Manufactured Housing Association for Regulatory Reform

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VIA ELECTRONIC SUBMISSION

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

Re: Proposed Rule – Manufactured Housing Construction and Safety Standards – Docket No. FR-6233-P-01; RIN 2502-AJ58

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 organization representing the views and interest 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 (1974 Act), as amended by the Manufactured Housing Improvement Act of 2000 (42 U.S.C. 5401, et seq.) (2000 reform law). MHARR was founded in 1985. Its members include independent producers of manufactured housing from all regions of the United States.

I. INTRODUCTION

On July 19, 2022,[1] HUD published a proposed rule in the Federal Register to adopt certain modifications and additions to the Federal Manufactured Home Construction and Safety Standards (FMHCSS) (24 C.F.R. 3280, et seq.) as recommended by the statutory Manufactured Housing Consensus Committee (MHCC). For the most part, MHARR supports these proposed amendments. However, it opposes – as it has consistently – the proposed contingent standard for manufactured home fire sprinkler systems and urges certain modifications to the proposed multi-dwelling unit manufactured housing standard in order to expand the range of affordable housing choices that will ultimately be available to American consumers. Based on these comments, MHARR urges HUD to:

(1) withdraw its contingent/conditional fire sprinkler standard;

[1] See, 87 Federal Register, No. 137 (July 19, 2022) "Manufactured Home Construction and Safety Standards," p. 43114, et seq.

(2) adopt a modified multi-dwelling unit manufactured housing standard as set forth herein;

(3) adopt such other and further changes to its proposed rule as are detailed herein; and

(4) act expeditiously to adopt and implement a final rule consistent therewith.

The grounds and bases for the final rule modifications sought by MHARR and related relief are set forth in detail herein.

II. COMMENTS

A. THERE IS NO VALID BASIS, AUTHORITY OR NEED FOR A CONDITIONAL FIRE SPRINKLER "STANDARD"

As described by HUD, the proposed rule, among other things, would "expand the fire safety subpart" of the FMHCSS "to include guidelines and requirements for the design and installation of fire sprinkler systems when a manufacturer chooses to install such a system...." The July 19, 2022 Notice of Proposed Rulemaking (NPR) clarifies this further, stating: "While the proposed rule is not adding a requirement that fire sprinkler systems be installed" in all manufactured homes, "when a manufacturer installs a fire sprinkler system," the NPR criteria "would establish the requirements for the installation of the fire sprinkler system."[2] The proposed fire sprinkler "standard," accordingly, as described and propounded by HUD, is not "voluntary," per se, as characterized by the MHCC and proponents before the MHCC, but rather, contingent or conditional on whether a manufacturer installs a fire sprinkler system in a HUD Code home, either as a matter of choice (by the manufacturer or homebuyer) or under compulsion of state or local law. If that contingency is met, however, the standard is clearly *mandatory* and could – at some point in the future – be extended to affirmatively *require* the installation of a sprinkler system in accordance with its installation directives.

Regardless of its characterization by HUD (or others), however, MHARR fundamentally rejects this formulation, as it has consistently for nearly five decades. While the bases for that rejection have previously been presented in detail by MHARR in multiple forums, those points are again summarized below.

1. There is No Statutory Basis for a Conditional Sprinkler Standard

After extended debate, the MHCC, on October 20, 2011, voted to accept a contingent or conditional fire sprinkler standard proposed by the Manufactured Housing Institute (MHI).[3] As set forth in the NPR, that standard would be incorporated in a new section 24 C.F.R. 3280.214 (and other new sections of the FMHCSS). In relevant part, section 3280.214 would state: "(a) General. (1) Fire sprinkler systems are not required by this subpart; however, when a manufacturer installs a fire sprinkler system, this section establishes the requirements for the installation of a fire

[2] See, 87 Federal Register No. 137, supra at p. 43120, col.1-2.

[3] The HUD-published proposed standard tracks almost verbatim with MHI's January 2011 regulatory proposal as submitted to the MHCC.

sprinkler system in a manufactured home. *** (b) Design. The design of the fire sprinkler system itself shall be in accordance with [National Fire Protection Association standard] 13D." The contingent proposed sprinkler standard as set forth in the NPR, is thus partly prescriptive and partly based on NFPA 13D as an incorporated reference standard. Ultimately, however, this formulation is contrary to law, insofar as the 1974 Act, as amended, provides no basis for the promulgation of conditional standards, as demonstrated below.

