Manufactured Housing Association for Regulatory Reform

1331 Pennsylvania Avenue, NW · Suite 508 · Washington, DC 20004 · 202-783-4087 · Fax 202-783-4075 · mharrdg@aol.com

July 19, 2012

VIA FEDERAL EXPRESS

Hon. Carol Galante
Assistant Secretary for Housing-Federal Housing Commissioner
U.S. Department of Housing and Urban Development
451 Seventh Street, S.W.
Washington, D.C. 20410

Re: Federal Manufactured Housing Program (Title VI) Issues

Dear Secretary Galante:

As you know, the manufactured housing industry, over the past decade, has suffered a severe decline leading to over 200,000 lost industry jobs and major hardship for lower and moderate-income American families that rely on HUD-regulated manufactured housing as a prime source of affordable homeownership. In large part, this huge decline is a byproduct of HUD's failure to fully and properly implement the Manufactured Housing Improvement Act of 2000 (2000 reform law) -- landmark legislation designed by Congress to complete the transition of manufactured housing from quasi-vehicular "trailers" to modern, legitimate housing at parity with all other types of housing. Non-implementation of the 2000 reform law has had broad repercussions including continuing and, in many cases, worsening discrimination against the industry and its consumers in matters as diverse as public and private financing, zoning, placement, state and local regulation and community acceptance, to name just a few.

Therefore, on September 22, 2011, the senior leadership of both national manufactured housing trade associations (i.e., MHARR and the Manufactured Housing Institute) met with you to seek your assistance and leadership in changing the Department's approach to manufactured housing generally and the implementation of the 2000 reform law in particular. Specifically, the industry asked for your assistance in: (1) expanding the availability of securitization for Federal Housing Administration (FHA) Title I manufactured housing loans; (2) the appointment of a non-career HUD program administrator; and (3) the appointment of collective national industry representatives to the Manufactured Housing Consensus Committee (MHCC).

In the absence of any positive response concerning these issues (among other reasons), the House of Representatives' Subcommittee on Insurance, Housing and Community Development held a hearing on February 1, 2012 focused specifically on HUD's implementation of the 2000 reform law. Although you did not personally testify at that hearing, both written and verbal testimony confirmed that key reform provisions of the 2000 law have not been fully and properly implemented by HUD; that HUD has failed to act on approximately 135 of the 185 proposed standards recommended by the Manufactured Housing Consensus Committee (MHCC); that HUD has bypassed MHCC review to implement a costly and unnecessary non-consensus expansion of in-plant regulation, and, just as importantly, that manufactured housing continues to suffer second-class status at HUD.

Since that time, the program has only deteriorated further. Thus, the program, to date (to our knowledge), has failed to comply with a request by the Subcommittee for a written explanation for its failure to process so many proposed standards; important regulatory decisions are once again being made behind closed doors with no accountability or transparency; and the MHCC -- the centerpiece reform of the 2000 law -- remains non-operational and dormant due to a supposed billing dispute between HUD and the MHCC's Administering Organization (AO). Indeed, despite assurances contained in your June 20, 2012 letter to MHARR that those "administrative issues" had been "resolved" and did not reflect an "intent to cause any disruption in ... services provided to the MHCC," the suspension of MHCC activities has now extended into a third month. To even begin addressing this reversion of the program, each of these issues, as well as the four priority matters set forth below, must be addressed and resolved by HUD. And, without a non-career program administrator as provided by the 2000 reform law, these policy aspects of the program must necessarily be addressed with you personally.

1. HUD Should Reject the Pending "Conditional" Federal Sprinkler Standard

MHARR asks that the Secretary formally reject the proposed fire sprinkler standard accepted by the MHCC on October 20, 2011. This is important because, as MHARR has previously warned, inaction that leaves the sprinkler proposal pending could trigger unintended consequences with damaging impacts on the industry and consumers.

Pursuant to the 2000 reform law, a proposed standard recommended by the MHCC must be submitted to the Secretary and published in the Federal Register for notice and comment within thirty days of receipt, unless the proposed standard is rejected. In the case of rejection, the Secretary, under section 604(a)(4)(B)(ii), must simply publish "in the Federal Register the rejected proposed ... standard, the reasons for rejection, and any recommended modifications set forth."

On October 20, 2011, the MHCC accepted a proposed fire sprinkler standard developed by the Manufactured Housing Institute (MHI) and HUD which provides, in relevant part: "Fire Sprinkler systems are not required by this subpart, however, when a manufacturer installs a sprinkler system, this section establishes the requirements for the installation of a sprinkler system in a manufactured home." There is no statutory basis for such a sprinkler standard, though, and the proposal should be rejected.

