the MHCC consensus process. HUD's attempt to restrict that opportunity through its 2010 "Interpretive Rule," accordingly, has misconstrued the law and has unlawfully limited the role of the MHCC as envisaged by Congress. As a result, the February 5, 2010 HUD "Interpretive Rule," is a regulatory action that should be repealed pursuant to EOs 13771 and 13777. Moreover, the collective representation of the industry on the MHCC should be restored with the appointment of full-time staff representatives to the MHCC from both MHARR and MHI.

D. HUD SHOULD WITHDRAW AND REPEAL CERTAIN "OPERATING PROCEDURES" AND RELATED MEMORANDA

1. HUD SHOULD WITHDRAW ALL "OPERATING PROCEDURES" MEMORANDA AND MATERIALS RELATING TO EXPANDED IN-PLANT REGULATION

HUD's program of expanded in-plant manufactured housing regulation, initiated in 2008 with no evidence of systemic deficiencies in the then-existing regulatory model (seemingly designed to sustain and generate substantial additional revenues for the program's entrenched, 40-year, de facto sole-source monitoring contractor in the face of a significant decline in manufactured housing production), and implemented in all phases by HUD in 2014, is a premier illustration of the Department's regulatory over-reach and violation of key reform provisions of the 2000 law – and resulting harm to the program, the industry and consumers of affordable housing.

Originally characterized as "cooperative" and "voluntary" by HUD,[45] this program which, according to the Department itself, fundamentally changed the focus, basis and emphasis of HUD in-plant production regulation,[46]was subsequently re-characterized as "not voluntary" by the Department, with no public process – in violation of both the 2000 reform law and the Administrative Procedure Act (APA) -- in 2010.[47] Since August 2014, this program has been enforced on a mandatory basis through arbitrary, subjective and costly in-plant "audits" conducted by HUD's "monitoring" contractor,[48] based on criteria exceeding the existing HUD Manufactured

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[45] See, MHARR March 4, 2010 letter to William W. Matchneer, III, Associate Deputy Secretary for Regulatory Affairs and Manufactured Housing.

[46] See, Minutes, Manufactured Housing Consensus Committee meeting, June 17, 2008 at p. 2. "Inspectors currently look at number of errors rather than a quality system. HUD will be directing their resources to be aimed at quality control system[s]."

[47] See, HUD (William W. Matchneer, III, Associate Deputy Assistant Secretary for Regulatory Affairs and Manufactured Housing) Memorandum dated March 3, 2010.

[48] The Institute for Building Technology and Safety (IBTS) has held the HUD manufactured housing program "monitoring" contract (albeit under differing corporate names) continuously since the inception of federal regulation

Housing Construction and Safety Standards (HUD Code) contained in a collection of non-regulatory and extra-regulatory materials (developed and/or modified at least in part by the same "monitoring" contractor)[49] including, but not limited to, "enhanced" inspection checklists, "Standard Operating Procedures," program "Field Guidance" memoranda,[50] an "Investigation and Reporting of Quality System Issues (QSI)" "guidebook," and other related materials.[51] Neither these criteria and materials, or the HUD program of expanded in-plant regulation itself, however, was ever subjected to the due process, stakeholder participation, accountability and transparency requirements of the 2000 reform law.

Because the HUD program, prior to the 2000 reform law, repeatedly relied on "interpretations" developed behind closed doors without the involvement or input of the public, program stakeholders, or regulated parties, to alter the effective meaning of existing standards and regulations, thereby unilaterally imposing new de facto regulatory mandates, Congress required in the 2000 reform law, that: (1) all new and amended standards and/or regulations be presented to the MHCC for consensus review and recommendations;[52] (2) that all new "Interpretive Bulletins" concerning the standards and/or regulations be presented to the MHCC for consensus review and recommendations;[53] and (3) that any "statement of policies, practices, or procedures relating to [the] construction and safety standards, regulations, inspections, monitoring, or other enforcement activities that constitutes a statement of general or particular applicability to implement, interpret or prescribe law or policy," must be brought to the MHCC for consensus review and recommendations.[54] Congress also provided that "any" such "change" – absent a declared public health or safety emergency – adopted without full compliance with the consensus committee procedures of section 604, is "void,"[55]while it mandated specific follow-up steps by the HUD Secretary upon receipt of an MHCC standards recommendation,[56] including the publication of all such recommendations, whether accepted or rejected, mandatory action by the Secretary within 12 months of submission, notice and comment rulemaking and sanctions for any failure to act within 12 months) or a proposed regulation or interpretation,[57] including publication of an approved recommendation for notice and comment, and a written explanation to the MHCC for any rejected recommendation, together with publication of the reasons for such rejection, or recommended modifications, in the Federal Register.