As MHARR has repeatedly emphasized, the fire safety of manufactured homes is manifestly a "safety" issue. Thus, the existing HUD fire safety standards for manufactured homes are specifically entitled "Fire Safety."[4] This is relevant because under the 1974 Act, as amended, "manufactured housing safety" is a defined term meaning "the performance of a manufactured home in such a manner that the public is protected against ... any unreasonable risk of death or injury to the user" of the home.[5] Based on this definition, the essential prerequisite to the adoption of a federal manufactured home safety standard is the existence of an "unreasonable risk" of death or injury to the occupant(s) of a manufactured home. The existence of any such unreasonable risk, moreover, is a non-delegable function which must be determined by HUD, as the agency charged with developing, maintaining and enforcing the federal standards.

Under this statutory definition, there either is an "unreasonable risk" of death or injury attributable to a manufactured home safety issue as determined by HUD, or there is not. Put differently, this is a binary determination with no middle ground. If there is an "unreasonable risk," HUD can adopt a federal safety standard to remedy, mitigate or otherwise address that risk. If there is not an "unreasonable risk," HUD cannot, quite simply, adopt such a standard. Consequently, if the current federal fire safety standards ensure "reasonable" fire safety without sprinklers – and they do, as demonstrated below – then, per se, there is no "unreasonable risk of death or injury" to be remedied by sprinklers, sprinkler installation criteria, or any measure other than those currently required by Subpart C.

In this regard, HUD has never determined, claimed, or even implied that the absence of fire sprinklers from Subpart C (until now) creates an "unreasonable risk" of death or injury in manufactured homes that comply with the existing HUD fire safety standards. To the contrary, section 3280.201 of the FMHCSS fire safety standards states an affirmative HUD conclusion that the present standards – without fire sprinklers – already ensure "reasonable fire safety" for manufactured home occupants. And indeed, HUD, in its initial consideration of the federal preemption of state or local fire sprinkler standards, correctly ruled that such standards were, in fact, preempted under the less rigorous preemption language of the original 1974 Act.[6] The MHCC, moreover, made no finding or determination of "unreasonable risk" in conjunction with its acceptance of the MHI-proposed conditional standard. Nor has HUD, in its proposed rule based on the MHCC recommendation, made any such determination or finding To the contrary, all of the evidence presented to the MHCC incident to its consideration of the MHI-proposed fire sprinkler standard, established that the current HUD fire safety standards, without the use of high-cost fire sprinklers, do, in fact, eliminate any "unreasonable risk of death or injury" due to fire, and

[4] See, 24 C.F.R. 3280.201-213.

[5] See, 42 U.S.C. 5402(8) (emphasis added).

[6] See, Attachment 1 hereto, July 27, 1989 communication from Mark Holman, Director, HUD Manufactured Housing and Construction Standards Division to Tom Smith, Fire Chief, City of Oklahoma City, Oklahoma.

achieve their stated purpose to "ensure reasonable fire safety to the occupants" of manufactured homes "by reducing fire hazards and by providing measures for early detection."[7]

Specifically, according to a July 2011 National Fire Protection Association (NFPA) report entitled "Manufactured Home Fires" and an October 14, 2011 update to that report, both of which were presented to the MHCC and summarized in verbal testimony, the fire safety of manufactured homes constructed in accordance with the existing HUD fire safety standards, is equal to or better than that of other type of one or two-family residential dwellings. The report and update thus show, among other things, that HUD Code manufactured homes have a lower incidence of fire per 1,000 homes than other occupied one or two-family dwellings. Similarly, HUD Code manufactured homes have "a lower rate of civilian fire injuries per 100,000 occupied housing units than other one or two-family homes" and post-HUD standard manufactured homes are more likely than other homes to have fires confined to the room of origin.[8] Most significantly, though, according to the October 14, 2011 update to this report, the fire death rate per 100,000 occupied homes for post-HUD standard manufactured homes is "comparable" to the fire death rate for other one or two-family homes.

Given the fact that the current HUD fire safety standards provide protection to manufactured home occupants equal to or better than other types of one or two-family dwellings, those standards, per se, without the use of high-cost fire sprinklers, ensure that there is no "unreasonable risk of death or injury" from fire. And, since there is no unreasonable risk of death or injury to occupants now, under the current HUD fire safety standards, there is, per se, no "unreasonable risk" to be remedied by fire sprinklers or a fire sprinkler standard. Furthermore, since the current fire safety standards, without sprinklers, already satisfy the statutory standard of reasonable protection, a sprinkler standard, per se, would unnecessarily increase consumer costs, contrary to the fundamental purposes of the Act, by triggering all of the approval and inspection requirements of the Procedural and Enforcement Regulations as well as their Subpart I recall provisions, where applicable.

