MHARR WASHINGTON UPDATE

The Manufactured Housing Association for Regulatory Reform is a Washington, DC based national trade association representing the views and interests of producers of manufactured housing

REPORT AND ANALYSIS

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DISCRIMINATORY ENERGY REGIULATION LOOMS ONCE AGAIN

Under a recent order issued by the United States District Court for the District of Columbia, in a case filed against the U.S. Department of Energy (DOE) by the activist Sierra Club, DOE will be required to propose new manufactured home energy "conservation" standards no later than May 14, 2021 and will be required to adopt final energy standards no later than February 14, 2022.

In the lawsuit, filed at the end of 2017, the Sierra Club sought an order compelling DOE to issue such standards in accordance with section 413 of the Energy Independence and Security Act (EISA) of 2007. Industry members will recall that DOE manufactured housing energy standards had been successfully opposed by MHARR and were effectively stalled at DOE until 2014. That year, however, the entire matter was revived when the then-Manufactured Housing Institute (MHI) Vice President for Regulatory Affairs, joined by energy special interests – in coordination with DOE – sought a "negotiated rulemaking" proceeding dominated by DOE allies that produced a set of extreme and extremely costly recommended standards. MHARR, as a member of the "negotiated rulemaking" working group, cast the only "no" vote against the recommended standards, while MHI and its members voted "yes" (with one abstention). DOE then, in 2016, proposed manufactured housing energy standards based on the illegitimate and fundamentally-tainted "negotiated rulemaking" Term Sheet approved by the "negotiated rulemaking" working group.

Those proposed standards – which were vehemently opposed by MHARR – were subsequently withdrawn by the Trump Administration in 2017, after being rejected by the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA). Later, in 2018, DOE published a modified energy standards proposal and underlying regulatory analysis in

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a Notice of Data Availability (NODA). Insofar as that proposal, however, continued to be based on the same data developed through the illegitimate "negotiated rulemaking" process and – like the original 2016 DOE proposal – would continue to impose extreme, discriminatory and disproportionate cost burdens on HUD Code consumers, MHARR, again, strongly opposed those standards, and DOE, since that time, has not taken further public action on the NODA proposal (the substance and basis of which was also rejected by the Manufactured Housing Consensus Committee).

DOE, meanwhile, in 2018, moved to dismiss the Sierra Club suit, contending that the group lacked legal standing to pursue such a claim on behalf of its members. That motion, however, was denied in March 2019, setting the stage for a potential trial on the supposed merits of the case. MHARR, in a communication to DOE at the time, strongly urged the Department to fully-defend the case, based on the corrupted "negotiated rulemaking" process that formed the foundation for both the 2016 and 2018 DOE proposed rules. DOE and the Department of Justice (DOJ), though, in an action completely inconsistent with the regulatory reform policies of President Trump and, in fact, more reminiscent of the Obama Administration (which routinely entered into agreements with radical special interest groups in regulatory litigation), entered into a "Consent Order" with the Sierra Club, which effectively requires the promulgation and adoption of manufactured housing energy standards by the dates noted above.

Any revival of this proceeding, however -- whether ordered by a court or not -- would be totally inconsistent with the regulatory reform policies of President Trump and in violation of the regulatory reform Executive Orders (EOs) which have been the hallmark of his administration in the regulatory arena. DOE's senior leadership, consequently, instead of following the feckless lead of the ineffectual DOJ "swamp" -- and career DOE regulators -- regarding this matter, should instead comply with and fully honor the regulatory reform policies of the President and his Administration to terminate the DOE manufactured housing energy standards travesty that has played out for more than a decade. At the same time, the entire industry needs to shake off the impact of years-worth of misinformation spread by DOE and its special interest allies regarding manufactured housing energy standards, and firmly reject the entire concept of discriminatory DOE manufactured housing energy standards that will cause major harm to both the industry and American consumers of affordable housing.

HUD TO CONDUCT ZONING STUDY PROPOSED BY MHARR

Some twenty years following the enactment of the Manufactured Housing Improvement Act of 2000 and its enhanced preemption provision, HUD has finally taken the first incremental step regarding a major MHARR priority – the rejection of discriminatory local zoning mandates that exclude or severely restrict the placement of HUD Code manufactured homes in large areas of the United States.

