Manufactured Housing Association for Regulatory Reform

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January 11, 2021

VIA FEDERAL EXPRESS AND ELECTRONIC SUBMISSION

Regulations Division
Office of Housing
U.S. Department of Housing and Urban Development
451 7th Street, S.W.
Washington, D.C. 20410-8000

Re: Manufactured Housing Program
Minimum Payments to the States
Docket No. FR-6234-A-01 – RIN 2502-AJ57

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 independent manufactured housing producers from all regions of the United States.

I. INTRODUCTION

On November 12, 2020, HUD published an Advance Notice of Proposed Rulemaking (ANPR) in the Federal Register[1] seeking public comment on potential modifications to its regulations concerning minimum payments to states that participate in various aspects of HUD's regulatory program for manufactured housing.[2] The modifications, as detailed in the ANPR, would: (1) pay each State Administrative Agency (SAA)[3] "for its participation in … various [federal] program elements, including SAA roles, participation in joint monitoring, and

[1] See, 85 Federal Register, No. 219 (November 12, 2020) at p. 71856 ("Manufactured Housing Program: Minimum Payments to the States; Advance Notice of Proposed Rulemaking and Request for Public Comment").

[2] See, e.g., 24 C.F.R. 3282.307; 24 C.F.R. 3284.10.

[3] 24 C.F.R. 3282.7(ii) defines a "State Administrative Agency" as "an agency of a State which has been approved or conditionally approved to carry out the State plan for enforcement of the" federal manufactured housing construction and safety "standards pursuant to section 623 of the Act, 42 U.S. C. 5422, and Subpart G of this part."

administering installation and dispute resolution programs;" and (2) change the "annual funding" for such payments "from minimum end of Fiscal Year lump sum payments to payments for each operational element at the end of each Fiscal Year;" as well as (3) establish a "sunset provision for states to strategize and plan for" such changes.[4] As explained by HUD, state funding changes ultimately would be designed to "more appropriately reflect the responsibilit[ies] of [each] corresponding state and [to] better encourage states to participate to the maximum extent possible in the Federal-State manufactured housing partnership program."[5]

For the reasons set forth in greater detail below, MHARR supports increased payments and related incentives to the states to participate in all aspects the federal-state partnership envisioned by the 1974 Act as amended. MHARR strenuously objects however, to any "sunset" of the so-called (and misnamed) "supplemental" payments currently made by HUD to all SAAs, or the reduction of such amounts currently paid to *any* SAA, which are expressly protected from elimination or diminution by statute. To the contrary, increases in payments to the states should be funded in whole or in part by corresponding *reductions* in program payments to – and program dependence upon – private (i.e., non-state) contractors in general and the entrenched program monitoring contractor in particular, which wields unlawful de facto enforcement authority and discretion within the federal program which exceeds and is contrary to its statutorily-defined and expressly limited function. MHARR, accordingly, believes that certain modifications and clarifications of the payments system outlined in the ANPR are necessary and essential.

II. BACKGROUND

The federal manufactured housing program established by the 1974 Act was envisioned by Congress – and established by law – as a federal-state partnership, with participating states and HUD sharing responsibility for the enforcement of uniform, preemptive, federal standards enacted by HUD pursuant to notice and comment and, since 2000, in accordance with a statutorily-prescribed consensus-based standards development process. Based on this federal-state partnership and specific provisions of the 2000 reform law, increased funding for state SAAs (and corresponding reductions in the responsibilities of – and funding provided to – private, revenue-driven contractors) has been a consistent priority for MHARR. Unlike private contractors, which HUD has allowed to drastically expand their role and influence within the federal manufactured housing program, in direct violation of law, SAAs, as state entities, are broadly accountable to their respective governments and, ultimately, to the public in each such state. They, therefore, have a degree of credibility and *legitimacy* that private contractors -- with a monetary incentive to find fault with as many homes as possible and to simultaneously promote ever more burdensome regulatory requirements and related enforcement activity -- do *not* have, and will *never* have.

Nevertheless, budgeted HUD funding for state SAAs has declined by nearly 32% since 2005,[6] despite the fact that SAAs are tasked with providing consumer protection for the occupants

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[4] See, 85 Federal Register, supra at p. 71857.

[5] Id.

[6] As is shown by HUD Congressional Justification documents, budgeted SAA payments in 2005 (with 146,881 HUD Code manufactured homes produced that year) were $6.6 million, while budgeted SAA payments in 2021 (with 94,615

of an ever-growing number of HUD Code manufactured homes produced since the inception of federal regulation in 1976. By contrast, HUD funding for its entrenched monitoring contractor[7] has increased by more than 91% since 2005, despite a 35.5% decline in per annum industry production over the same period.[8] Thus, SAA funding for a steadily growing number of homes and a steadily growing workload has substantially decreased over time, while funding for the monitoring contract over the same period has consistently increased, despite the fact that the contractor is responsible only for "monitoring" a significantly-smaller number of current-production homes.

This anomaly has had multiple negative impacts on the federal program, on American consumers of affordable housing and on the industry itself. These impacts include, but are not limited to: (1) needless suppression of state participation in the HUD program despite its structure and design as a federal-state partnership; (2) the withdrawal of certain states from participation in the HUD program either in toto[9] or with respect to specific program elements,[10] due to insufficient federal funding and related budgetary constraints; (3) needless regulatory burdens on manufacturers and corresponding regulatory cost burdens on consumers due to the revenue-driven pseudo-regulatory excesses of program contractors acting in lieu of HUD and/or state entities; and (4) significant continuing discrimination against federally-regulated manufactured homes and manufactured homeowners at the state and local level due to HUD's long-term failure to integrate as many state governments as possible into the federal-state partnership established by the 1974 Act, and thereby encourage broader acceptance of manufactured homes as an affordable housing resource, among others.

Given these negative consequences of existing program policies that have unlawfully diminished the role of the states within the HUD program while accentuating the illegitimate role and influence of entrenched program contractors, MHARR agrees with the stated concept and alleged objective of the proposals outlined in the ANPR – i.e., to "incentivize continued and new state partnerships." That objective, however, must be accomplished in a manner that: (1) fully complies with applicable law; and (2) properly re-balances the role and funding of SAAs versus the role and funding of private program contractors. MHARR, accordingly, offers the following comments with respect to the specific topics set forth in the November 12, 2020 ANPR.

HUD Code homes produced in 2019 – the last year for which full data is currently available -- were projected at just $4.5 million.

[7] The current monitoring contractor, the Institute for Building Technology and Safety (IBTS) has held the HUD manufactured housing monitoring contract continuously since the inception of federal regulation in 1976, albeit under different corporate names. While each successive monitoring contract has been advertised as a supposedly "competitive" procurement, those procurements – based on award criteria that appear to be tailored to the unique experience of the one and only actual program contractor – are, in effect, de facto sole-source procurements without compliance with the legal safeguards required by law for sole-source contracts.

[8] Corresponding payments to the entrenched HUD monitoring contractor were $3.14 million in 2005 while $6 million is budgeted for Fiscal Year 2021.

[9] E.g., the state of Michigan – formerly an SAA -- withdrew from the HUD program totally in 2015.