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in 1976 under successive de facto sole-source procurements utilizing evaluation and award criteria tailored to IBTS' specific experience as the program's sole monitoring contractor. IBTS was awarded its most recent five-year "monitoring" contract (with total compensation of $25,006,546.00) in August 2013. In 2014, according to public federal tax filings, IBTS revenue from the HUD manufactured housing contract accounted for more than one-quarter of its total revenues (i.e., 26.3%).

[49] See e.g., HUD FOIA October 21, 2014 production, July 16, 2009 communication from then-IBTS employee Jason McJury (and current HUD employee) to HUD.

[50] See, HUD Memorandum dated June 23, 2008.

[51] See, materials included in Attachment 11, hereto.

[52] See, sections 604(a)(4), 604(b)(1) and 604(b)(3).

[53] See, section 604(b)(3).

[54] See, section 604(b)(6).

[55] HUD, ironically via an alleged "Interpretive Rule" issued in February 2010 without opportunity for public comment, attempted to emasculate and effectively nullify section 604(b)(6) of the 2000 reform law. Section III(C), supra, addresses this rule and calls for its repeal.

[56] See, section 604(a)(4)-(5).

[57] See, section 604(b)(4).

Given the fact that HUD's program of expanded in-plant regulation changes program policies, practices and procedures with respect to the focus, extent and basis of in-plant regulation, inspections and monitoring, that program – and all its constituent elements – regardless of how characterized or denominated by HUD, should have been brought to the MHCC for consensus review and recommendations. No such review, however, has ever occurred. Moreover, when HUD did refer certain proposals related to this program to the MHCC in 2008, those proposals did not gain consensus support and, as a result, were effectively rejected. Rather than returning to the MHCC at any point, however – or publishing the elements of its program for notice and comment -- HUD chose to unilaterally impose its full program of expanded in-plant regulation in violation of the law and its resultant status under the 2000 reform law as a "void" agency action.

Significantly, by circumventing the MHCC and its consensus process, as well as the further requirements of the 2000 reform law regarding mandatory response, publication and notice and comment procedures for any matter emerging from the Committee (and by failing to otherwise publish its program of expanded in-plant regulation as a new or amended regulation or Interpretive Bulletin), HUD purposely evaded the requirements of section 604(e) of the 2000 reform law. That section directs both the MHCC and the Secretary of HUD, in recommending or establishing standards, regulations, or interpretations, to consider both: (1) "the extent to which any such [action would] contribute to carrying out the purposes of" the 2000 law; and (2) "the probable effect of such [action] on the cost of the manufactured home to the public." Through these directives, the law requires the MHCC and HUD to determine that any change to the regulations and/or their interpretation is both objectively justified in relation to the purposes of the 2000 reform law, and cost-effective from the standpoint of maintaining the congressionally-recognized affordability of manufactured housing.

An analysis of the available evidence relevant to these requirements shows *why* HUD chose to circumvent the MHCC and proper rulemaking. First, there was – and is -- no evidence of any objective need or justification for the wholesale change in regulatory focus and procedures ushered-in by HUD's program of expanded in-plant regulation. Under the 2000 reform law, alternative dispute resolution programs for manufactured housing "defects" are mandated in every state – either pursuant to state law or a federal "default" program administered by HUD. Insofar as these programs address "defects" reported during the first year after the sale of a manufactured home, DR referrals are a direct barometer of home quality, manufacturer quality assurance and overall compliance with the HUD standards. Information disclosed by HUD, however, shows that between 2008 and 2014 (spanning a period pre-dating the expanded in-plant regulation program to just before its mandatory implementation), of the 123,174 HUD Code homes sited in 23 federally-administered states, only 24 homes – or .019% -- were referred for dispute resolution and of those 24 referrals, only 3 homes – or .002% -- were found to actually qualify for DR resolution under standards (24 C.F.R. Part 3288) adopted by HUD. In two representative states with state administered DR programs (i.e., Texas and Virginia), the DR referral rate was only marginally higher, at 1.4%. From this evidence, it is clear that HUD's pre-existing in-plant inspection regime already provided manufactured housing residents the "reasonable protection" required by applicable law.

Second, HUD has never offered any evidence or basis to demonstrate that its program of expanded in-plant regulation is cost-justified. Anecdotal evidence available from manufacturers,

however, shows that the costs of responding to repeated multi-day production facility audits based on arbitrary and ever-shifting criteria and "monitoring" contractor demands, involving additional employee-hours, documentation, response time and other new and additional costs, is substantial and disproportionately impacts smaller industry businesses.[58] Furthermore, to the extent that HUD's program of expanded in-plant regulation is not objectively justified in relation to the purposes of the 2000 law, any additional costs that it imposes would be excessive by definition and an unwarranted and unnecessary burden on consumers, particularly the lower and moderate income homebuyers who rely the most upon the affordability of HUD Code manufactured housing.

