Manufactured Housing Association for Regulatory Reform

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VIA FEDERAL EXPRESS

Ms. Pamela Beck Danner, Esq.
Administrator
Office of Manufactured Housing Programs
U.S. Department of Housing and Urban Development
Room 9162
451 Seventh Street, S.W.
Washington, D.C. 20410

Re: Manufactured Housing Program Issues

Dear PAM Danner:

When you were appointed to be the new Administrator of the federal manufactured housing program in March 2014, the Manufactured Housing Association for Regulatory Reform (MHARR), in its initial welcome letter (and in two follow-up meetings), emphasized that "the program faces significant challenges that will need to be addressed, including remaining issues with the full and proper implementation of the [Manufactured Housing Improvement Act of 2000] and the diminished status of the federal program...." Over the following months, as it promised it would, MHARR has provided both you and the program with ample time and opportunity to positively address a number of ongoing regulatory issues and, more importantly, take steps to put the federal program on a proper track to fully comply with the letter and intent of the 2000 reform law. Eight months later, however, unnecessary and unnecessarily costly regulatory practices and policies first implemented by the initial manufactured housing program administrator (while rightfully slowed by Acting Administrator Henry Czauski) not only remain in place, but have, in a number of key instances, been expanded, extended or exacerbated by recent decisions. After analyzing and thoroughly considering these actions at the recent MHARR Board of Directors meeting, we are writing to advise you of these issues, set forth below, follow-up with a meeting and, hopefully, a positive dialogue to seek their resolution.

1. Use of Manufactured Homes Other Than as Single-Family Housing

On October 3, 2014, your office 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 states 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 cites 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).

While such a restriction, as applied strictly to design and construction of the home may be plausible based on the specific requirements of the HUD Code, a restriction on the sale of such a home -- based on its intended, actual or possible use by the purchaser -- is not permissible. Based on the amendments contained in the 2000 reform law, so long as a manufactured home is designed, constructed, delivered and installed in accordance with the HUD standards and regulations, and is not subsequently taken out of compliance, its end use by a purchaser is -- and should be – of no legitimate concern to HUD.

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.

Second, there is no basis in the authorizing law or Obama Administration policy 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, as you know, when Congress established federal authority over the safety and construction of manufactured homes its intent was to create a federal-state partnership. A de facto federal use restriction not only exceeds federal authority, as noted above, but also improperly usurps state and local authority over the use of residential structures placed within their jurisdictions.

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 used for other purposes in compliance with state and/or local requirements.

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, as an aspect of the MHCC consideration of the definition of a "manufactured home" vis-à-vis recreational vehicles and other non-residential structures (see, topic 6, below).

2. Expanded In-Plant Regulation

MHARR has consistently maintained (and documented with specific evidence) that the expanded HUD program of in-plant regulation initiated on a supposedly "voluntary" basis by the former program administrator in 2010 is (a) unnecessary, and (b) in violation of the 2000 reform law. Your office, however, as indicated during an August 12, 2014 conference call with Primary Inspection Agencies (PIAs) and manufacturers, appears poised to move forward with the final mandatory implementation of

this program – an action that is unacceptable, unwarranted and potentially a matter for federal judicial review.

That conference call detailed significant impending "changes" to the scope, nature and intrusiveness of manufacturing plant inspections and related monitoring. These "changes" to an already bloated, confusing and unnecessarily costly quagmire of pseudo-regulatory "audit procedures," "Computer Coded Items Guidelines," "Quality Systems Issues Guidelines," "Functional Category Checklists," "templates," "work sheets" and other assorted procedures, forms, activities and red tape, represent -- as documented by MHARR in its May 22, 2014 comments on the proposed increase to HUD's certification label fee -- little more than make-work activity for the program's entrenched (and only) monitoring contractor and, by extension, private, for-profit PIAs, at a time when HUD Code manufacturers are building their best homes. This is confirmed, among other benchmarks, by the minimal level of consumer referrals to the federal manufactured housing Alternate Dispute Resolution system administered by HUD, as reflected by documents produced by HUD this year in response to a still-pending MHARR Freedom of Information Act (FOIA) request regarding this specific matter. Expanded in-plant regulation also establishes a de facto double standard for PIA funding, which allows private PIAs to increase billing for such additional make-work functions, while state PIAs must perform those same functions based on set funding levels established by each such PIA state