Specifically, HUD's Office of Policy Development and Research (PD&R), in the February 14, 2020 edition of the Federal Register, announced that it will seek approval from the Office of Management and Budget (OMB) to conduct a study of local zoning and land use barriers affecting

manufactured housing, as requested by MHARR in an April 4, 2019 meeting with PD&R officials and a corresponding April 24, 2019 communication to HUD Secretary, Dr. Ben Carson.

At the April 4, 2019 meeting with PD&R, MHARR sought an authoritative HUD study of local land use exclusions and discriminatory restrictions specifically targeting HUD-regulated manufactured housing. In its subsequent letter to Secretary Carson, MHARR described this initiative as: "[A]n … effort to … jump-start a process leading to the enforcement of Congress' enhanced preemption regime to remove such baseless, discriminatory barriers to the availability and utilization of inherently affordable HUD Code manufactured housing." MHARR thus "requested that HUD, as a first step, utilize its resources to research, study and analyze such discriminatory and exclusionary zoning and its local and national impact(s) on the availability of affordable housing and homeownership in light of relevant national housing policies," noting that "Such research and analysis could then serve as a roadmap for further HUD action going forward." (Emphasis added).

Consistent with MHARR's request and proposal to PD&R, the impending study is described in the Federal Register as being designed to assess the "main drivers or barriers to the financing, siting and development of factory-built housing systems in various communities[.]" A "significant portion" of the study, as characterized by HUD, "will involve identifying types of barriers, their potential impact (or stringency) and their use in various communities." MHARR will continue to engage with HUD in order to advance this study and to press for HUD action to eliminate baseless and discriminatory zoning provisions which exclude affordable HUD Code manufactured housing from large areas of the United States.

While such a study is potentially significant – and, having been long-delayed, must be conducted expeditiously – it should not delay immediate action by HUD to pursue the invalidation of one or more specific, targeted and blatant instances of local zoning discrimination against HUD Code manufactured homes and manufactured homeowners that undermine the availability of affordable housing and homeownership for too many Americans. Such a two track strategy, involving a targeted "test case" (including litigation, if necessary), combined with a simultaneous broader study of the national and local impacts of discriminatory zoning against HUD Code housing, is necessary to establishing the parity between manufactured homes and other types of housing that the 2000 reform law was designed to bring about. MHARR, accordingly, will continue to advance such a simultaneous dual-track approach in its engagement with HUD and particularly senior HUD officials.

DANA WADE NOMINATED TO SENIOR HUD POST

Ms. Dana Wade, who previously served as acting HUD Assistant Secretary for Housing and White House liaison to HUD and HUD Secretary Ben Carson during 2017 and 2018, has been nominated by President Trump to return to HUD as Assistant Secretary for Housing/Federal Housing Commissioner. In that role, Ms. Wade will become the highest-ranking appointed HUD official with direct authority over the federal manufactured housing program.

In her prior stint at HUD, Ms. Wade took bold action to correct multiple failures within the HUD program which took the program far afield of the reforms mandated by the Manufactured Housing Improvement Act of 2000 and resulted in unnecessary regulation-driven cost burdens for both HUD Code manufacturers and American consumers of affordable housing. These included multiple instances of costly de facto regulations and standards being implemented by the HUD program via unpublished "guidance" (and similar) documents, issued without notice and comment rulemaking in violation of applicable law.

As part of the program reforms undertaken during her earlier tenure at HUD, Ms. Wade – at the urging of MHARR – reassigned former program administrator Pamela Danner, who subsequently left HUD altogether. She also took action that led to the departure of other program regulators with a history and track record of imposing costly, unnecessary and baseless regulatory cost burdens on both industry members and consumers, while simultaneously initiating a "top-to-bottom" review of all existing and impending HUD manufactured housing standards and regulations under Trump Administration Executive Orders 13771 and 13777. That review is still pending at HUD following the review and recommendation of numerous reform proposals (including significant measures proposed by MHARR) by the statutory Manufactured Housing Consensus Committee (MHCC).