Accordingly, there is no valid statutory basis for the proposed contingent fire sprinkler standard and HUD must delete that proposed standard from any final rule adopted in this docket.

2. The Proposed Conditional Sprinkler Standard is not Needed to Preempt State and Local Sprinkler Mandates

In substantial part, the MHCC's rationale for recommending the adoption of a contingent federal fire sprinkler standard was that such a standard would ensure the federal preemption of state and/or local fire sprinkler standards under 42 U.S.C. 5403(d). As MHARR has repeatedly demonstrated, however, this claim is spurious, as both the plain language and structure of the 1974 Act, as amended, make it clear that properly construed, such mandates are preempted now, without an ostensibly "conditional" federal sprinkler standard.

Beyond demonstrating that there is no statutory authority for the adoption of the proposed conditional federal fire sprinkler standard, the NFPA fire safety data presented to the MHCC,

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

[8] See, NFPA, "Manufactured Home Fires," July 2011 at pp. 5, 10.

shows that an explicit HUD fire sprinkler standard – either contingent as proposed in the July 19, 2022 NPR or otherwise – is not (and should not be) needed to trigger the federal preemption of any state or local fire sprinkler standard applicable to HUD Code manufactured homes. Rather, under the enhanced federal preemption of the 2000 reform law, the current HUD fire safety standards federally preempt any state or local sprinkler mandates in accordance with the purposes of the Act as established by Congress. Those standards, accordingly, should – and must -- be deemed and declared fully preemptive by HUD.

The 2000 reform law substantially enhanced the scope of federal preemption under the Act. Pursuant to section 604(d) of the Act (42 U.S.C. 5403(d)), as amended:

> "Whenever a federal manufactured home construction and safety standard established under this title is in effect, no state or political subdivision ... shall have any authority to establish or to continue in effect ... any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the federal ... standard. Federal preemption under this subsection shall be broadly and liberally construed to ensure that disparate state or local requirements or standards do not affect the uniformity and comprehensiveness of the standards promulgated under this section nor the federal superintendence of the manufactured housing industry...."

(Emphasis added).

Under the amended language, there is no longer any debate as to whether the pivotal "same aspect of performance" language is to be construed broadly, as maintained by MHARR since its inception, or narrowly, as maintained by HUD in a series of preemption opinions dating to the mid-1990s. Instead, that issue has been definitively resolved by Congress with its directive that preemption under the Act is to be "broadly and liberally construed" in order to achieve the federal purposes of the Act. Thus, HUD's prior legal analysis of the preemption of state and local sprinkler standards, which was specifically premised on a narrow construction of the "same aspect of performance" test, is no longer valid.

Construing the dispositive "same aspect of performance" language "broadly and liberally" in favor of preemption, as mandated by Congress, and given the information presented to the MHCC by NFPA, showing that the existing HUD fire safety standards protect occupants from an "unreasonable risk of death or injury" from fire, it is evident that state and local sprinkler laws are – and should be – preempted by the existing HUD standards.

Previous HUD opinions, based upon its statutorily-invalidated narrow construction of the "same aspect of performance" test, concluded that state and local sprinkler mandates were not preempted because even though the federal standards specifically address "fire safety," the federal standards contain no provisions "directly addressing" sprinkler systems. Thus, in a February 9, 1995 legal opinion obtained by MHARR through the Freedom of Information Act (FOIA), HUD's General Counsel stated, in relevant part:

> "Even though the stated purpose of the Subpart is to set forth requirements to "assure reasonable fire safety," the rest of Subpart C, which contains the fire safety standards, has no provisions directly addressing sprinkler systems. Moreover, the fire safety standards fail to contain even a category that could be interpreted to include sprinkler systems such as "fire extinguishing equipment." Instead of extinguishing or subduing fires, the federal standards, as noted above, are concerned with "reducing fire hazards" and "providing measures for early detection." Because the federal standards fail to contain specific requirements or categories relating to sprinklers and because the federal standards' basic concerns are with reducing fire hazards and providing measures for early detection instead of fire extinguishment, the federal standards would not preempt a state requirement for sprinklers...."

(Emphasis added). (Footnotes omitted). Such opinions, however, were expressly based on a narrow construction of the "same aspect of performance" language extrapolated from two 1960s-era court decisions construing the National Traffic and Motor Vehicle Safety Act of 1966. That analysis, however, has now been overruled by Congress' unequivocal directive to "broadly and liberally" construe the scope of federal preemption under the Act.