HUD's failure to follow the mandatory procedures of the 2000 reform law with respect to such expended in-plant regulation has also led to a veritable free-for-all among the various PIAs, with varying forms, interpretations and demands. The resulting lack of a uniform, enforceable regulation has created an uneven and discriminatory playing field for manufacturers and subjects manufacturers to significant uncertainties regarding matters that could potentially subject them to civil and/or criminal penalties – all in violation of their basic rights.

Furthermore, these new procedures and requirements, as you know, were never considered or recommended by the MHCC, and their regulatory compliance cost impact on manufacturers and the purchase price of manufactured housing for consumers have never been considered by either the MHCC or HUD, as acknowledged by HUD during the August 12, 2014 conference call. Section 604(b)(6) of the 2000 law is quite clear that all changes to inspection or monitoring "practices," "procedures," or "policies" must be brought to the MHCC prior to implementation and HUD's failure to follow that process with respect to what the Department itself acknowledges are changes to previously existing practices and procedures is a plain violation of a key protection of the 2000 reform law.

Like your predecessor, Acting Administrator Henry Czauski, we urge you to defer the mandatory implementation of this system and instead present this entire matter to the MHCC for a proper evaluation of – and consensus recommendations regarding – its cost and necessity.

3. Subpart I Monthly Record Inspections

HUD's October 1, 2013 Subpart I amendments final rule imposes a major new regulatory burden on manufacturers (and related regulatory compliance costs passed to consumers) that was never published for comment, violates the requirements of the 2000 reform law and will unnecessarily increase the cost of manufactured housing for already hard-pressed consumers. Specifically, section 3282.366(b) of the final Subpart I rule requires third-party Primary Inspection Agencies (PIAs) to "review at least monthly the manufacturer's service and inspection records." No such requirement is currently contained in section 3282.366, or elsewhere in Subpart I. Nor was this provision published for comment as part of the proposed Subpart I amendment rule issued by HUD on February 15, 2011. While the proposed rule did contain a similar provision in section 3282.362(c)(1), that proposed section merely called for "periodic"

PIA review of such manufacturer records. When the final rule was published, however, the proposed 3282.362(c)(1) revision was deleted and replaced with the new section 3282.366(b), which is materially different in that it specifies a minimum time period (monthly) for such reviews.

As MHARR has consistently maintained – and as HUD effectively conceded during its August 12, 2014 conference call with PIAs and manufacturers -- there is no indication that either the proposed provision (3282.362(c)(1)) or the unilaterally modified final rule provision (3282.366(b)) was ever evaluated for its probable impact "on the cost of the manufactured home to the public" as required by the 2000 reform law. And that impact will be substantial, as HUD, in the preamble to the final rule, "agreed" with "commenters" concerned that "the new requirement ... would significantly add to the PIA's responsibilities` [and] increase costs" while doing "nothing to ensure that consumers are protected." Moreover, expanding PIA functions through this unilateral change to the regulations creates a double standard that allows private PIAs to increase their billing to client manufacturers to account for such expanded duties, while state PIAs are trapped between expanded responsibilities and a set fee established by each such PIA state.

Having never afforded regulated parties – or anyone else – an opportunity to comment on this provision of the final rule as actually adopted, contrary to both the Administrative Procedure Act and the 2000 reform law; having never considered the cost implications of the modified final rule in violation of the 2000 reform law; and having substantively and significantly altered a consensus MHCC-recommended regulation at the final stage of rulemaking, HUD should withdraw this provision – either entirely or pending proper MHCC consideration and opportunity for public comment.

4. Certification Label Fee Increase and Utilization

HUD's stated intent to utilize increased fee revenues in support of the "make-work" contractor activities involved in its program of expanded in-plant regulation and activity to review "at least monthly" PIA record reviews, runs directly counter to Congress' most recent directive to HUD regarding regulatory activities and related costs.