[10] E.g., the state of Pennsylvania, although still an SAA state, withdrew from the HUD manufactured housing installation program in 2020.

III. COMMENTS

A. HUD, BY STATUTE, MUST MAINTAIN A BASE FUNDING LEVEL FOR STATE SAAs

While certain language and phraseology used in the ANPR is unclear and, in some cases, facially or implicitly contradictory, it appears that HUD, through the incentive-based funding system described therein, wishes to terminate (i.e., "sunset"), within five to ten years, minimum base payments currently being paid to fully and conditionally-approved SAAs[11] and to ultimately transition to a funding system based completely on actual (i.e., current annual) floors produced and/or shipped, combined with additional payments based on participation in specifically-identified program elements, including joint "monitoring" activity, maintenance of a dispute resolution program, and "installation oversight." Consequently, at the end of the "sunset" period as ultimately determined by HUD, the minimum funding level(s) currently guaranteed to all state SAAs by the minimum base payment regime would end, and subsequent funding levels would be determined based strictly on: (1) the number of HUD Code floors produced in that state (if any); (2) the number of HUD Code floors shipped that state; and (3) participation in joint monitoring, dispute resolution and/or installation oversight activities. Funding levels for individual states, accordingly, would vary and would fluctuate each fiscal year, based on factors both outside and within the control of the state in question.

While MHARR, as noted above, supports a payment structure that would incentivize as many states as possible to participate in the federal manufactured housing program as SAAs, such incentivization *must* be achieved in a manner that is fully consistent with existing law. In that regard, when the original 1974 federal manufactured housing law was amended in 2000, one of Congress' principal objectives was to maintain and strengthen state participation in the federal-state partnership underlying the HUD manufactured housing program. As a result, Congress included a provision in the 2000 reform law designed to ensure that funding for state SAAs would not be reduced below levels extant at that time. Section 620(e)(3) of that law thus states: "On and after the effective date of the Manufactured Housing Improvement Act of 2000, the Secretary *shall* continue to fund the States having approved state plans in … amounts that are not less than … allocated amounts based on the fee distribution system in effect on the day before such effective date." (42 U.S.C. 5419(e)(3)). (Emphasis added). Insofar as the 2000 reform law was signed into law on December 27, 2000, this provision effectively requires that states continue to be compensated by HUD at allocated levels *no lower* than those paid (i.e., "allocated") on December 26, 2000.

Section 620(e)(3) thus establishes a mandatory *statutory* floor for state payments based on allocated amounts in effect at that time. While payments to the states in any given fiscal year may exceed that minimum statutory floor, they may not be lowered below that floor.[12] Moreover, since

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[11] Minimum base funding has been provided for fully approved SAAs and now for conditionally approved SAAs pursuant to the minimum state payments final rule published by HUD contemporaneously with the ANPR herein. See, 85 Federal Register No. 219 (November 12, 2020) at p. 71831 ("Minimum Payments to the States").

[12] While the baseline for such payments was subsequently advanced to Fiscal Year 2014 by HUD regulation on the premise that such payments would be equal to or greater than the statutory minimum based on FY 2000 funding levels, HUD cannot by regulation either eliminate that statutory mandate or reduce payments to *any* SAA below that

this floor payment level is statutorily mandated, it may not simply be ignored or read out of the law by administrative fiat. As a result, HUD has no authority to unilaterally "sunset" the minimum base payment mandated by section 620(e)(3), or to reduce the payment to any state below that minimum floor. Put differently, if Congress had wanted this base payment floor to be temporary, it could have specifically provided so in the 2000 reform law. It did not. If it had wanted to "sunset" the base payment floor at any time, it could have specifically done so. It did not. If it had wanted to give HUD the authority to change or eliminate the base payment floor, it also could have done so. Again, it did not. As a result—and in the absence of any contrary action by Congress -- the statutory minimum payment is *permanent* and may not be unilaterally discarded *at any time* by HUD. Accordingly, there cannot be and should not be any "sunsetting" or elimination (either in whole or in part) of the statutory base payment to the states. Instead, any modified state payments should – and must – be in *addition to* the statutory base payment as provided by law.

Consequently, a state with production and/or shipment volume that would result in a calculated payment amount that exceeds the baseline FY 2000/2014 funding amount should receive a payment based on that calculated amount. By contrast, a state with production and/or shipment volume resulting in a calculated amount less than the FY 2000/2014 baseline in any given year, should continue to receive the baseline amount for that year. The statutory baseline would thus remain, as envisioned by the 2000 reform law, and as mandated by Congress, a continuing floor for all SAAs, but not a ceiling.

By contrast, there is no comparable statutory protection and no statutorily prescribed baseline funding level for program contractors. As a result, such funding, unlike state funding, *can* be unilaterally reduced by HUD, and, for two overriding and compelling reasons, *should* be substantially reduced, with the excess funds made available to support increased SAA funding.

First, contractor funding, and especially "monitoring" contract funding, has substantially increased since 2000, even as annual industry production has fallen to levels far below those that were typical in the late 1990s and early 2000s. For example, HUD Code industry production peaked at more than 373,000 homes in 1998 and remained close to historical norms through 2005, when 146,881 manufactured homes were produced.[13] That year, budgeted contractor funding for the HUD program, according to the Department's annual Congressional Budget Justifications, was $3,140,000.[14]Conversely, for FY 2020, with 2019 annual HUD Code production at just 94,615 homes, HUD has budgeted $8,400,000 for contractor funding.[15] Thus, while per annum industry production since 2005 has declined by more than 35%, budgeted contractor funding through FY 2020 *increased* by 167.5%.[16] This baseless and anomalous disparity should and must be corrected by reducing contractor funding to amounts that legitimately reflect current production levels.

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statutorily mandated level. See, Attachment 1 hereto, MHARR February 14, 2017 comments to HUD ("Minimum Payments to States," Docket No. FR-5848-P-01, RIN 2502-AJ37).

[13] Calendar year production statistics are based on reports compiled on behalf of the HUD Office of Manufactured Housing Programs (OMHP).

[14] See, Attachment 2 hereto, FY 2005 HUD Congressional Budget Justifications.

[15] See, Attachment 3 hereto, FY 2020 HUD Congressional Budget Justifications.

[16] Put differently, in FY 2005, budgeted program contractor funding was 47.5% of the funding provided to state SAAs. By FY 2020, that ratio had totally reversed, with *state SAA* funding now standing at 42.8% of budgeted program contractor funding.

Second, contractor funding should and must be corrected – i.e., reduced – to properly reflect and correspond with the performance of *legitimate and lawful* contractor functions in accordance with the 2000 reform law. Specifically, the above-described "disconnect" between substantially higher funding to "monitor" significantly lower industry production since 2000, is a result of policy decisions made by HUD in connection with its unlawful post-2000 reform law sub-regulatory expansion of in-plant regulation, as well HUD's corresponding unlawful delegation of inherently governmental functions to the entrenched monitoring contractor in recent contracts. While MHARR has already described and analyzed these unlawful functions and delegations *in detail* in prior publications, comments, and correspondence to HUD,[17] their relevance in the context of the present ANPR lies in the fact that the 2000 reform law, for the first time, incorporates a specific definition of "monitoring." Under that express definition, the "monitoring" function is expressly limited and confined to the "periodic review of … primary inspection agencies … for the purpose of ensuring that the primary inspection agencies are discharging their duties under this title."[18] Insofar as the present duties and contractual responsibilities of the monitoring contractor extend *well beyond* any activities required to "ensure that the primary inspection agencies" are properly "discharging their duties," those contractual elements and HUD's corresponding over-dependence on the entrenched monitoring contractor are unlawful and should be eliminated, with the resulting savings being utilized for proper, legitimate and sufficient SAA funding (and/or a HUD label fee reduction if warranted).[19]

Accordingly, *no state*, under any modified payment system, should have its federal funding level reduced below current levels. State funding increases, moreover, should be facilitated by corresponding reductions in the activities and funding of program contractors and, most particularly the entrenched "monitoring" contractor.