The fire safety of manufactured homes is manifestly a "safety" issue. Under the Act, "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." Based on this definition, the essential prerequisite to the adoption of a federal manufactured home safety standard is an "unreasonable risk" of death or injury to the occupant(s) of a manufactured home. The existence of any such unreasonable risk, moreover, must be determined by HUD, as the agency charged with developing, maintaining and enforcing the federal standards. Under this definition, there either is an "unreasonable risk" of death or injury as determined by HUD, or there is not. If there is an "unreasonable risk" HUD can adopt a federal safety standard to remedy that risk. If there is not an "unreasonable risk," the Secretary cannot adopt a standard.

Consequently, if the current federal fire safety standards ensure "reasonable" fire safety without sprinklers, then, per se, there is no "unreasonable risk of death or injury" to be remedied by a federal sprinkler standard. HUD, though, has never determined, claimed, or even implied that the absence of fire sprinklers creates an "unreasonable risk" of death or injury in manufactured homes that comply with the existing HUD fire safety standards. Nor did the MHCC make any such finding or determination. To the contrary, all the evidence presented to the MHCC establishes that the current HUD fire safety standards, without sprinklers, eliminate any "unreasonable risk of death or injury" and 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."

Specifically, according to a July 2011 National Fire Protection Association (NFPA) report, "Manufactured Home Fires" and an October 14, 2011 update (errata sheet), both of which were presented to the MHCC, the fire safety of today's HUD Code manufactured homes is equal to or better than that of other types of one or two family residential dwellings. The report and update show that HUD Code manufactured homes have a lower incidence of fire than other occupied one or two-family dwellings, have a lower rate of civilian fire injuries than other one or two-family homes and are more likely than other homes to have fires confined to the room of origin. (See, NFPA, "Manufactured Home Fires," July 2011 at pp. 5, 10) Moreover, as shown by the October 14, 2011 update, the fire death rate for post-HUD standard manufactured homes is "comparable" to other one or two-family homes.

Given the fact that the current HUD fire safety standards provide protection that is equal to or better than other types of one or two-family dwellings, those standards, without the use of 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 under the current fire safety standards, there is, per se, no "unreasonable risk" to be remedied by fire sprinklers. Consequently, there is no statutory predicate for a sprinkler standard of any kind and the Secretary should reject the MHCC-accepted proposed standard in accordance with 42 U.S.C. 5403(a)(4)(B-C). Moreover, the same NFPA data shows that the current HUD standards should federally preempt all state or local sprinkler mandates applicable to HUD Code homes.

Construing preemption "broadly and liberally" as required by the 2000 reform law, preemption analysis should focus on the federal objective to be achieved. In this case, the federal objective is to prevent an "unreasonable risk of death or injury" due to fire and ensure "reasonable fire safety" for manufactured home "occupants." Since that objective, according to the NFPA data, is met by the current federal standards, there is no room for states and localities to require any equipment or measures different from those specified in the HUD standards. Per se, any additional or different equipment or measures required by a state or locality – such as fire sprinklers -- would impair the uniformity of federal regulation. Furthermore, because the existing HUD standards already fulfill the federal objective of the Act, state or local sprinkler mandates would have the effect of unnecessarily increasing the cost of manufactured homes to the public, contrary to the directive of the Act, to "protect the ... affordability of manufactured homes" and "facilitate the availability of affordable manufactured homes."

Accordingly, MHARR asks that the Secretary reject the October 20, 2011 proposed sprinkler standard and instead act to preempt state and/or local sprinkler requirements under current Subpart C of the HUD fire safety standards. Otherwise, MHARR asks that HUD return the proposed standard to the MHCC for further consideration and analysis.

2. Expanded In-Plant Regulation Must be Subjected to MHCC Review and Rulemaking

As was addressed at the February 1, 2012 congressional oversight hearing and as you should be aware, beginning in 2009 and continuing to date, the HUD program has engaged in a de facto expansion of in-plant regulation specifically designed to change the focus of that regulation from the inspection of individual homes under construction to the creation of a "golden" quality assurance system. Originally presented to the industry as a program of "voluntary" cooperation, the elements of this expansion -- "enhanced" quality assurance checklists and a HUD "standard operating procedure" (SOP) -- were later declared "not voluntary" by a March 3, 2010 HUD "Field Guidance" document, having never been reviewed or considered by the MHCC or subjected to notice and comment rulemaking as required by the 2000 reform law.