Nor have the full costs and negative impacts of expanded in-plant regulation been realized to date. Given the extra-regulatory status of the program and the absence of any procedural or substantive safeguards connected to its evolution or enforcement, the program is, effectively, a platform for the imposition of virtually any type of subjective, arbitrary, or capricious demand that HUD and/or its revenue-driven "monitoring" contractor wishes to impose on any regulated party at any time.[59] And, insofar as the most recent HUD "monitoring" contract directs the program contractor to "resolve" disputed "quality assurance" issues directly with Primary Inspection Agencies wherever possible, without HUD involvement, the program contractor is free to impose whatever demands it wishes based on its own construction of extra-regulatory criteria and sources with no transparency and/or direct accountability to HUD officials.

Based on the above, HUD's program of expanded in-plant regulation violates the 2000 reform law and has no basis or justification grounded in fact. To the extent that it expands and extends in-plant regulation without basis or justification, it constitutes useless "make-work" for HUD's monitoring contractor that imposes needless costs on manufacturers with no quantifiable corresponding benefits whatsoever for consumers. To the extent, then, that this program entails all costs and no demonstrated benefits, it should be repealed in toto pursuant to Section 3(d) of EO 13777.

2. HUD SHOULD WITHDRAW ALL PRE- 2000 "GUIDANCE" REGARDING THE SCOPE OF FEDERAL PREEMPTION

On January 23, 1997, HUD published a "Notice of Staff Guidance" on the construction, scope and application of federal preemption under the 1974 Act.[60]HUD stated in that notice that the "guidelines" set forth therein were "not binding on either HUD or the public" and were being

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[58] A 2010 report by the U.S. Small Business Administration, "The Impact of Regulatory Costs on Small Firms," concluded that "small businesses, defined as firms employing fewer than 20 employees, bear the largest burden of federal regulations."

[59] It must also be noted that due to "make work" monitoring contractor activity under HUD's program of expanded in-plant regulation, annual HUD payments to the monitoring contractor between 2007 and 2014 grew by more than 50%, while per capita direct HUD payments to the monitoring contractor increased by 127%, despite a 32.8% decline in annual industry production over the same period. This ongoing expansion of the role and compensation of the monitoring contractor directly contradicts Congress' directive in the Report accompanying the Transportation and Housing and Urban Development and Related Agencies Appropriations Bill of 2015, stating: "...[T]he Committee recognizes that manufactured housing production has declined substantially since peak industry production in 1998, and continues to decline due to a variety of factors. Expenditures supporting the [manufactured housing] programs should reflect and correspond with this decline, which has specifically reduced the number of inpsections and inspection hours required for new units." (Emphasis added).

[60] See, 62 Federal Register, No. 15, January 23, 1997, at p. 3456, et seq.

published for "informational purposes only. Subsequently, on May 5, 1997, HUD published a "Statement of Policy" concerning federal preemption under the 1974 Act and state or local zoning ordinances, and/or decisions that exclude HUD Code manufactured homes.[61]Both of these pre-2000 reform law statements construed the scope of federal preemption in extremely narrow terms, effectively sanctioning the exclusion of HUD Code manufactured homes from vast areas of the nation based on discriminatory criteria masked as "zoning" measures. In view of the significant enhancement of federal preemption mandated by Congress in the 2000 reform law, however, it is long past time for these outdated, superseded and regressive interpretations of federal preemption to be formally withdrawn and replaced with a new statement on the scope of federal preemption based on the express terms of section 604(d) of the 2000 reform law.

The excessively narrow interpretation of federal preemption maintained by HUD under the 1974 Act *should* have changed *completely* – and immediately -- in the wake of the 2000 reform law. Among other things, that law added a new sentence to the original preemption provision, stating:

> "Federal preemption under this subsection shall be *broadly and liberally construed* to ensure that disparate *state or local requirements or standards* do not affect the uniformity and comprehensiveness of the [federal] standards promulgated under this section nor the federal superintendence of the manufactured housing industry...." (Emphasis added).

With this *statutory* amendment, Congress made two *key changes* to federal preemption. First, it *legislatively overruled* – with express, unequivocal and unmistakable language – HUD's pre-existing unduly narrow interpretation and application of federal preemption. Second – and, again, directly contrary to HUD's narrow approach to preemption -- it explicitly *expanded* the *scope* of that preemption. Thus, while HUD had previously ruled that the federal standards could only preempt state or local construction or safety *standards*, the 2000 reform law expressly expanded the reach of federal preemption to also include state or local "*requirements*" that interfere with federal "superintendence" of the industry and, by natural extension, to the accomplishment of the federal law's purposes, including expanding the availability and affordability of manufactured housing.