B. PROGRAM "ELEMENT" PAYMENTS SHOULD BE BASED ON ACTUAL COSTS OF PERFORMANCE

In addition to increases in state baseline funding, MHARR agrees with HUD that it should provide further funding to the states to compensate for the performance of functions authorized by the 2000 reform law, principally installation regulation and dispute resolution. That additional funding, however, should be based on legitimate, *factual,* and accurate estimates of the actual costs of performing those functions, and *not* arbitrary assumptions, as appears to be the case at present.

Specifically, at a November 2020 MHCC subcommittee meeting, during an initial discussion of the program "element" payments detailed in the ANPR, MHARR inquired as to the factual basis for those program element amounts. The response from HUD, essentially, was that the payment ranges for those program elements were selected by HUD without specific factual

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[17] See, e.g., Attachment 4, hereto, October 2015 MHARR Viewpoint, "'Monitoring Contractor's Domination of Federal Program Must End."

[18] The lawful duties of primary inspection agencies are set forth in 24 C.F.R. 3282.351, et seq.

[19] It should also be emphasized, as was already made clear by the MHCC at its January 7, 2021 special meeting, that increased state payments should not be financed by and should not result in *any* certification label fee increase. Such fees are ultimately paid by consumers and any further increase would disproportionately impact and harm lower and moderate-income manufactured homebuyers.

underpinning relating to the actual state costs of performing those functions. The stated amounts, or "ranges" in the ANPR, therefore, are inherently arbitrary and capricious, and should not be the basis for state program element payments under any proposed or final rule. Instead, HUD, based on factual and specific input from the states, should set program element payment levels based on the actual (and reasonable) costs of performing those functions.

C. RESPONSES TO SPECIFIC ANPR INQUIRIES

The November 12, 2020 ANPR sets forth six specific inquiries with respect to aspects of a modified state payments system. MHARR responds to those inquiries as follows:

1. Should HUD change from a minimum annual payment structure to a payment structure that is based on an eligible state's participation in the federal program?

MHARR Response: Conditionally, yes. As is stated above, however, HUD should and must maintain the minimum base state payments mandated by the 2000 reform law, as augmented by program element payments based on the actual and reasonable cost of performing those functions.

2. Should HUD provide a uniform annual funding amount associated with each partnership element? Is the range of funding proposed by HUD for each partnership element appropriate?

MHARR Response: Yes, HUD should provide program element payments to states performing such functions. The current payment ranges, however, appear to have no basis in relevant fact and are, therefore arbitrary and capricious. Instead, HUD should calculate program element payments based on actual and accurate cost information for each state.

3. Can a state determine its budgeting needs and establish and implement additional partnership elements to retain maximum compensation within a 5 or 10-year sunset period?

MHARR Response: Unknown, pending further ANPR responses from the states. This inquiry, however, is fundamentally irrelevant and improper, as a "sunset" of the base payment mandated by the 2000 reform law, as explained above, would be unlawful.

4. Will states that are not currently SAAs be incentivized to become SAAs?

MHARR Response: Yes, but only if SAA status is a required condition for such payments and if such payments reflect the actual and reasonable costs of performing those functions. Just as importantly, however, if HUD truly wants to incentivize states to become SAAs, the number of manufactured homes in every state must be increased. In order to facilitate and advance that objective, HUD must utilize its statutory authority -- via enhanced federal preemption as mandated by the 2000 reform law -- to increase the areas and number of jurisdictions in each state where manufactured homes can be sited without discriminatory zoning exclusions or restrictions. States, accordingly, should be incentivized to report such discrimination to HUD and HUD should undertake a program to invalidate such exclusions and restrictions.

5. Should HUD consider payments to states that are not SAAs?

MHARR Response: See response to Question 4, above. Put simply, and as MHARR noted during the January 7, 2021 MHCC discussion of this matter, such states will not be incentivized to become SAAs if they are subsidized by HUD to perform program elements without submitting a state plan pursuant to section 623 of the 2000 reform law (42 U.S.C. 5422) and becoming an SAA.

6. Should HUD augment the per-unit formula to account for each transportable section with a manufacturer-reported first destination in a state that administers a HUD-approved installation program?

MHARR Response: See responses to Questions 4 and 5, above.

IV. CONCLUSION

For all of the foregoing reasons, MHARR supports the ostensible objectives of the ANPR – (1) to encourage continued and additional state participation in as many aspects of the federal manufactured housing program as possible; and (2) to properly and equitably compensate states for such participation based upon the actual duties that approved state entities perform. With respect to specific amounts for such compensation and procedural aspects of the calculation and distribution of such funds including, but not limited to, the time and nature of payments (e.g., lump sum or progressive) MHARR would refer HUD to the comments received individual states and from the Manufactured Housing Consensus Committee (MHCC), which considered this matter on January 7, 2021. Regardless of such procedural input, however, HUD should act expeditiously – and in any event more quickly than the four years which passed between its 2016 proposed minimum payments rule and its November 2020 final state payments rule – to publish a proposed rule on this matter that will be consistent with the 2000 reform law, will help to achieve the purposes and goals of the 2000 reform law, and will fully and properly implement the 2000 reform law as enacted by Congress.

Sincerely,

Mark Weiss
President & CEO

cc: Hon. Dana Wade

Manufactured Housing Association for Regulatory Reform

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February 14, 2017

VIA FEDERAL EXPRESS AND ELECTRONIC SUBMISSION

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

Re: Manufactured Housing Program
Minimum Payments to States
Docket No. FR-5848-P-01 – RIN 2502-AJ37

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 independent manufactured housing producers from all regions of the United States.[1]

I. INTRODUCTION

On December 16, 2016, HUD published a proposed rule in the Federal Register (see, 81 Federal Register, No. 242 at pp. 91083-91086) to amend its current regulations governing minimum payments to State Administrative Agencies (SAAs) (i.e., 24 C.F.R. 3282.307 and 24 C.F.R. 3284.10). Pursuant to the proposed rule, section 307 of HUD's Procedural and Enforcement Regulations (PER) 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) $14.00 for each transportable section of new manufactured housing that is produced in that state." (See, 81

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

Federal Register, No. 242 at p. 91084, col.1). In addition, 24 C.F.R. 3284.10 would be amended to "ensure participating states (regardless of approval status before December 27, 2000) receive a funding level no less than the cumulative amount that state received in [Fiscal Year] 2014." Id.

For the reasons set forth in greater detail below, MHARR supports the adoption of the proposed rule as a final rule without further modification or alteration.