Under a "broad and liberal" construction of federal preemption and the "same aspect of performance" test, preemption analysis should focus on the federal objective to be achieved and the federal purposes of the Act. In this case, the federal objective, under the express terms of the Act, is to prevent an "unreasonable risk of death or injury" due to fire and, conversely, ensure "reasonable fire safety" for manufactured home "occupants," as declared by HUD. And since that objective, according to the NFPA data, is already met by the current federal standards, which provide protection comparable to or greater than all other types of one or two-family dwellings without the use of high-cost sprinklers, it is – and should be – irrelevant to preemption analysis what specific type of equipment or measures are mandated by the FMHCSS to achieve that result. As long as the federal objective is met under the existing federal standards promulgated by HUD, there is – and should be – no room for states and localities to require any other or additional equipment or measures different from those specified in the HUD standards. Per se, then, any additional or different equipment or measures required by a state or locality – such as fire sprinklers -- would impair the uniformity of federal regulation, and, therefore, should be preempted.

Furthermore, because the current existing HUD fire safety standards already fulfill the federal objective of the Act -- to ensure reasonable fire protection for occupants -- state or local sprinkler mandates would have the effect of unnecessarily increasing the cost of manufactured homes to the public, contrary to a key purpose of the Act, to "protect the ... affordability of manufactured homes" and "facilitate the availability of affordable manufactured homes." (See, 42 U.S.C. 5401(b)(1-2). Stated differently, since the existing federal standards already ensure reasonable fire protection for manufactured home occupants, state or local sprinkler mandates would add nothing to the fulfillment of the federal mandate, while substantially increasing the cost of a manufactured home.

Consequently, a contingent federal sprinkler standard, as proposed by HUD, is not required to support the federal preemption of state and/or local sprinkler mandates pursuant to 42 U.S.C. 5403(d).

3. A Conditional Fire Sprinkler Standard would Increase the Likelihood Of the Imposition of a High-Cost Mandatory HUD Sprinkler Standard

Beyond the fact that a sprinkler standard is unnecessary, unauthorized by applicable law and would have no impact on the federal preemption of state and local sprinkler mandates affecting manufactured homes, the conditional sprinkler standard being proposed by HUD would have other significantly negative effects on manufactured homes and the manufactured housing industry.

First, the inclusion of any type of sprinkler standard in the FMHCSS standards, whether denominated conditional, contingent, "not required," or otherwise, substantially increases the likelihood that a mandatory sprinkler standard will ultimately be included in the HUD standards and enforced against all manufactured homes. While couched as being triggered only by a manufacturer's election to install a sprinkler system, there would be no bar to mandatory enforcement of this standard by HUD against all manufactured homes in the future -- either as a policy decision by a future HUD administration, or by court order as a result of litigation by any party with an appropriate interest. Put differently, there is no guarantee that such a standard, once adopted, will not be extended to all manufactured homes, based on a mere request by an interested party, subsequent HUD "interpretation," or by court ruling. In fact, the history of ever-expanding regulation under the program shows that such an expansion is likely -- all at the same time that other segments of the housing industry are successfully resisting the imposition of such state and local mandates. For this reason alone, the supposedly conditional sprinkler standard is a regulatory "Trojan Horse" that should be rejected. NFPA 13D already exists as a private-sector "voluntary" sprinkler standard for manufactured homes. There is no need, basis, or justification for a dangerous, parallel government-based "voluntary" standard.

Second, and closely related to the above issue, even a "voluntary" federal standard would be misused by sprinkler proponents as a rationale and justification for the adoption of state and local sprinkler standards, either for all homes, or specifically for manufactured homes. A federal standard could thus have the unintended negative effect of promoting and advancing the adoption of state and local sprinkler standards, thus reversing the current trend that has seen the model International Residential Code (IRC) sprinkler mandate either rejected or modified by most jurisdictions.

Third, once "triggered" by the installation of a sprinkler system, the proposed HUD sprinkler standards are characterized by the NPR as regulatory "requirements." As a result, the sprinkler standards, once triggered and, therefore, mandatory, would be subject to Subpart I procedures and enforcement, just like any other FMHCSS standard. Thus, a HUD sprinkler standard, even if conditional, would result in the full applicability of Subpart I to the performance of any sprinkler system so installed for the life of the home, with its all of its investigation, documentation, notice and recall requirements.