Following the 2000 reform law, in yet another internal "guidance" document HUD maintained that the 2000 law actually changed nothing regarding preemption. In discredited "guidance" regarding then-"Recent Program Activity," HUD stated: "Does the 2000 Act expand the scope of federal preemption? *No,* though revised language in section 604(d) does require that the original preemption provision be 'broadly and liberally construed,' *HUD does in fact take a broad and liberal view with regard to preemption of state and local standards when they actually conflict with HUD's Manufactured Home Construction and Safety Standards.*" (Emphasis added).

HUD's assertion that it was already taking a "broad and liberal view" of preemption under the Chrysler Corp. v. Tofany and Chrysler Corp. v. Rhodes cases, before the 2000 reform law, is demonstrably false. The courts in both of those cases concluded that the "same aspect of performance" language in the National Traffic and Motor Vehicle Safety act of 1966 statute should

[61] See, 62 Federal Register, No. 86, May 5, 1997, at p. 24337, et seq.

court, in fact, stated: "we conclude that the 'aspect of performance' language in the preemption section of the Act must be construed *narrowly*." (Emphasis added). For HUD to claim, then, that before the 2000 law, it was already construing preemption "broadly," under cases which specifically state that preemption is to be construed "narrowly," is absurd.

The fact of the matter, is that when Congress passed the 2000 reform law, it was well aware of HUD's microscopic approach to federal preemption and [fire] sprinkler preemption in particular. Thus, the 'broad and liberal' provision of the 2000 reform law *directly overruled* HUD's unduly narrow pre-2000 interpretation of federal preemption. Further, for HUD to claim, without any basis whatsoever, that the 2000 law did not expand the scope of preemption under the law – when Congress specifically added "*requirements*" (and not just construction and safety "standards") to the *type* of state or local enactments that could be preempted (note how the word "requirements" is omitted from the language quoted in HUD's "guidance" document) -- is again, a misrepresentation of the 2000 reform law. Which makes it all the more incredulous and indefensible that HUD, for over two decades, has left on the books "Statements of Staff Guidance" regarding federal preemption, adopted *before* the 2000 reform law, that fail, in any way, to reflect the changes made to federal preemption by Congress.

For more than a *decade* after the enactment of the 2000 reform law, then, HUD maintained the unsupportable fiction that the 2000 law did not make any *real* change to federal preemption and that, as a result, it did not need to change its administrative approach to preemption. This position not only conflicts with the plain meaning and legislative history of the changes made in the 2000 reform law but has resulted in significant harm to both the HUD Code industry and the lower and moderate-income American families who depend on manufactured housing as the nation's premier source of affordable, non-subsidized home-ownership. By continuing an unduly narrow approach to federal preemption, HUD has allowed localities to use alleged "standards" and various other types of mandates, including supposed "zoning" ordinances and requirements, to effectively exclude and discriminate-against the industry, its products and, most importantly, the Americans who seek to purchase and own a manufactured home of their own.

The time has come for HUD to conduct a thorough reassessment of the state of federal preemption under the 2000 reform law, in order to make it consistent, logical and predictable, to preserve legitimate state authority as provided by the 2000 reform law, and to accomplish the laudable and *necessary* goals of that legislation. The Executive Order 13771/13777 regulatory review process provides a proper and necessary mechanism for that review. Pursuant to that process, HUD should (1) withdraw all "guidance" documents and other directives issued prior to the 2000 reform law; (2) fully implement the enhanced federal preemption mandated by the 2000 reform law, including the preemption of "zoning" and placement restrictions which discriminatorily exclude HUD code manufactured housing; and (3) engage the MHCC to develop new, replacement guidance on the scope and applicability of the enhanced federal preemption mandated by the 2000 reform law.

E. HUD SHOULD WITHDRAW OR AMEND ITS PENDING FROST-FREE "INTERPRETIVE BULLETIN"

HUD, pursuant to EOs 13771 and 13777, should halt — and reject - current and ongoing regulatory activity by the federal program to force states with state-law manufactured home installation standards and programs to comply with and adopt federal installation mandates.

Coupled with dispute resolution, the installation provisions of the 2000 reform law were adopted to close significant gaps in the original National Manufactured Housing Construction and Safety Standards Act of 1974, as construed by HUD. Although the industry has always supported sound consumer protection and the safe and proper installation of manufactured homes (which had been at the root of the overwhelming majority of consumer complaints prior to the 2000 law), HUD determined, soon after the enactment of the original 1974 federal manufactured housing law, that it would not address the installation of manufactured homes, because that law did not include specific authorization for such standards.

Recognizing, however, that proper installation is crucial: (1) to the proper performance of a manufactured home; (2) to the value of that home to its owner and consumer finance providers; and (3) to public and government acceptance of manufactured homes as legitimate "housing," rather than 'trailers," the industry, consumers and other stakeholders worked, for nearly 12 years, to develop the installation provisions that were ultimately included in the 2000 reform law.