II. BACKGROUND

In July 2015, HUD informally presented a proposal to alter the distribution of minimum fee payments to SAAs, which perform specific enforcement functions under the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended by the Manufactured Housing Improvement Act of 2000 (2000 law), as part of a federal-state partnership devised and legislated by Congress. That proposal, set forth in a memorandum from the HUD manufactured housing program Administrator to all SAAs, would have increased per section payments from existing levels, but would have reduced total SAA funding for many states by basing payments on current shipment levels rather than the much higher shipment levels that existed at the end of 2000, as is required by the Manufactured Housing Improvement Act of 2000.[2]

Specifically, the July 2015 HUD proposal – which MHARR strenuously opposed – would have: (1) eliminated the existing distinction between full-approved and conditionally-approved SAAs; (2) increased per-section SAA compensation from $2.50 per section manufactured in-state and $9.00 per section shipped in-state to $20.00 and $10.00 respectively (or $30.00 per floor for homes built and sited in the same state); (3) based total SAA compensation on 2014 production rather than 2000 production; and (4) eliminated "supplemental" SAA payments designed to maintain funding at 2000 levels for states that subsequently fell below 2000 base level funding.

As was emphasized by MHARR in subsequent communications with HUD, this initial proposal and resulting deep cuts in SAA funding would have driven a substantial number of SAAs out of the HUD program, undermining the federal-state partnership established by Congress, while further empowering and extending the de facto regulatory functions of HUD's entrenched 40-year "monitoring" contractor (which performs SAA functions in non-SAA states).

In direct response to these objections,[3] HUD developed an "alternative" SAA funding structure, that would provide SAAs $14.00 per section for homes manufactured in-state and $9.00 per section for homes sited in-state (or a total of $23.00 per section for homes both manufactured and sited in-state), with a guarantee of total funding levels no lower than those paid in Fiscal Year (FY) 2014 -- which would be equal to or higher than total funding levels for each state in 2000, by

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[2] Section 620(e)(3) of the 2000 reform law (42 U.S.C. 5419), "Payments to the States," is designed to prevent payment reductions to the states by providing that "the Secretary shall continue to fund the States ... in ... amounts which are not less than the allocated amounts based on the fee distribution system in effect on the day before the effective date" of the 2000 reform law (i.e., December 27, 2000). This provision is worded to make aggregate payment levels -- at the time of the implementation of the 2000 law -- the minimum amount paid to each state SAA.

[3] As confirmed by HUD program officials at the August 2015 meeting of the Manufactured Housing Consensus Committee (MHCC).

virtue of the supplemental payments made in FY 2014. The Regulatory and Enforcement Subcommittee of the MHCC unanimously approved this "alternative" funding plan on October 27, 2015, and the full MHCC approved this "alternative" proposal at its January 2016 meeting. The proposed rule published by HUD on December 16, 2016, according to its preamble, is "consistent" with the "alternative" funding proposal presented to – and approved by – the MHCC. (See, 81 Federal Register, No. 242 at p. 91084, col. 1: "HUD proposes revising payments to states consistent with that proposal through this rule").

III. COMMENTS

Increased funding for state SAAs, and corresponding reductions in funding levels for revenue-driven program contractors, has been a consistent priority for MHARR since the enactment of the Manufactured Housing Improvement Act of 2000. Unlike private contractors -- which HUD has allowed to drastically expand their role, functions and influence within the manufactured housing program (effectively setting program policy and needlessly increasing regulatory compliance costs with little or no benefit to consumers and little or no accountability or oversight by the HUD program) -- SAAs, as state entities, are broadly accountable to their respective governments, and ultimately to the voters and public in each such state. Yet, HUD funding for the program monitoring contractor increased by nearly 30% between 2005 and 2014, while budgeted HUD payments to SAAs fell by 50% over the same period.

Thus, when HUD, in May 2014, proposed an unprecedented 156% increase in the certification label fee paid by HUD Code manufacturers, MHARR, in its May 22, 2014 written comments, specifically called on HUD to use additional program revenues to increase funding for all state SAAs. MHARR stated:

> "Unlike the program monitoring contractor which monitors only a significantly-reduced number of new homes ... SAAs constitute the first line of protection for a growing number of both new and existing manufactured homes. *** With a substantial number of states facing critical difficulties providing funding for SAA operations, it is essential that additional HUD funding be provided and provided soon. Consequently ... any additional program revenues should be utilized to increase payments to the SAAs and thereby preserve the federal-state partnership that is the bedrock of the program."

(Emphasis added).

While HUD continues to significantly and needlessly overpay program contractors for pseudo-regulatory "make-work" activity that carries little or no benefit for consumers -- substantially increasing regulatory compliance costs for manufacturers at a time when federal and state consumer dispute resolution program data shows minimal levels of consumer complaints – the amendments set forth in the December 16, 2016 proposed rule appear to be consistent with the mandate of the 2000 reform law that requires minimum SAA funding levels no less than "allocated amounts based on the fee distribution system in effect on the day before [the] effective date" of the 2000 law, i.e., December 27, 2000. By providing for minimum payments to SAAs, regardless

of their approval status, "based on the amount a state received in Fiscal Year (FY) 2014, which is at least the same amount that each fully-approved state received as of December 27, 2000," the proposed rule appears to be "consistent with" the "alternative" HUD proposal considered and recommended by the MHCC. MHARR, accordingly, supports the proposed rule as stated.

With respect to the specific questions posed by HUD in the preamble to its proposed rule, MHARR responds as follows:

1. "In determining a revised equitable fee distribution formula, what methods should HUD consider to increase the amounts paid to the states? For example, should HUD rely on the past three years or more of fee income data received by both fully approved and conditionally approved states in assessing the amount of the increase of payment to each SAA?"

A. MHARR does not object to distribution increases based on an aggregate of cumulative in-state production and in-state shipment data reflecting a reasonable time-defined period, so long as the minimum per annum distribution level to any state – regardless of approval status – does not fall below the minimum level mandated by the 2000 law.

2. "Should fully approved states be entitled to higher levels of payments than conditionally approved SAAs?"

A. No. The HUD "alternative" proposal approved by the MHCC – which HUD maintains is "consistent" with the December 16, 2016 proposed rule – set forth a formula under which "whether a state was fully or conditionally approved would cease to affect funding." (See, 81 Federal Register, No. 242 at p. 91084, col. 1). Funding distinctions based on SAA approval status should not be re-introduced via such a modification of the rule as proposed.

3. "Should HUD revise 24 C.F.R. 3282.307(b) to allow the amount of the distribution of fees among the states to be established by Notice in order to more timely address changes or fluctuations in production levels, in order to assure that the states are adequately funded for the inspections and work they perform?"

A. No. Pursuant to section 620(d) of the 2000 law (42 U.S.C. 5419(d)), "the amount of any fee collected under this section may only be modified – (1) as specifically authorized in advance in an annual appropriations act; and (2) pursuant to rulemaking in accordance with section 553 of title 5, United States Code." Insofar as subsection (a)(1)(B) of the same section specifically addresses "funding to states" using fee revenues collected thereunder, any such utilization of those fees for payments to the states is similarly subject to the requirements of subsection (d). Accordingly, modifications via notice only would contradict the statute and would be unlawful.