For all of the reasons set forth above, therefore, the conditional fire sprinkler standard included in the proposed rule must be eliminated from any final rule in this docket.

B. THERE IS NO LEGITIMATE BASIS FOR LIMITING MULTI-UNIT MANUFACTURED HOMES TO A MAXIMUM OF THREE-UNITS

While MHARR supports the express authorization of multi-unit HUD Code homes as set forth in the NPR,[9] it continues to object to the three-unit limitation as proposed. That limitation, for the reasons addressed below, has no more federal statutory basis than the previous "one family" limitation[10] that would be retracted by the proposed rule. Accordingly, HUD should adopt a final rule which authorizes multi-unit manufactured homes, but contains no artificial limit on the number of units. Alternatively, HUD should adopt a final rule with a four-unit provision.

1. Regulatory and Statutory Background

On October 3, 2014,[11] the former administrator of the HUD Office of Manufactured Housing Programs (OMHP) issued a memorandum stating that manufacturers "may not design or build manufactured homes labeled pursuant to the National Manufactured Home Construction and Safety Standards for multifamily or other non-single family residential use." (Emphasis added). The same memorandum stated that manufactured homes "bearing a HUD certification label may not be sold for purposes other than single family use" (emphasis added) and threatens possible civil or criminal penalties for violations. In support of this ruling, the memorandum cited 24 C.F.R. 3280.2, which defines a manufactured home as a "dwelling" and further defines a "dwelling unit" as "one or more habitable rooms which are designed to be occupied by one family with facilities for living, sleeping, cooking and eating." (Emphasis added).

MHARR immediately and vigorously objected to the administrator's construction of the relevant regulatory provision – and related threats against manufacturers. These objections were enumerated in a November 12, 2014 communication to the administrator stating, in part:

> "**First**, the restriction exceeds relevant statutory authority. The statutory definition of "manufactured home" contained in 42 U.S.C. 5402(6) states that a manufactured home is a "dwelling," but does not otherwise define a "dwelling," or limit a "dwelling" – either expressly or implicitly -- to a "single-family" home. Thus, there is no statutory support for the 3280.2 restriction of a "dwelling unit" to occupancy "by one family." As the recent decision of the United States District Court for the District of Columbia, in American Insurance Association v. Department of Housing and Urban Development (No. 1:13-cv-00966) makes abundantly clear, federal regulations may not exceed the scope of the underlying grant of authority from Congress.

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[9] See, 87 Federal Register, No. 137 at pp. 43119, 43152-43153.

[10] See, 24 C.F.R. 3280.2: "Dwelling unit means one or more habitable rooms which are designed to be occupied by one family with facilities for living, sleeping, cooking and eating."

[11] See, Attachment 2, hereto, October 3, 2014 Memorandum from Pamela Beck Danner, OMHP Administrator.

"**Second**, there is no basis in the authorizing law ... for HUD to define what does or does not constitute a "family" or a "single family" for purposes of habitation in a manufactured home. With an increasing number of habitation and living arrangements being sanctioned under the equal protection mandates of both federal and state law(s), there is no applicable HUD definition of a "family," and both manufacturers and retailers could be subject to discrimination claims and potential liability for refusing a sale or lease based on the status of the purchaser or the expected use of the home.

"**Third** ... when Congress established federal authority over the safety and construction of manufactured homes ... its intent was to create a federal-state partnership with respect to enforcement and other issues. A de facto federal use restriction not only exceeds federal authority, as noted above, but also improperly usurps remaining state and local authority over the use of residential structures placed within their jurisdictions. Put differently, once a manufactured home constructed in accordance with the federal standards is sold (and properly installed), its use becomes a matter for state and/or local authority (e.g., zoning and use permits) and is not a federal matter or a matter for federal impositions upon such state and/or local authority. Quite simply, beyond the point of sale, the use and suitability of the structure becomes a matter for state and/or local regulation – like any other permanent dwelling designed and built to any other code.

"**Fourth**, and related to the last point above, such a restriction on the sale of manufactured homes based on intended or actual use, effectively discriminates against the HUD Code industry, in that other types of residentially-designed and built structures are freely used for other purposes in compliance with state and/or local codes (e.g., site-built homes in residential communities that local authorities allow to be converted for use as a doctor's office).

"Consequently, HUD should rescind its October 3, 2014 memorandum and address the proper definition of a "dwelling" through the Manufactured Housing Consensus Committee (MHCC) process...."

(Emphasis added).