The result was a statutory structure, based on the 1994 recommendations of the National Commission on Manufactured Housing, which authorized any state that wished to do so (i.e., a "complying' state), to establish (or continue) a state-law installation program and state-law installation standards, so long as those requirements provided protection that met or exceeded baseline federal standards to be developed by the Manufactured Housing Consensus Committee and adopted by HUD. HUD, by contrast, was authorized to regulate installation only in noncomplying (i.e., "default") states that failed to adopt a state-law installation program within five years of enactment of the 2000 law.

This structure was consistent with the nearly-universal view of program stakeholders that varying soils and other installation-related conditions in different geographical areas made states the best and most appropriate party to regulate the siting of manufactured homes. The 2000 reform law, consequently, allows states to take the lead role in the regulation of installation, with HUD assuming that duty only in default states that fail to adopt and implement a conforming state-law program.

What the 2000 reform law does not do, however again recognizing, as it does, the unique competence and ability of the states and state authorities to determine proper installation systems and techniques within their own borders — is authorize or direct HUD to substitute its judgment for that of state authorities regarding the specific details and elements of any given state installation standard. Put differently, the 2000 law allows HUD to determine whether a state-law installation program and state-law installation standards as an integrated "whole" provide consumers with a level of protection equal-to-or-greater-than the HUD standards for default states at the time of the initial acceptance of those programs, but does not provide back-door authority for HUD to

micromanage state-law programs and/or standards or over-ride state judgments regarding the need for - or content of any specific installation requirement.

As early as 2004, MHARR voiced concern that HUD, contrary to the structure, language and intent of the 2000 reform law, was committed to 'totally federaliz[ing] installation regulation under ... its control." And, in fact, HUD has consistently sought to undermine the law's clear division of federal-state responsibility and its preference for state regulation of installation (including an express reservation of state installation authority added to the preemption section of the law), beginning with its separation of the baseline federal installation standards and program from the preemptive Part 3280 Federal Manufactured Housing Construction and Safety Standards, thus giving rise to the "re-codification" of installation, which MHARR vigorously opposed.

Now, HUD — through a double-edged process — is attempting to effectively federalize manufactured home installation regulation in all fifty states and thereby nullify the federal-state partnership that lies at the core of the HUD program as envisaged by Congress. In one part of this process, HUD (both directly and via a non-accountable installation contractor) is attempting to use the State Plan approval and re-certification process to over-ride and replace — or compel state officials to revise, modify and replace — state-adopted installation standards in complying states, based upon the "equal or greater protection" language of the 2000 law. In the second part of this process, HUD has asserted — for the first time since the inception of installation regulation under the 2000 reform law — that new HUD interpretations of the federal installation standards for default states are binding, not only in those default states, but in states with compliant state-law installation standards and programs. Pursuant to this scheme to undermine state authority as specifically incorporated within the 2000 reform law, HUD has proposed — and presented to the MHCC — a supposed "Interpretative Bulletin" that, in fact, would substantively modify provisions of the federal installation standards for default states regarding manufactured home foundations in freezing climates.[62]

MHARR has directly and strenuously objected to both of these actions as a blatant abuse of HUD's authority and has called for both actions to be halted. [63] HUD's intentional distortion and misapplication of the installation mandate of the 2000 reform law — seeking to undermine, restrict and ultimately abolish the legitimate role and authority of the states as established by Congress,[64] will result in significant harm for the industry and consumers, and impose needless and excessive regulatory compliance costs. Accordingly, both elements of this effort to negate state installation authority should be terminated pursuant to EOs 13771 and 13777.

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[62] See, proposed Interpretative Bulletin 1-1-17.

[63] See, Attachment 12 hereto, MHARR December 9, 2016 comments regarding proposed Interpretative Bulletin I-I-17. See also, MHARR April 14, 2016 correspondence to Pamela Danner, manufactured housing program administrator.

[64] The importance of preserving state authority as a counterweight to excessive or unreasonable federal regulation, was addressed by House of Representatives Majority Leader Kevin McCarthy, in an article published June 1, 2017: "[S]ome parts of Washington have gathered up power for decades while simultaneously shedding accountability. States, which have always been more accountable to the people, were reduced to implementers of federal policy. *** People have more power when states have more power because states are, by their nature, closer and more responsive to the people." See Majority Leader Kevin McCarthy, "Washington's Power Shift: How Congress is Enacting Trump's Call to Drain the Swamp."