IV. CONCLUSION

For all of the foregoing reasons, MHARR supports the proposed rule as stated in the Federal Register. A final rule adopting this long-delayed proposal and long-needed update and enhancement of fee distributions to the states should be implemented without any further delay. While the federal program was designed and intended by Congress to operate as a federal-state partnership, HUD, in recent years, has done everything in its power to eclipse the authority and operations of state SAAs, while effectively turning over more and more elements of the manufactured housing program (with an corresponding expansion of needless make-work activity) to revenue-driven contractors. With this rule and with new leadership at HUD under the Trump Administration, state funding can hopefully be restored to appropriate levels, while funding for entrenched program contractors is reduced accordingly.

Very truly yours,

Mark Weiss
President and CEO

HOUSING
MANUFACTURED HOUSING STANDARDS PROGRAM
2005 Summary Statement and Initiatives
(Dollars in Thousands)

MANUFACTURED HOUSING STANDARDS PROGRAM	Enacted/ Request	Carryover	Supplemental/ Rescission	Total Resources	Obligations	Outlays
2003 Appropriation	$9,814[a/]	$2,468	...	$12,282	$9,041	$6,911
2004 Appropriation/Request	13,000	3,241	-77	16,164	13,241	13,000
2005 Request	13,000	2,923	...	15,923	14,000	13,000
Program Improvements/Offsets	...	-318	77	-241	759	...

a/ In fiscal year 2003, $13 million was appropriated however, only $9.8 million in fees were collected.

Summary Statement

The Budget proposes $13 million for Manufactured Housing for fiscal year 2005. This amount will be derived from fees assessed on each transportable unit produced.

Production forecasts for fiscal year 2005 range from 280,000 to 333,333 units. Based on the upper end of the forecast, fiscal year 2005 estimates assume fee-based income of $13 million based on a fee level of $39 per unit. At the lower end of the forecast, an increase in the fee from $39 to approximately $46 per unit would be required to generate $13 million in income. These funds will allow the Department to pay an increased share of fee income to the 38 participating states, and continue executing current activities.

The following table reflects an estimate of the use of the $13 million. However, the table is for illustrative purposes only. Actual expenditures may deviate from these amounts.

Cost Categories for Federal Manufactured Housing Program	FY 2005 Budget Request
Payments to States	$6.6 million
Salaries	1.75 million
Contract for Monitoring Primary Inspection Agencies and States	3.14 million
Contract for Consensus Committee Administering Organization	0.25 million
Other Contracts	0.76 million
Contract for Installation Inspection and Enforcement	0.25 million
Contract for Dispute Resolution Enforcement	0.25 million
Total	$13.0 million

Manufactured housing is a critical element in the nation's supply of affordable housing. The Federal Manufactured Housing Program is the sole party, through Federal pre-emption, responsible for the oversight of the design and construction of all manufactured housing

(mobile homes) in the United States. The program is administered from the Department's Headquarters with no Field Office staff support. The proposed fee income will allow the Department to continue its oversight of the manufacturer's inspection agencies, identifying weaknesses in the oversight of production and design review and approval systems, and to monitor the performance of states working as partners in identifying serious defects and imminent safety hazards in new and existing manufactured housing.

Initiatives

Dispute Resolution Enforcement. The Department's regulatory responsibility now includes the resolution of consumer-initiated disputes unresolved among manufacturers, installers, and retailers of manufactured housing. The 2000 Act requires the Department to carry out these responsibilities with completed rule-making, administration, and procurement no later than December 27, 2005. Further, the Manufactured Housing Consensus Committee must review and recommend all of the proposed standards and regulations prior to the Department's own rule making.

HOUSING
MANUFACTURED HOUSING STANDARDS
Summary of Resources by Program
(Dollars in Thousands)

Budget Activity	2003 Budget Authority	2002 Carryover Into 2003	2003 Total Resources	2003 Obligations	2004 Budget Authority/ Request	2003 Carryover Into 2004	2004 Total Resources	2005 Request
Fees	$9,814	$2,468	$12,282	$9,041	$12,923	$3,241	$16,164	$13,000
Total Manufactured Housing Standards Program	9,814	2,468	12,282	9,041	12,923	3,241	16,164	13,000
FTE								
Headquarters			14				16	16
Field			...				...	...
Total			14				16	16

HOUSING
MANUFACTURED HOUSING STANDARDS PROGRAM
Program Offsets
(Dollars in Thousands)

Fees	**Amount**
2003 Appropriation	$9,814
2004 Appropriation/Request	12,923
2005 Request	13,000
Program Improvements/Offsets	77

Proposed Actions

The regulatory activities supported by the $13 million in fee revenue will: (1) cover the contractual costs of the program; (2) make payments to the States for the costs of investigating purchaser complaints; and (3) cover the Department's expenses for staff. Payment for this last item is made through a transfer to the "Salaries and Expenses, HUD" account. The Department will ensure that staffing is sufficient for proper program administration and enforcement of standards.

Production forecasts for fiscal year 2005 range from 280,000 to 333,333 units. Based on the upper end of the forecast, fiscal year 2005 estimates assume fee-based income of $13 million based on a fee level of $39 per unit. At the lower end of the forecast, an increase in the fee from $39 to approximately $46 per unit would be required to generate $13 million in income. These funds will allow the Department to pay an increased share of fee income to the 38 participating states, and continue executing current activities.

Manufactured housing is a critical element in the nation's supply of affordable housing. The Federal Manufactured Housing Program is the sole party, through Federal pre-emption, responsible for the oversight of the design and construction of all manufactured housing (mobile homes) in the United States. The program is administered from the Department's Headquarters with no field office staff support. The proposed fee income will allow the Department to continue its oversight of the manufacturer's inspection agencies, identifying weaknesses in the oversight of production and design review and approval systems, and to monitor the performance of states working as partners in identifying serious defects and imminent safety hazards in new and existing manufactured housing.

The Department regulates the design, construction, and safety of manufactured housing pursuant to its authority under the National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. 5401, *et seq.* ("the Act"). The standards are to govern quality, durability, and safety among other things. The Act originally took effect June 15, 1976, and all manufactured homes produced since then must meet Federal manufactured home construction and safety standards. The Act was amended by the Manufactured Housing Improvement Act of 2000 (Title VI, P.L. 106-569, 114 Stat. 2944, approved December 27, 2000) in part to provide for the establishment of a consensus committee for manufacturing housing that is charged with providing recommendations to the Secretary to adopt, revise, and interpret manufactured housing construction and safety standards and procedural and enforcement regulations, as well as submitting to the Secretary proposed model installation standards. Additionally, the Department's regulatory responsibility now includes the resolution of consumer-initiated disputes unresolved among manufacturers, installers, and retailers of manufactured housing. The 2000 Act requires the Department to carry out these responsibilities with completed rule-making, administration, and procurement no later than December 27, 2005. Further, the Manufactured Housing Consensus Committee must review and recommend all of the proposed standards and regulations prior to the Department's own rule making.