Subsequently (through an MHARR-developed regulatory proposal), this matter came before the MHCC which subsequently recommended the proposed rule now set forth in the NPR. While MHARR generally supports the proposed rule and its express authorization of multi-unit manufactured homes consistent with applicable federal law, it continues to object to the proposed rule's three-unit limitation as not having any valid, legitimate, or specific basis in the 1974 Act, as amended.

Accordingly, MHARR asks that HUD eliminate the three-unit restriction from any final rule, or alternatively, that HUD increase the limit to four units and specifically state, in the final rule, the precise legal basis for any such restriction whatsoever.

2. The Proposed Three-Unit Maximum has no Basis in Law or any Applicable Regulation

HUD appears to recognize that the three-unit maximum for multi-unit manufactured homes, as proposed in the July 19, 2022 NPR, has no basis in federal manufactured housing law, insofar as it states:

> "Consistent with a 2015 determination made by the MHCC, HUD is proposing a maximum of three dwelling units for a multi-dwelling unit manufactured home. The MHCC based its determination on ensuring consistency with a similar state code. HUD is interested in public comment specific to this maximum provision for three dwelling units, including benefits and challenges if a four unit maximum were considered...."

(Emphasis added).[12] Contemporaneous MHCC Subcommittee documents indicate that the three-unit limitation was based on the belief of certain subcommittee members that a three-unit limitation would keep the HUD standards consistent with the International Code Council's (ICC) International Residential Code (IRC), while a higher limit, or no limit would require compliance with the ICC's International Building Code (IBC).[13]

Such reliance on – or reference to – state building codes or non-manufactured housing model codes as the basis for a unit limitation, however, has no legitimate basis.

First, manufactured housing is not subject to and is not regulated as to construction pursuant to any state code or model code *other* than those incorporated within the HUD Code by reference, and neither the IRC or IBC are subject to any such wholesale incorporation, or incorporation specifically with respect to multi-unit dwellings.

Second, neither the IBC or the IRC is developed for – or applicable to – the unique construction of manufactured housing, or the statutory purposes of federal manufactured housing law, including the need to maintain the fundamental affordability of HUD Code housing.

Consequently, insofar as neither the IBC nor the IRC is applicable to or binding upon HUD-regulated manufactured housing, they provide no legitimate or valid basis for any such regulatory limitation. To the contrary, manufactured housing construction is expressly and comprehensively regulated under federal law. And, insofar as applicable federal *law* does not bar multi-unit manufactured homes (as previously demonstrated by MHARR), and does not place a limit (either expressly or by implication) on the number of units that may be included within a multi-unit manufactured home, there is no more basis in existing federal law for such a limit than

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[12] See, 87 Federal Register, No. 137, supra at p. 43119, col. 3.

[13] The Subcommittee Chairman, in a March 26, 2016 discussion document, thus stated: "I don't think we should do more than 3 units. After 3 units, in my opinion, we need to follow the IBC and not the IRC.... I think 3 is pushing it, but the Ohio Building Code allows it." See, Attachment [insert], hereto at p. 5-6. The Chairman, it should be noted was – and is – the President and Chief Executive Officer of NTA, an engineering firm and HUD-approved manufactured housing Primary Inspection Agency, that was purchased in whole by ICC in 2019.

there was for the previous 24 C.F.R. 3280.2 language limiting the definition of "dwelling unit" to "one family" – and HUD's proposed rule cites no such basis.

For this reason, the three-unit limitation (or any other unit limitation) on multi-unit manufactured homes should be eliminated in any final rule adopted by HUD. Alternatively, if HUD maintains that a unit limitation is warranted and authorized under applicable law, it should increase the number of units permitted to four and, more importantly, specifically cite and explain that federal legal authority for any such limitation.

C. THERE IS NO VALID BASIS FOR INCREASING THE CURRENT WIND RESISTANCE STANDARDS

HUD, in the July 19, 2022 NPR, proposes to amend section 3280.305 of the FMHCSS to "update the reference for design wind pressures for Exposure C" from the American Society of Civil Engineers' (ASCE) 7-88 reference standard to the subsequent ASCE 7-05 standard.[14] As part of that proposed change, "HUD staff" recalculated the wind speed references "used to design manufactured homes in Wind Zones II and III" of the FMHCSS.[15] This included converting the current maximum speeds in Wind Zones II and III (i.e., 100 MPH and 110 MPH, respectively), based on the "fastest mile" parameter of the ASCE 7-88 standard, to the "three-second gust" parameter of ASCE 7-05. Using this calculation, HUD determined that "overall wind design pressure" for manufactured homes, "would be decreased 47 percent if the wind speeds currently published in the [FMHCSS] were left unrevised yet the design option was updated to ASCE 7-05." [16] (Emphasis added). In light of this "apples to apples" comparison, which would have resulted in a downward revision of the current HUD wind standards, HUD conducted a further "iterative analysis," pursuant to which it "determined that wind speeds of 140 MPH and 150 MPH for Zones II and III," based on the three-second gust parameter, would keep manufactured housing on par with design of other single-family structures."[17] (Emphasis added).