F. HUD SHOULD WITHDRAW OR AMEND CERTAIN "FIELD GUIDANCE" MEMORANDA ISSUED WITHOUT MHCC CONSIDERATION OR OTHER DUE PROCESS

Insofar as all changes to the HUD standards and PER regulations, as well as changes to "policies," "practices" or "procedures related to any aspect of enforcement, whether denominated as an "interpretation," or otherwise, must be submitted to the MHCC, pursuant to section 604(b)(6) of the 2000 reform law for prior review, consideration and recommendations, or – absent such review -- be deemed presumptively "void," each of the following "guidance" or interpretive memoranda, imposed without MHCC review or consideration must (in addition to any relief sought above) be withdrawn and submitted to the MHCC for proper consensus consideration in accordance with section 604(b)(6) of the 2000 reform law:

(1) Frost-Free guidance (as distinguished from the pending Frost-Free IB);
(2) Field Guidance and related memoranda on expanded in-plant regulation;
(3) Memoranda concerning attached garages and "add-ons (June 12, 2014) and (November 10, 2014);"[65]
(4) Field Guidance on attic insulation (March 1, 2014)
(5) Field Guidance on Air ducts (May 1, 2014)
(6) RV Exemption memorandum (October 1, 2014) and (January 20, 2015)
(7) Memorandum on single-family use (October 3, 2014)
(8) Memorandum on electrical connection workmanship (December 5, 2014)
(9) Memorandum on mixing valves (March 10, 2015)
(10) Memorandum on deviation reports (August 31, 2015)
(11) Memorandum on chassis bonding connections (August 31, 2015)
(12) Memorandum on off-line fabrication (February 25, 2016)
(13) Memorandum on site-completion (August 17, 2016)
(14) Memorandum on Professional Engineer/Registered Architect seals for wind zone II and III structural designs (December 7, 2016).

Accordingly, MHARR seeks the withdrawal of each and every such interpretive memorandum or "field guidance" document,[66] subject to full consensus review by the MHCC and further recommendations concerning those interpretations (including potential recommendations for the permanent withdrawal of such interpretations). Further, HUD, in accordance with the 2000 reform law and EOs 13771 and 13777, should discontinue the use of such "field guidance" or related memoranda, as being in fundamental conflict with the consensus and due process safeguards of that law, and Trump Administration regulatory policy.

[65] See, MHARR communication to HUD dated March 9, 2015 seeking the withdrawal of this baseless, unilateral "interpretation."

[66] This listing of "field guidance" and related interpretive memoranda is not necessarily exhaustive. All such "field guidance" and related documents, however, should be withdrawn and – if necessary and appropriate – submitted to the MHCC for review, consideration and recommendations in accordance with the 2000 reform law.

The HUD manufactured housing program has had the same monitoring contractor (i.e., the same continuing entity, with the same personnel, albeit under different names — initially the "National Conference of States on Building Codes and Standards" then "Housing and Building Technology," and now the "Institute for Building Technology and Safety') since the inception of federal regulation in 1976. Although the monitoring function contract is subject, nominally, to competitive bidding, the contract is a de facto sole source procurement. Because the federal program is unique within the residential construction industry and no other entity has ever served as the monitoring contractor, no other organization has directly comparable experience. Thus, solicitations for the contract have been based on award factors that track the experience and performance of the existing contractor, effectively preventing any other bidder from competing for the contract. Moreover, the one time that another organization did submit a bid, its lower-priced offer was subject to a second round of analysis that ultimately resulted in an award to the incumbent contractor.

As it has been structured by the program since the inception of federal regulation four decades ago, the monitoring contract is not only fatally-flawed in its process — i.e., its failure to generate full and fair competition as required by applicable law — but is also substantively flawed, in that it creates a distinct financial incentive for the contractor to find fault with manufactured homes (regardless of whether any fault actually exists) and to pursue the expansion and extension of regulatory and pseudo-regulatory mandates in order to increase revenues.

Beyond these fatal structural flaws, without new ideas and new thinking, the program effectively, remains frozen in the 1970's and has not evolved along with the industry. This is one of the primary reasons that the federal program, government at all levels and other organizations and entities continue to view and treat manufactured homes as 'trailers," causing untold difficulties for the industry and consumers, including financing, zoning, placement and other issues. The 2000 reform law, moreover, was designed to assure a balance between reasonable consumer protection and affordability. But the HUD program and the entrenched incumbent contractor have a history of continually ratcheting-up regulation, with more detailed, intricate and costly procedures, inspections, record-keeping, reports and red-tape, despite the fact that consumer complaints regarding manufactured homes, as shown by HUD's own data, are not only minimal, but on a downward trend.