Activities authorized by the Act include the following:

1. Establishment of Standards. Under the Act, the Secretary is directed to establish appropriate Federal manufactured home standards for the construction, design, and performance of manufactured homes which meet the needs of the public, including quality, durability, and safety. The Department appointed the Manufactured Housing Consensus Committee, as mandated by statute in 2002. The Consensus Committee is responsible for initiating new manufactured housing construction and safety standards and reviewing recommended revisions to the standards.

2. Consensus Committee. In 2000, the Act was amended to establish a consensus standards and regulatory development process. HUD has contracted with the National Fire Protection Association (NFPA) to serve as the Administering Organization to support a Consensus Committee to implement the revised standards process, an effort requiring resources not previously accounted for in the program's budget. The Secretary appointed 21 persons to serve on the Consensus Committee, the cost of which is accounted for in the Administering Organization contract.

3. Enforcement of Standards. Enforcement of the standards is accomplished mainly by third-party primary inspection agencies. These agencies can be private or State agencies and are approved and monitored by HUD.

4. Addressing noncompliance with Standards. Title VI of the 1974 Act requires that every company that builds manufactured homes provide HUD with the plans for each model produced. The manufacturer is required to issue a certification that each section built meets the Federal standards in effect at the time of production. If the Department determines that any manufactured home does not comply with standards or contains a defect constituting a significant safety hazard, it may require the producer to notify the purchaser of the manufactured home of the defect. In certain cases, HUD may require repair, replacement or refund of the price of the defective section(s).

5. Administration and Enforcement of Installation Standards and Dispute Resolution Program. The 2000 Act calls for the development of new program standards and regulations for the installation of manufactured homes as well as a new program for dispute resolution. Under current market conditions there are approximately 200,000 homes installed nationwide each year.

Budget and Activities

Payments to States and Program S&E. The Manufactured Housing Program has two primary financial responsibilities, and several activities of a more discretionary nature requiring financial commitments. The two primary responsibilities are to share the fee income with the participating states, and to pay staff salaries and expenses allowing overall administration of the program. Together these two financial commitments account for approximately 39 percent of the fiscal year 2005 budget. Other essential program elements are supported through procured services.

Administering Organization and Consensus Committee. One responsibility is to ensure the Manufactured Housing Consensus Committee (MHCC), mandated by the Manufactured Housing Improvement Act of 2000, is able to meet on a regular basis to carry out its responsibilities, primarily the recommendation of new and revised design and construction standards for manufactured housing. This is accomplished through a contract with an Administering Organization (AO), with projected fiscal year 2005 cost of $200,000.

Monitoring, Inspection, and Support Contracts. The Department uses several resources to monitor program administration by the 17 inspection agencies and 38 state administrative agencies: staff paid from fee income, state payments from fee income, and contractual assistance paid through fee income. The projected costs of these activities will account for approximately 37 percent of the fiscal year 2005 Budget.

Installation and Dispute Resolution Support Contracts. Preparing and processing these procurements must begin in fiscal year 2005. The several contracts supporting these activities must have been executed no later than the final quarter of fiscal year 2005 to allow the Department to begin the new mandated activities by December 2005. The funds to pay for these contracts are projected to account for 22 percent of the budget, and will be paid primarily by the appropriated funds.

HOUSING
MANUFACTURED HOUSING STANDARDS PROGRAM
Performance Measurement Table

Program Name: Manufactured Housing Standards Program					
Program Mission: Increase the nation's supply of affordable housing.					
Performance Indicators	**Data Sources**	**Performance Report**		**Performance Plan**	
		2003 Plan	**2003 Actual**	**2004 Enacted**	**2005 Plan**
Upon review by the Consensus Committee, HUD will develop final rules for the dispute resolution and installations programs mandated by the Manufactured Housing Improvement Act of 2000.	Office of Housing	Consensus Committee will submit to HUD Proposed Regulation	Consensus Committee submitted to HUD Proposed Regulation	Publish Proposed Rule	Publish Final Rule

Explanation of Indicators

None.

HOUSING
MANUFACTURED HOUSING STANDARDS PROGRAM
Justification of Proposed Changes in Appropriations Language

The 2005 President's Budget includes proposed changes in the appropriations language listed and explained below. New language is italicized and underlined, and language proposed for deletion is bracketed.

For necessary expenses as authorized by the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended (42 U.S.C. 5401 et seq.), up to $13,000,000 to remain available until expended, to be derived from the Manufactured Housing Fees Trust Fund: Provided, That not to exceed the total amount appropriated under this heading shall be available from the general fund of the Treasury to the extent necessary to incur obligations and make expenditures pending the receipt of collections to the Fund pursuant to section 620 of such Act: Provided further, That the amount made available under this heading from the general fund shall be reduced as such collections are received during fiscal year [2004] *2005* so as to result in a final fiscal year [2004] *2005* appropriation from the general fund estimated at not more than $0 and fees pursuant to such section 620 shall be modified as necessary to ensure such a final fiscal year [2004] *2005* appropriation. (Division G, H.R. 2673, Consolidated Appropriations Bill, FY 2004.)

Explanation of Changes

No new policy changes are proposed.

HOUSING
MANUFACTURED HOUSING STANDARDS PROGRAM
Crosswalk of 2003 Availability
(Dollars in Thousands)

Budget Authority	2003 Enacted	Supplemental/ Rescission	Approved Reprogrammings	Transfers	Carryover	Total 2003 Resources
Fees	$9,814	...	...	...	$2,468	$12,282
Total	9,814	...	...	...	2,468	12,282

HOUSING
MANUFACTURED HOUSING STANDARDS PROGRAM
Crosswalk of 2004 Availability
(Dollars in Thousands)

Budget Authority	2004 President's Budget Request	Congressional Appropriations Action on 2004 Request	2004 Supplemental/ Rescission	Reprogrammings	Carryover	Total 2004 Resources
Fees	$13,000	$13,000	-$77	...	$3,241	$16,164
Total Changes	13,000	13,000	-77	...	3,241	16,164

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
HOUSING
MANUFACTURED HOUSING FEES TRUST FUND
2020 Summary of Resources

(Dollars in Thousands)

	Enacted/ Requested	Carryover	Supplemental/ Rescission	Total Resources	Obligations	Outlays
2018 Appropriation	11,000	3,478[a]	-	14,478	8,157	8,278
2019 Annualized CR	11,000	6,321	-	17,321	13,729	10,216
2020 Request	12,000	3,592	-	15,592	11,721	10,790
Change from 2019	1,000	(2,729)	-	(1,729)	(2,008)	574

a/ Reflects carryover of $2.7 million and $821.4 thousand in recoveries of prior year obligations.

1. Program Purpose and Budget Overview

The 2020 President's Budget for the Manufactured Housing Program is $12 million, which is $1 million more than the 2019 Annualized CR. The requested funds will support updating the construction, safety, and installation standards; monitoring of third-party inspection agencies for compliance with construction and safety standards; compensating state-administrative agencies (SAAs) for addressing consumer complaints and other activities; ensuring compliance with installation standards; recertifying of installation programs run by the states; administering the federal dispute resolution program; and the recertifying the dispute resolution programs run by the states.