It appears, then, that under HUD's calculations, a change from the current FMHCSS standards, based on a "fastest mile" parameter, to the ASCE 7-05 values, based on a three-second gust parameter, would have resulted in a reduction of the current manufactured housing wind design values. Rather than accept such a decrease, however, consistent with the MHCC's express recommendation to update the FMHCSS wind design pressures to correspond to the ASCE 7-05 values HUD, instead has apparently chosen to arbitrarily increase those design speeds "to keep manufactured housing on par" with the design of "other single-family structures." Consequently, from the explanation offered in the NPR, it appears that HUD has far exceeded the recommendation of the MHCC on this matter, and instead has arbitrarily increased the wind design criteria for Wind Zones II and III, based on a parameter – i.e., consistency with the design of other single-family structures – that is not mandated or appropriate under applicable federal law.

Specifically, neither applicable statutory law (i.e., the National Manufactured Housing Construction and Safety Standards Act of 1974 as amended by the Manufactured Housing

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[14] See, 87 Federal Register, No. 137 at p. 43121, col. 3.

[15] Id. at p.43121, col. 1.

[16] Id. at col. 2-3.

[17] Id. at col. 3.

Improvement Act of 2000) nor HUD regulations promulgated thereunder require or even permit HUD to base new or amended FMHCSS standards on identity with or similarity to standards for other types of single-family housing. Instead, the statutory considerations that both HUD and the MHCC must follow in "establishing and interpreting standards and regulations," are set forth in section 604(e) of the 2000 reform law (42 U.S.C. 5403(e)). And that provision, does not include any language requiring or even suggesting that manufactured housing construction and safety standards should be consistent with or similar to site-built housing standards. By contrast, that section does affirmatively require the MHCC and HUD, in recommending and proposing FMHCSS standards, respectively, to "consider the probable effect of such standard on the cost of the manufactured home to the public" – something that neither the MHCC or HUD has ever done.[18] Consequently, HUD's determinative parameter for the proposed wind design standard revision, as stated in the NPR, is inconsistent with – and inapposite to -- governing law, while the crucial cost-benefit parameter affirmatively actually set out in the governing statute, has never been met and has, in fact, been studiously ignored.

If, then, an increase in the design wind speed for Wind Zones II and III would result from updating from the ASCE 7-88 standard to the ASCE 7-05 standard, then HUD should specify what particular aspect of manufactured housing safety is allegedly deficient or insufficient under the current standards, produce evidence supporting that determination, and also provide evidence showing the cost impact of any such change on the purchase price of the homes affected by any such change – all as is affirmatively required by applicable law.

Conversely, absent specific safety and performance justification for the wind design changes being proposed by HUD and absent a cost-benefit analysis of any such changes, as expressly required by statute, MHARR objects to the changes as proposed in the NPR.

D. OTHER UNSUBSTANTIATED PROPOSALS THAT WOULD INCREASE CONSUMER COSTS SHOULD ALSO BE REJECTED

In addition to the proposed standards addressed above, there are other mandates set forth in the July 19, 2022 NPR that would increase the acquisition cost of manufactured homes without remedying any identified safety or construction deficiency in HUD Code manufactured homes and must, therefore, be eliminated from the final rule in this docket, regardless of whether or not such mandates were recommended by the MHCC. Those mandates include:

(1) HUD Reference No. 8, Water Resistive Barrier;[19]

(2) HUD reference No. 25, National Design Specification for Wood Construction;[20]and

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[18] Nothing in the governing statutes generally, or section 604(e) specifically, exempts updates to reference standards from the cost-benefit analysis required for new or amended FMHCSS standards. Accordingly, the failure to conduct such an analysis would render any such rule "arbitrary, capricious or an abuse of discretion" and subject to invalidation pursuant to the federal Administrative Procedure Act (APA).

[19] See, 87 Federal Register, No. 137 at p. 43116.

[20] Id. at p. 43118.