By imposing these fundamental changes to the in-plant inspection system without complying with the relevant procedures of the 2000 reform law, HUD has effectively bypassed the substantive dual requirements of that law for any new proposed standard or regulation, i.e., a showing of objective need and justification and a showing that the proposed action would be cost effective. This is very significant because there is no objective evidence – and none has ever been offered by HUD – to show the need for any of these changes or the additional costs to consumers, with no corresponding benefit, that they entail. At that the time that these changes were first proffered by HUD, there was no public outcry whatsoever for expanded in-plant regulation, there was no showing of systemic deficiencies in the existing system, and reports from the federal dispute resolution system showed that the number of consumer complaints was minimal. Indeed, the only "need" ever shown for an expansion of in-plant regulation, is the "need" of the entrenched monitoring contractor for make-work hours in light of the decline in manufactured home production since the contract was last awarded (see, section 3, below).

In support of this costly and unnecessary expansion of in-plant regulation, the program maintains that it may impose additional inspection criteria under 24 C.F.R. 3282(d), which states that "manufacturers may be required to furnish supplementary information to the DAPIA [Design Approval Primary Inspection Agency] if the design information or the quality assurance manual ... is not in accordance with accepted engineering practice." Yet, the program has never identified the specific deficiencies in "accepted engineering practices" that allegedly existed prior to the SOP and enhanced checklists, nor has it identified a source or baseline for determining what is or is not an "accepted engineering practice."

More importantly, section 604(b)(6) of the 2000 law expressly requires compliance with the MHCC review and rulemaking procedures outlined in section 604(a) and (b) for any "change" in "policies, practices, or procedures relating to ... inspections," and the SOP, "enhanced" checklists, and altered audit procedures, designed to change the focus of the inspection process to a "golden quality assurance system" certainly do that. None of these changes were brought to the MHCC, however, because of a distorted HUD "interpretation" of section 604(b)(6) of the 2000 reform law which emasculates that provision and effectively reads it out of the law. Specifically because of past abuses, section 604(b)(6) was designed as a "catchall," to ensure that virtually all quasi-legislative actions of the Department, whether characterized as a "rule" or not, would be subject to review, consideration and comment, prior to implementation, by the MHCC.

In a February 5, 2010 "Interpretive Rule," however, issued without opportunity for public comment, HUD ruled that section 604(b)(6) applies only to actions that would constitute a "rule" under the Administrative Procedure Act (APA), which makes no sense, because APA rules are, by definition, subject to rulemaking and would be subject to comment by the MHCC as part of the rulemaking process in any event. Instead, section 604(b)(6) was intended to ensure an opportunity for stakeholder comment and consensus recommendations on a wide range of quasi-legislative program actions that would not otherwise be subject to public review or comment. Accordingly, the HUD "Interpretive Rule" seriously misconstrues the 2000 law and has allowed HUD to continue developing new de facto regulations without the transparency and accountability mandated by Congress. That "interpretation" should be revoked, section 604(b)(6) should be enforced as written and the entire procedure established by the SOP and related checklists should be brought to the MHCC and subject to all applicable procedural safeguards and requirements of section 604 of the 2000 law.

3. The Program Monitoring Contract should be Downsized

With industry production continuing near historic lows and with the Fiscal Year (FY) 2013 appropriation for the HUD manufactured housing program almost certain to reduce the program budget

by at least $1 million (Senate bill) and possibly $2.5 million (House bill) below the current funding level, HUD should reduce funding for the program monitoring contract and instead allocate additional resources to the State Administrative Agencies (SAAs) that serve as HUD's partners in the federal program.

First, there is no conceivable basis for maintaining the monitoring contract at its present funding level, let alone expanding it. Since the last re-procurement of the monitoring contract – five years ago -- industry production has declined by nearly 50 percent. Furthermore, there is no evidence that expanded production surveillance is warranted. Today's manufactured home is a much superior product than that of years past as reflected by the fact -- acknowledged by HUD regulators at the October 2010 HUD-COSAA meeting – that the number of consumer referrals to the HUD dispute resolution program has been minimal. This confirms that there is no need for the type of intensive, intrusive and needlessly costly in-plant regulation, paperwork and red tape that undermines the affordability of manufactured homes while providing little or no benefit to consumers.