2. Request

The Manufactured Housing Program issues and enforces appropriate standards for the construction, design, performance, and installation of manufactured homes to assure their quality, durability, affordability, and safety. HUD's construction and safety standards preempt state and local laws and apply to all manufactured homes produced after June 15, 1976. HUD may enforce these standards directly or through SAAs. HUD may inspect factories and retailer lots and review records to enforce such standards. If a

manufactured home does not conform to federal standards, the manufacturer must take certain actions, including possibly notifying the consumer and correcting the problem.

While manufactured housing serves all sectors of the population, its continued availability and affordability is especially critical for young families, individuals with moderate or low incomes, and elderly households with fixed incomes. In 2017, the median household income of manufactured homeowners was $30,000, making it a key component of affordable housing. In calendar year 2016, the average sales price of a manufactured home was $70,600.[1]

The 2020 President's Budget supports the following activities:

Payments to States - $3.6 million

The request will cover payments made to SAAs to offset their costs for handling consumer complaints and overseeing notification and correction-related activities as outlined in federal manufactured home regulations.

Contracts - $8.4 million
The request will cover the contractual costs for monitoring and enforcement of the program to effectively carry out the multiple federally mandated and preemptive oversight and compliance aspects of the program.

3. Justification

Before 1974, regulation of manufactured homes was left to the states and manufacturers were required to comply with numerous different building codes that created a burdensome and inefficient marketplace. This decentralized regulatory structure resulted in a patchwork of regulations with varying degrees of enforcement and compliance. These variations also hindered manufacturers' ability to ship their homes across state lines and impeded the productivity and efficiency of the industry. In response, Congress passed the National Manufactured Housing Construction and Safety Standards Act of 1974.

The Act established HUD's responsibility for manufactured home design, construction, and consumer protection to protect the quality, durability, safety, and affordability of manufactured homes. The Manufactured Home Improvement Act of 2000 (2000 Act) expanded those responsibilities, requiring HUD to provide installation standards and dispute resolution services where states did not have a HUD-approved program to offer those services. The 2000 Act also required HUD to approve and recertify state installation and

[1] Manufactured Housing Institute, 2018 Manufactured Housing Facts, Updated June 2018.

dispute resolution programs and establish and manage the Manufactured Housing Consensus Committee (see below). HUD's regulation of manufactured housing fulfills a statutory mandate in establishing federally preemptive standards (one national building code) for the industry and protecting consumers. To accomplish these goals and fulfill the requirements of the Act, the duties of HUD's Office of Manufactured Housing Programs (OMHP) include:

- **Establishment and updating of Manufactured Home Construction and Safety and Installation Standards for the construction, design, and performance of manufactured homes.** These standards are established to meet the goals of the 2000 Act and the needs of the public for the quality, durability, and safety of manufactured homes. HUD also establishes model standards for the installation of manufactured homes. These standards are updated by the OMHP following careful analysis of proposals from the industry and consumers, in close coordination with the Manufactured Housing Consensus Committee (MHCC), a 21-person Federal Advisory Committee composed of representatives from the manufacturing industry (producers/retailers), public officials/general interest, and users (consumer leaders, representatives of consumer organizations, and owners and residents of manufactured homes).

- **Monitoring the manufacturers' compliance with the Construction and Safety Standards.** HUD monitors third-party agencies who approve manufacturers' designs (Design Approval Primary Inspection Agencies - DAPIAs) and agencies who inspect construction and quality programs in the plants (In-plant Production Inspection Agencies - IPIAs). These agencies ensure that quality control programs are in place and that HUD standards are being met during home production in over 132 manufacturing plants nationwide. In addition, the HUD contractor monitors the performance of SAAs (see bullet below).

- **Addressing non-conformances with the Construction and Safety Standards by requiring manufacturers to notify consumers of a defect; or, in the event of a serious problem, require the manufacturer to repair or replace manufactured homes.** The OMHP partners with states—SAAs—through cooperative agreements to carry out consumer complaint activities on HUD's behalf. HUD is responsible for direct oversight in states without SAAs.

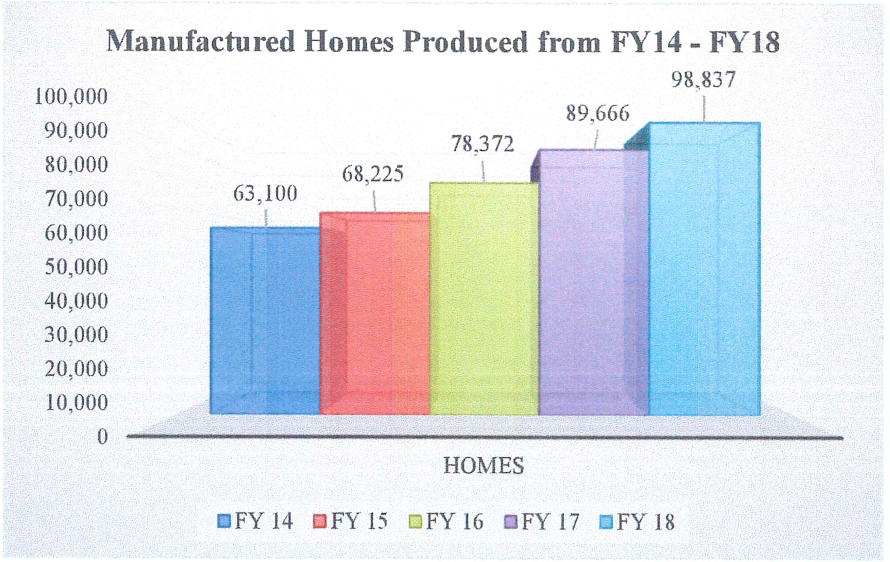
- **Establishment and Oversight of Model Installation Standards in all States.** The OMHP is responsible for installation oversight nationwide and the licensing and training of installers. OMHP has implemented a federally run program in 14 states that have no installation program of their own, and it oversees HUD-approved programs in 36 states.

- **Establish and Administer the Dispute Resolution Program to resolve disputes between manufacturers, retailers, and installers of manufactured homes.** OMHP administers a federally run program in 24 States that have no dispute resolution program of their own, and it oversees HUD-approved programs in 26 states.

- **Coordinate the Activities of the Manufactured Housing Consensus Committee through the use of an Administering Organization (AO).** The Committee is mandated by the amendments to the National Manufactured Housing Construction and Safety Standards Act and oversees the consensus process for the development of standards and regulations. The MHCC is responsible for providing recommendations to the Secretary on construction standards, installation standards, and enforcement regulations.
- **Meetings with Partners in the Federal Manufactured Housing Program**. These meetings are held with all parties that work with the federal program to ensure it operates in a consistent manner. These meetings bring together parties in the federal program including meetings of the MHCC, meetings with in-plant and design approval agencies, national and regional meetings with its state partners, as well as meetings with other federal agencies, manufacturers, installers, and homeowners.

The costs of these programmatic activities are rising steadily due to increases in the production of manufactured homes and the steady increase in the number of production facilities nationwide. The number of manufactured homes produced has increased by nearly 57 percent from 2014-2018. Also, the number of manufacturing plants has increased from 122 in 2013 to 132 in 2018. In addition, monitoring inspections are now being conducted as a result of full implementation of HUD's installation and dispute resolution programs.