For the manufactured housing industry to recover and advance substantially from the decline of the past two decades, this cycle must be broken, and the federal program must be brought into full compliance with the objectives and purposes of the 2000 reform law. For decades MHARR has documented the slow but steady accretion of more and more program functions in that one and only "monitoring" contractor which – according to the specific definition of "monitoring" included by Congress in the 2000 reform law to limit the power and authority of the monitoring function and contractor[67]– is supposed to ensure the proper performance of the program's third-party Primary Inspection Agencies. Along with these extended functions have come a steady increase in power, authority and influence within the program, as reflected by multiple contractor-initiated and/or contractor-developed pseudo-regulations (e.g., "Acceptable

[67] See, 42 U.S.C. 5402(20): "'monitoring' means the process of periodic review of the primary inspection agencies, by the Secretary or by a State agency ... which process shall be for the purpose of ensuring that the primary inspection agencies are discharging their duties under this title."

Quality Level," " Computer Coded Items" and others), *de facto* standards and expanded in-plant regulation, as well as multiple layers of costly, time-consuming policies, procedures, practices, criteria, "checklists" and *de facto* "interpretations" of virtually every aspect of the HUD regulatory program, *none* of which have ever gone through notice and comment rulemaking, as required by law, *or* been proven to produce corresponding benefits for homeowners.

HUD program officials have continually denied that the monitoring contractor exercises substantial discretionary power within the program – the very hallmark of inherently governmental authority – just as they have denied the continually-expanding role and pervasive influence of the monitoring contractor, even as both have clearly evolved and grown over the past 40 years. Those same officials – also for decades – routinely dismissed (or ignored) complaints of systematic abuses by the "monitoring" contractor ranging from arbitrary, subjective and baseless regulatory demands, to excessive paperwork and red tape that needlessly inflate regulatory compliance costs to the ultimate benefit of exactly no one (except the contractor and its bottom line). Worse yet, in a disturbing number of cases, regulated parties that approached HUD were targeted for reprisals and retribution.

As with so many other matters, the law is squarely on the side of industry members and consumers. Based on aggressive MHARR documentation and education efforts in Congress during the 19080s and 1990s, as well as MHARR's participation in and exposure of these issues at National Commission on Manufactured Housing, in numerous industry forums and at multiple congressional hearings, Congress, took significant steps in the Manufactured Housing Improvement Act of 2000 to curb the power of all contractors within the HUD program – but especially the entrenched "monitoring" contractor -- to prevent any one contractor, in the future, from amassing so many program functions that it effectively controls the policy and direction of the program based on its own self-interest.

These limiting provisions include, among others: (1) the "separate and independent contractors" requirement of section 623, which was the basis for the recent termination of the "monitoring" contractor's dispute resolution subcontract; (2) the definition of "monitoring" inserted in section 603, which specifically restricts the "monitoring" function to the "periodic review of ... primary inspection agencies ... for the purpose of ensuring that the primary inspection agencies are discharging their duties" under the law; (3) section 604(b)(6), which requires that all changes to program policies, procedures and practices be brought to the MHCC and subjected to notice and comment rulemaking, regardless of what they are called or how they are characterized by HUD and/or the "monitoring" contractor; and (4) the provision for an appointed, non-career program Administrator, in order to assure strong, transparent and responsive program accountability in all matters, including contracting and the proper (limited) role of program contractors.

The 2000 reform law, therefore, *if* fully and properly implemented, has the necessary safeguards to break the accumulated power of the entrenched "monitoring" contractor and move the program back to a healthy, lawful and effective contracting structure and regimen, where a genuine "monitoring" contractor would perform the limited ministerial function of "periodically review[ing]" the PIAs and accountable HUD officials – subject to federal government ethics law and regulations -- would be in firm control of program policy and direction, rather than a self-

interested revenue-driven private actor. But, as has been the case with far too much of the 2000 law, its key contracting reforms have been honored more in the breach than in actuality. Not surprisingly, then, the Government Accountability Office (GAO) in its July 2014 report on HUD's implementation of the 2000 reform law, pointed out significant "questions and uncertainties about HUD's oversight of the monitoring contract...."

In order to expose and document the true and full extent of the *de facto* domination of the HUD program by the "monitoring" contractor, MHARR in its comprehensive September 2012 Freedom of Information Act (FOIA) request to HUD, sought multiple categories of documents relating to the activities and program functions of the contractor, including its current contract. And although HUD's response took over two years, it nevertheless was truly revealing, in that it disclosed, for the first time, a full copy of the most recent "monitoring" master contract (executed in 2013), which MHARR has reviewed and analyzed.