Second, a stagnant non-competitive contracting process harms the program, the industry and consumers. The federal program has had the same monitoring contractor (i.e., the same entity, with the same personnel, albeit under different names) since the start of federal regulation in 1976. This lack of competition and an entrenched contractor have deprived the program of the new blood and fresh thinking that it needs to evolve and grow. Without new ideas and thinking, the program remains mired in the 1970's and has not evolved along with the industry. This is one of the primary reasons that manufactured homes continue to be viewed as "trailers," causing untold difficulty for the industry and consumers.

Furthermore, the 2000 reform law was designed to assure a balance of reasonable consumer protection and affordability. But the HUD program and monitoring contractor have a history of constantly ratcheting-up regulation, with more detailed, intricate and costly procedures, inspections, record-keeping, reports and red-tape -- demands that never end and cannot reasonably be met by anyone. This is a result, in part, of a structure that provides a financial incentive for an entrenched monitoring contractor to find fault with manufactured homes.

With the monitoring contract due for re-solicitation this year, this cycle must be broken. It is thus essential: (1) that the monitoring contract be downsized to accurately correspond with industry production, the need for in-plant monitoring and the program reforms of the 2000 law; and (2) that the program ensure full, open and objective competition for the next monitoring contract, with new award criteria that do not penalize or ward off new bidders without direct program experience, and a structure that does not provide a financial incentive for excessive or punitive regulation.

With such savings on the program monitoring contract, HUD should increase the allocation of program funding provided to SAAs, which – unlike the monitoring contractor -- constitute the first line of protection for a growing number of consumers residing in an ever-expanding number of both new and existing manufactured homes. Indeed, with a number of states facing critical difficulties providing funding for SAA operations, it is essential that HUD funding for these state partners – a key consumer protection component of the manufactured housing program -- be enhanced as soon as possible.

4. HUD Should Complete Action on a Final "On-Site Completion" Rule

In the key area of on-site completion and Alternate Construction (AC), HUD has failed to act for over two years on the final implementation of an on-site completion rule proposed in June 2010. That proposal, supported by all program stakeholders including MHARR, would avoid the necessity of multiple AC approvals and significantly streamline the time and cost to complete final construction of the

home in conformance with the standards at the home-site, but remains stalled at HUD without explanation.

To make matters worse, program regulators are now seeking to retract a January 2009 ruling by the then-program administrator which exempted manufacturers obtaining HUD AC approval for specific roof ridge designs from the necessity of conducting costly on-site IPIA inspections, apparently on the basis that the administrator had no authority to grant such an exemption. Adding to the confusion and chaos is the fact that the retraction is being applied only to new AC approvals. Thus, manufacturers which had AC requests approved before the retraction will be able to continue without on-site inspections, while newer AC approvals, some of which have been delayed for more than a year without explanation, will require costly on-site IPIA inspection, placing companies with the newer AC approvals at a major competitive disadvantage while needlessly increasing costs and delaying move-in times for homebuyers. These arbitrary actions create a discriminatory two-tiered system that, together with the stalled on-site completion rule, need to be addressed and resolved.

As you know, section 604(b)(6) of the 2000 reform law specifically requires that any "changes" in "policies, practices, or procedures relating to ... inspections" be submitted to the MHCC for review and published for notice and comment rulemaking, or otherwise be deemed "void." In this instance, HUD is unilaterally seeking to reverse a major policy regarding AC inspections without any of the procedural safeguards required by the 2000 law, resulting in discriminatory treatment of different manufacturers utilizing the same designs.

Accordingly, we ask that you personally intervene in this matter and take action to: (1) ensure the publication of a final on-site completion rule prior to the end of 2012; and (2) uphold a uniform rule for all manufacturers regarding roof ridge AC approvals based on the 2009 ruling which did not require on-site inspections of the approved roof ridge designs and construction.

Secretary Galante, manufactured housing, a home ownership resource that is affordable for nearly every American without the need for costly taxpayer-funded subsidies, should be a priority for HUD and a vital component of every HUD housing and homeownership program. Instead, manufactured housing is at best neglected by HUD and at worst subject to needless, debilitating, discriminatory regulation that has reduced the industry to a fraction of its former size and threatens its recovery and future growth. Again, given the absence of a non-career program administrator, it is incumbent upon you to provide the personal involvement and leadership that is needed to change the course of the HUD program, so that it treats manufactured housing as housing, as intended by Congress and begins to look to quality, non-subsidized, affordable manufactured housing as a solution to the nation's affordable housing problems.

MHARR looks forward to renewed strong leadership on your part on all critical matters related to the federal program and will be in touch with you for follow-up.

Sincerely,

Danny D. Ghorbani
President

cc: Hon. Spencer Bachus
Hon. Judy Biggert