Given the gradual regression of the HUD program since the appointment of a career administrator in 2019, Ms. Wade's return to HUD in a senior leadership position raises at least the possibility of a return to policies that will actually advance the affordable housing initiatives of both President Trump and Secretary Carson.

FANNIE AND FREDDIE CONTINUE THE "HIJACKING" OF DUTY TO SERVE

Following Federal Housing Finance Agency (FHFA) "listening sessions" at the end of 2019 and a February 4, 2020 meeting between manufactured housing sector stakeholders (including MHARR) and FHFA Director Mark Calabria (see, MHARR Washington Update dated February 5, 2020), the Duty to Serve Underserved Markets (DTS) mandate remains effectively stalled with respect to secondary market and securitization support by Fannie Mae and Freddie Mac for the largest segment of the manufactured housing lending market, represented by personal property or "chattel" loans.

More than eleven years after the enactment of DTS, as part of the Housing and Economic Recovery Act of 2008 (HERA), Fannie Mae and Freddie Mac have yet to provide such support for any manufactured home consumer chattel loans, despite the fact that chattel loans comprise nearly 80 percent of the manufactured housing consumer lending market according to data compiled by the U.S. Census Bureau. And while Fannie Mae and Freddie Mac chattel loan "pilot programs" are supposedly "under review" at FHFA, there has been no reported progress to date on either the approval of those programs or their implementation by Fannie Mae and Freddie Mac. As a result, despite an ongoing effort by some to effectively divert DTS support from existing, mainstream manufactured housing to a "new class" or "new generation" of significantly more costly factory-built homes, only an extremely small number of those "new generation" homes (titled as real

estate) have received DTS support, while DTS support by the Government Sponsored Enterprises (GSEs) for manufactured housing chattel loans remains non-existent.

MHARR, in the February 4, 2020 meeting, the late-2019 "listening sessions," and an earlier July 2019 meeting with Director Calabria (who is very familiar with manufactured housing and has worked with MHARR in the past) has made it clear – as it has consistently -- that the DTS mandate, with respect to manufactured housing, cannot be met without market-significant GSE/FHFA support for the chattel lending market.

Given the obvious and continuing failure of the GSEs and FHFA, for more than a decade, to implement the DTS mandate as enacted by Congress, and particularly in light of their apparent objective to redirect DTS and change the fundamental nature of the DTS mandate to serve a "new class" or "new generation" of supposed manufactured homes that are significantly more costly than mainstream affordable HUD Code manufactured housing – with dire consequences for the vast majority of the industry and consumers as well – the time has arrived for the industry's post-production sector to stop and reassess. First, retailers, communities and independent finance companies should consider how restricting homebuyers (and potential homebuyers) to higher-cost loans offered by captive finance companies – as a result of the lack of market-significant GSE securitization for the vast bulk of the HUD Code market – harms the overall HUD Code market and harms their businesses in particular. Second, given the continuing failure of Fannie Mae and Freddie Mac, and their regulator (FHFA), to fully-implement the statutory DTS mandate, those same post-production entities should step forward to demand congressional intervention and oversight in order to put this critically important consumer financing mandate back on track.

HUD 2021 BUDGET INCREASES FEDERAL PROGRAM AND CONTRACT SPENDING

While the recent release of HUD's proposed Fiscal Year (FY) 2021 budget contains some positive news for the industry and would appear to fulfill several significant MHARR objectives, it nevertheless contains increased funding for the federal program as a whole and particularly for program contractors, thus expanding the reach and authority of the program "monitoring" contractor in particular which, as MHARR has repeatedly demonstrated, wields governmental-type power and authority that may not legitimately be delegated to a private entity.

In the White House budget blueprint released on February 10, 2020, overall funding for the federal manufactured housing program would grow to $14 million, an increase of $1 million over the $13 million appropriated by Congress in FY 2020, and an increase of $2 million over the $12 million in program funding sought by the Administration in the FY 2020 budget. The bulk of this increase, as detailed in HUD's FY 2021 Congressional Budget Justifications, would go to manufactured housing program contractors, with a budgeted increase of $1.1 million in payments to all contractors, including the program monitoring contractor, again, despite a 2% decline in overall industry production in 2019. MHARR has long opposed any increases in contractor funding and particularly funding for the program monitoring contractor which wields disproportionate authority within the HUD regulatory system.