(3) any reference standard modification that would increase the initial acquisition cost of a manufactured home without addressing a specifically-identified safety or construction deficiency.

First, with regard to the proposed standard set forth as HUD Reference Number 8, for example, HUD, while acknowledging the increased cost of a "water resistive barrier," maintains that such a mandate would "increase home resiliency for consumers." (Emphasis added). The 1974 Act (as amended), however, does not give HUD an open, endless warrant to mandate changes to the design and construction of manufactured homes simply because it (or some other purported "authority," or proprietary code developer) would like to have that change implemented in an ideal world. Instead, as MHARR has repeatedly noted in connection with HUD's proposed conditional sprinkler "standard," the 1974 Act (as amended) provides HUD with authority to propose and adopt standards to address specific, identified life, health, safety and construction issues to ensure "the performance of a manufactured home in such a manner that the public is protected against any unreasonable risk of ... accidents due to the design or construction of such manufactured home, or any unreasonable risk of death or injury to the user or to the public if such accidents do occur." (42 U.S.C. 5402(8)). "Increased home resiliency," by contrast, is not identified by HUD's governing statute as a valid or sufficient basis for the imposition of a mandatory standard, particularly when that standard, as acknowledged by HUD, would increase the cost of the home to the purchaser and thereby exclude certain purchasers in numbers that have not been published or apparently calculated or considered by HUD. Instead, this matter should be left up to consumers and the free market to resolve based on the needs and wants of individual consumers. As a result, this proposed standard should be eliminated from any final rule adopted in this docket.

Second, HUD Reference Number 25, the National Design Specification for Wood Construction, should be eliminated from any final rule. While HUD again acknowledges that the adoption of this standard would "increase construction costs" for HUD Code builders and the cost of manufactured homes to consumers, HUD nevertheless maintains that adoption of this reference standard from the American Wood Council, would "align [the] manufactured housing code with site-built construction standards." Again, though, the "alignment" of FMHCSS standards with "site-built construction standards" is not a purpose or objective of the 1974 Act (as amended), nor does the Act require or even permit HUD to adopt FMHCSS standards based on their alleged "alignment" with standards for non-HUD Code homes. This is particularly the case, moreover, when the proposed standard – as is the case here – would increase the purchase cost of the home and exclude potential purchasers without delivering specific identified and quantified benefits for homebuyers. And the same reasoning applies to any other reference standard change, addition, or modification proposed by HUD in the July 19, 2022 NPR. For each such change, pursuant to section 604(e) of the 1974 Act (as amended), the purchase price impact must be calculated and weighed against the alleged benefit(s) of that proposed change. Yet, no such analysis appears in Table 2 or the preamble of the NPR.

Third, the cost impact of these and any other proposed changes cannot be considered in isolation. Rather, HUD must consider the cost impact of any such proposed changes or additions to the FMHCSS standards in the context of the extraordinarily high-cost "energy conservation" standards that (absent industry action seeking judicial intervention) will be imposed on manufactured homes by the U.S. Department of Energy (DOE) as of May 31, 2023. As MHARR

has demonstrated, those standards will likely exclude millions of lower and moderate-income Americans from the manufactured housing market in and of themselves. Compounding the extreme cost and exclusionary impact of those standards (which has not even been fully calculated due to DOE's failure to propose or estimate the costs of regulatory compliance, testing and enforcement) with additional needless or baseless HUD standards will only serve to further increase the cost of manufactured housing and the exclusion of significant numbers of lower and moderate-income purchasers, contrary to the specific mandate of the 1974 Act (as amended) as well as the housing affordability policies of the Biden Administration.

Accordingly, absent full and legitimate justification of the need for such new and/or additional standards, as well as specific cost-benefit justification for those standards, each such mandate must be eliminated from any final rule in this docket.

III. CONCLUSION

For all of the foregoing reasons, MHARR asks that HUD modify the proposed rule set forth in the July 19, 2022 NPR consistent with the comments contained herein and that HUD issue a final rule reflecting those modifications, which are necessary to ensure that the final rule herein provides the maximum degree of benefit (and smallest corresponding cost) for the millions of lower and moderate-income Americans who rely on the inherent affordability of HUD Code manufactured housing. Further, MHARR hereby reserves its right to supplement these comments to address other aspects of the NPR based on new or additional information.

Sincerely,

Mark Weiss
President and CEO

cc: Hon. Marcia Fudge
Hon. Julia Gordon
MHCC Members
HUD Code Manufactured Housing Industry Members

Attachments