Manufacturers pay a $100 fee per transportable section of a manufactured home (a manufactured home typically has 1-2 transportable sections). In 2018, HUD collected approximately $15.1 million in fees and projects $16 million in fee collections during 2020.



In summary, since the program's inception in 1976, the overall quality, safety, and durability of manufactured housing has improved, and its affordability has been maintained. The number of per capita fires and deaths in manufactured homes has been significantly reduced compared to homes produced before the HUD standards became effective. Manufactured homes produced under HUD Code perform better in high wind events due to enhancements to modern manufactured home construction standards. In a

study conducted after Hurricane Charley, which made landfall in 2004, manufactured homes produced under HUD's 1994 wind standard requirements performed significantly better than pre-1994 units. Additionally, mobile homes produced prior to the HUD program's effective date in 1976 were more severely damaged overall than manufactured homes produced under HUD regulations. Moreover, financial organizations have been encouraged to offer home mortgages instead of chattel financing due to the increased lifetime and durability of manufactured homes produced under HUD's program.

HOUSING
MANUFACTURED HOUSING FEES TRUST FUND
Summary of Resources by Program

(Dollars in Thousands)

Budget Activity	2018 Budget Authority	2017 Carryover Into 2018	2018 Total Resources	2018 Obligations	2019 Annualized CR	2018 Carryover Into 2019	2019 Total Resources	2020 Request
Payments to States	3,600	579	4,179	3,431	3,600	1,374	4,974	3,600
Contracts	7,400	2,899	10,299	4,726	7,400	4,947	12,347	8,400
Total	11,000	3,478	14,478	8,157	11,000	6,321	17,321	12,000

HOUSING
MANUFACTURED HOUSING FEES TRUST FUND
Appropriations Language

The 2020 President's Budget includes the appropriation language listed below:

For necessary expenses as authorized by the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5401 et seq.), up to $12,000,000, to remain available until expended, of which $12,000,000 is to be derived from the Manufactured Housing Fees Trust Fund: Provided, That not to exceed the total amount appropriated under this heading shall be available from the general fund of the Treasury to the extent necessary to incur obligations and make expenditures pending the receipt of collections to the Fund pursuant to section 620 of such Act: Provided further, That the amount made available under this heading from the general fund shall be reduced as such collections are received during fiscal year 2020 so as to result in a final fiscal year 2020 appropriation from the general fund estimated at zero, and fees pursuant to such section 620 shall be modified as necessary to ensure such a final fiscal year 2020 appropriation: Provided further, That for the dispute resolution and installation programs, the Secretary may assess and collect fees from any program participant: Provided further, That such collections shall be deposited into the Fund, and the Secretary, as provided herein, may use such collections, as well as fees collected under section 620, for necessary expenses of such Act: Provided further, That, notwithstanding the requirements of section 620 of such Act, the Secretary may carry out responsibilities of the Secretary under such Act through the use of approved service providers that are paid directly by the recipients of their services.

Note.—A full-year 2019 appropriation for this account was not enacted at the time the budget was prepared; therefore, the budget assumes this account is operating under the Continuing Appropriations Act, 2019 (Division C of P.L. 115-245, as amended). The amounts included for 2019 reflect the annualized level provided by the continuing resolution.

THE JOURNAL
The Magazine For Manufactured & Modular Housing Professionals

MHARR Viewpoint

By Mark Weiss **OCTOBER 2015** *As printed in The Journal*

"'Monitoring' Contractor's Domination of Federal Program Must End"

Attending the HUD-IPIA-SAA conference in April 2015, one had to wonder just who runs the federal manufactured housing program on a policy and implementation level – HUD or its entrenched "monitoring" contractor. Employees of the revenue-driven "monitoring" contractor (the only entity to hold that contract since the inception of federal regulation in 1976, albeit under different corporate names) participated in panel presentations, offered interpretations of the standards and enforcement regulations, and made broad pronouncements on program policies (for example, IPIA concurrences for non-conformance determinations). All of this led MHARR to emphasize, in its April 16, 2015 meeting report, the unprecedented (and dangerous) degree to which the revenue-driven "program contractor – and its allies – and *their* interests are now driving the federal program," instead of publicly accountable officials at HUD. And, indeed, *no* other governmental agency has such a dependent, distorted and intertwined relationship with a contractor that, like HUD, it would actually seek – *repeatedly* – to prevent full and fair competition for that contract. With this situation now reaching a critical stage, however, it is important to have a clear understanding of all its various aspects.

The federal program, obviously, did not reach this point overnight. For decades MHARR has been a lone voice opposing the slow but steady accretion of more and more program functions in that one and only "monitoring" contractor which – nominally, at least – is supposed to be keeping tabs on 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 a slew of contractor-initiated and/or contractor-developed pseudo-regulations (e.g., "Acceptable 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, for their part, spent years denying (and still do) 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 (with the exception of just a few short periods) 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. And now, with the domination of the program by a paid contractor reaching a critical stage, others in the industry – and consumers – can no longer afford to be bystanders.

To be sure, and 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, 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 a startling look at – and confirmation of – just how pervasive the role of the monitoring contractor in the federal program actually is, and just how much real, "on the ground" authority it exercises, contrary to the claims of successive HUD program Administrators. 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:

1. *Developing* in-plant audit procedures under HUD's unilateral program of expanded in-plant regulation (page 14);
2. Reviewing IPIA responses in disputed matters and preparing written counter-replies *for HUD* (page 16);
3. Drafting IPIA Performance Reviews *for HUD* (page 18);
4. Providing responses *for HUD* in disputes with IPIAs (page 20);
5. Proposing revisions to the Audit Procedures Manual and the Procedural and Enforcement Regulations to "improve the process" (page 21)
6. 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 (page 25);
7. Providing "recommendations" for specific HUD corrective or *enforcement* actions against DAPIAs (page 26);
8. Developing checklists to be used in evaluating State Administrative Agency (SAA) procedures and methods (page 30);
9. Conducting post-production inspections to "verify" retailer compliance (page 31);
10. Preparing evaluation reports *for HUD* in connection with consideration of the acceptance of new or modified State Plans (page 32);
11. Participating in research, review and developing proposed action and follow-up for "special design and construction requests" (page 35);
12. Conducting unspecified "special investigations" (page 35);
13. Analyzing and researching "technical issues" *for HUD* (page 36);
14. *Evaluating* findings to "determine the validity and strength of evidence collected during audits" (page 36);
15. Providing "expert testimony" and "engineering support" to "assist" HUD (page 36);
16. Reviewing any application by a state or organization to be approved as a new IPIA, DAPIA or SAA (page 37); and
17. Preparing a "draft" acceptance report on any such application *for HUD* (page 37).

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., point 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 – and as regulated parties under the HUD program well know – 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 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. MHARR, consequently –based on its multi-year FOIA effort to gather relevant evidence and information, and with the "monitoring" contractor's domination of the federal program now worsening thanks, in part, to HUD's 156% hike in label fees in 2014 – is now considering all available options, including potential legal approaches, to end this distorted and dysfunctional contracting system.

In MHARR's view, the long-standing domination of the HUD program by a single revenue-driven contractor must end in order to "liberate" the program and the industry, thereby allowing both to fulfill *all* of the goals and purposes of the 2000 reform law, by providing Americans with the best quality housing at the most affordable price.

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