MHARR, by contrast, has sought <u>increases</u> in payments to State Administrative Agencies (SAAs) in order to maintain a strong federal-state partnership within the HUD program, while simultaneously reducing the role of program contractors. In this regard, the proposed FY 2021 budget does contain some positive news. Under the FY 2021 proposal, budgeted funding for state SAAs would increase by $900,000.00 to $4.5 million for all SAAs. An increase in SAA funding, to ensure continuing state participation in the HUD program and to encourage <u>additional</u> states to become involved, has been an MHARR priority since the enactment of the Manufactured Housing Improvement Act of 2000. For more than a decade, however, funding increases have been actively resisted by HUD program officials, leading at least one state to leave the HUD program. In response, MHARR has engaged continually with Congress and, in fact, MHARR-proposed language seeking increased SAA funding has appeared in Appropriations Committee reports on HUD manufactured housing program budgets since at least 2011.

At the same time, however, further delays in distributing this additional funding are possible. HUD's Congressional Justifications thus indicate that the program will "reassess <u>both</u> its current SAA payment structure <u>and</u> the revised payment structure proposed in 2016 in order to ensure a more equitable distribution of funds among states…." (Emphasis added). It is, therefore possible, if not likely, that HUD will make changes to its 2016 proposed rule (which MHARR generally supported), or may begin a new rulemaking proceeding on SAA funding altogether, causing further delays. Regardless, MHARR will continue to press for proper SAA funding, corresponding <u>reductions</u> in contractor funding, <u>and</u> the expeditious enactment of a final SAA funding rule.

Beyond this, the proposed budget <u>apparently</u> also includes funding for another consistent MHARR priority, the establishment of an <u>appointed</u> non-career manufactured housing program administrator, as required by the 2000 reform law, albeit under the new title of Deputy Assistant Secretary for Manufactured Housing. Assuming that this position is, in fact, funded in HUD's final FY 2021 appropriation, MHARR will insist that this official be strictly and exclusively in charge of – and dedicated to -- the federal manufactured housing program which, under the leadership of President Trump and Secretary Carson, is gradually being elevated to a higher (and well-deserved) status within the Department.

Lastly, the proposed White House budget would eliminate funding for Community Development Block Grants (CDBG). MHARR is analyzing the potential impact of the termination of CDBG grants on recent legislation regarding the inclusion of manufactured homes in local community applications for such grants through HUD.

HUD PROPOSES NEW MH STANDARDS

HUD, on January 31, 2020, published a proposed rule in the Federal Register which would adopt the so-called "third" set of standards recommended by the Manufactured Housing Consensus Committee (MHCC). While HUD action to update the federal standards and implement MHCC recommendations represents a positive step, the federal program still lags far behind in processing MHCC proposals for revisions to the federal manufactured housing standards and regulations. Thus, for example, certain proposals contained in latest HUD publication date back to at least

2006. In addition, as the November 2020 election approaches, HUD has still not completed its consideration of hundreds of regulatory reform proposals (including major reform proposals submitted by MHARR) processed by the MHCC during 2019. As MHARR has repeatedly stressed, the implementation of these reforms is crucial to the realization of President Trump's effort to reduce unnecessary regulatory burdens affecting both the industry and American consumers of affordable housing.

Among other things, the standards revisions proposed by HUD would resolve issues involving attached garages and carports which have previously been addressed by HUD through unpublished "guidance" documents and similar memoranda which have now been deemed "non-binding" by Trump Administration Executive Orders 13891 and 13892. In addition, the proposed rule would establish a new Subpart K of the Part 3280 standards to address "attached manufactured homes with a zero lot line and other related construction that is not covered elsewhere in the standards." While significant in itself, this action is hopefully a precursor to HUD action on another long-delayed MHCC recommendation to establish standards for multi-family manufactured homes.

Comments on the proposed rule are due on or before March 31, 2020. MHARR, as usual, will file its comments in advance of the HUD deadline and will make those comments available for use and/or reference by others in the industry.

MHARR is a Washington D.C.-based national trade association representing the views and interests of independent producers of federally-regulated manufactured housing.

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