That contract, covering up to five years for a total of $25 million-plus, provides confirmation of the pervasive and improper role of the monitoring contractor. While boilerplate recitations in the contract pay lip service to the narrow and limited "monitoring" function described in the 2000 reform law, the actual contract work tasks go well beyond that limited function. Thus, among other things, the "monitoring" contractor, is tasked with:

- *Developing* in-plant audit procedures under HUD's unilateral program of expanded in-plant regulation;
- Reviewing IPIA responses in disputed matters and preparing written counter-replies *for HUD*;
- Drafting IPIA Performance Reviews *for HUD*;
- Providing responses *for HUD* in disputes with IPIAs;
- Proposing revisions to the Audit Procedures Manual and the Procedural and Enforcement Regulations to "improve the process;"
- Preparing reports on "potential" design or quality assurance deficiencies found during DAPIA reviews and *seeking to "resolve"* such items – sending a report to HUD only if the item cannot be resolved between the DAPIA and the contractor;
- Providing "recommendations" for specific HUD corrective or *enforcement* actions against DAPIAs;
- Developing checklists to be used in evaluating State Administrative Agency procedures and methods;
- Conducting post-production inspections to "verify" retailer compliance;
- Preparing evaluation reports *for HUD* in connection with consideration of the acceptance of new or modified State Plans;
- Participating in research, review and developing proposed action and follow-up for "special design and construction requests;"
- Conducting unspecified "special investigations;"
- Analyzing and researching "technical issues" *for HUD*;
- *Evaluating* findings to "determine the validity and strength of evidence collected during audits;"
- Providing "expert testimony" and "engineering support" to "assist" HUD;

- Reviewing any application by a state or organization to be approved as a new IPIA, DAPIA or SAA; and
- Preparing a "draft" acceptance report on any such application *for HUD*.

(Emphasis added).

In examining these functions both individually and collectively, it is evident that for large portions of the regulatory authority of the federal manufactured housing program, the so-called program "monitoring" contractor, contrary to the 2000 reform law -- and broader federal law on the delegation of inherently governmental authority -- is, in actuality: (1) the "legislature," developing *de facto* requirements, procedures and qualifications; (2) the *de facto* judge *and* jury, gathering evidence, evaluating that evidence, and drawing conclusions that are then submitted for HUD to rubber-stamp; and (3) a *de facto* enforcer, with the power to impose its own interpretation of everything and anything on regulated parties without HUD ever being involved (see, e.g., bullet number six, above).

Of course, the tasks specified in the 2013 "monitoring" contract are phrased in language designed to foster the *impression* that the contractor does not exercise inherently governmental *discretionary* authority. But, as the list of contract functions demonstrates, a multitude of discretionary issues are effectively decided by the contractor without action or involvement by HUD. And even when such actions and decisions do go back to HUD, it is evident that HUD is so pervasively dependent on the contractor that the contractor's decisions and "recommendations" are, effectively, final in a way that is rejected by relevant guidance from the Office of Management and Budget (OMB) and other federal agencies: "*even where Federal officials retain ultimate authority to approve and review contractor actions, the contractor may nonetheless be performing an inherently governmental action if its role is extensive and the Federal officials' role is minimal.*" (Emphasis added).

The impact of this excessive, revenue-driven contracting system on the HUD program, HUD's erstwhile state partners, the industry and, most importantly, consumers, has been devastating, excessively costly and ruinous, and is getting worse. Indeed, HUD's failure to facilitate one of the two *primary* goals of the 2000 reform law – to "facilitate the availability of affordable manufactured homes and … increase homeownership for all Americans" – is a direct outgrowth of this distorted, dysfunctional and arguably illegal contracting system.

It is thus essential that the program ensure that there is full and open competition for the monitoring contract. Accordingly, the monitoring contract, which expires in August 2018, must be re-solicited pursuant to fundamentally modified award criteria (for a unitary contract – not two separate contracts, as presented at the November 17, 2017 "industry day" event -- that could be awarded to, and held by, the same contractor) that that do not penalize or ward off new bidders without direct pre-existing program experience, and a structure that does not provide a financial incentive for excessive or punitive regulation. Instead, any new program "monitoring" contract should: (1) drastically reduce the functions assigned to the "monitoring contractor;" (2) totally eliminate any discretionary or pseudo-regulatory functions; (3) should limit "monitoring" functions to the evaluation of PIAs in accordance with the statutory definition of "monitoring" set

forth in the 2000 reform law; and (4) in accordance with these reforms, significantly reduce funding for the monitoring contract.

IV. CONCLUSION

In accordance with the foregoing, HUD should either repeal or modify significant elements of the federal manufactured housing program detailed above pursuant to EOs 13771 and 13777 in order to maintain consumer protections mandated by applicable law, while eliminating unnecessary regulatory burdens and compliance costs that disproportionately harm smaller businesses, needlessly increase the cost of HUD-regulated manufactured housing, needlessly exclude lower and moderate-income Americans from the benefits of homeownership, and needlessly impair and limit the growth and evolution of the manufactured housing industry (as well as full and robust competition within the industry), thereby inhibiting job growth within a uniquely domestic manufacturing industry.

Sincerely,

Mark Weiss
President and CEO

cc: Hon. Dr. Ben Carson
Hon. Mick Mulvaney
Hon. Neomi Rao (OIRA)
Hon. Gary Cohn (Chairman, National Economic Council)