MHARR, in its May 22, 2014 comments concerning the then-proposed certification label fee increase (provided to Congress as well), objected to the use of label fee revenues for "make-work" contractor activity, particularly given reduced industry production levels, and called on HUD to allocate additional funds to State Administrative Agencies (SAAs) serving as the first line of consumer protection for an ever-growing number of homes. In part, MHARR stated:

> "In Congressional Budget Justifications as recent as Fiscal Year 2012, HUD has claimed that despite a decade-long decline in manufactured home production beginning in 1998 -- and historically low industry production levels beginning in 2009 -- the magnitude of its manufactured housing program "responsibilities" remains "unchanged." But this claim, given industry production levels at a mere fraction of historical norms, defies credulity. The precipitous decline in industry production levels since the last fee adjustment in 2002 should have resulted both in reduced program responsibilities and lower program expenditures. The fact that program expenditures have increased instead, points to other factors driving those increases, including expenses that do not justify a label fee increase and must be addressed and corrected by the program going forward."

Based on MHARR's comments, the U.S. Senate, in its report on the 2015 HUD appropriations bill, noted that "expenditures supporting the [manufactured housing] programs should reflect and correspond with

th[e] decline [in production levels], which has specifically reduced the number of inspections and inspection hours required for new units." (Emphasis added).

Despite this clear instruction to HUD to halt expanded regulation at a time of historically low production levels, HUD, in the preamble to its final fee increase rule, stated that:

> "HUD's overall monitoring costs have remained constant or gradually increased over the last few years due to inflation and efforts to enhance quality and reduce non-conformances and the number of consumer complaints. The improvements in overall home quality and reduced levels of consumer complaints are not ''make-work'' activities... [W]ithout a similar level of monitoring, these improvements may not be sustained."

It is thus very clear that a significant component of the label fee increase is being – and will be -- used to fund the drastically-expanded contractor activities driven by the combination of expanded in-plant regulation and the new "at least monthly" Subpart I IPIA manufacturer record reviews. Indeed, the preamble acknowledges as much, stating that increased program monitoring costs funded by the label fee:

> "are the direct result of the focus of HUD's cooperative monitoring and training over the past four years with manufacturers and their inspection agencies to improve overall construction quality ... [a] process [that] is more time consuming for auditors and therefore, more expensive."

Thus, added to all the other increased costs to manufacturers and consumers resulting from the expansion of in-plant regulation and Subpart I paperwork, will be part of the 156% label fee increase adopted by the Department. To make matters worse, HUD is not even considering – and has made no firm commitment to – an increase in funding for State Administrative Agencies (SAAs), while expanding make-work billing for the monitoring and private PIAs.

The availability of expanded contractor funding, moreover, will substantially increase incentives across-the-board for even more intrusive and burdensome regulation.

All of this presents a scenario of skyrocketing regulatory compliance costs and devastating consequences for consumers of affordable housing -- with no basis or foundation whatsoever. This is totally unacceptable to the industry and particularly the smaller and medium-sized manufacturers represented by MHARR that are disproportionately impacted by unnecessary and excessive regulation. MHARR urges HUD to re-allocate a substantial portion of its label fee increase to the SAAs that are an essential part of the federal-state partnership envisioned by the National Manufactured Housing Construction and Safety Standards Act of 1974. Those agencies (which, unlike contractors, reflect the broad policy priorities and concerns of the states and their resident consumers) have been hobbled in recent years by declining state budgets and need enhanced resources to remain part of the federal program. Absent such a reallocation of the label fee increase, and/or a corresponding reduction in the label fee to eliminate make-work contractor activity, MHARR will urge Congress to reduce the new $100.00 per floor fee, based on the directive in the Senate report.

5. HUD Enforcement of Attached Garages

On June 12, 2014, your office issued a memorandum concerning manufactured homes designed and constructed to facilitate attached garages. Characterizing attached garages as "add-ons" under the relevant HUD regulations, that memorandum, for the first time, mandated "Alternate Construction" (AC)

approval for such designs, coupled with Subpart I treatment for any such homes designed and constructed without an AC approval, including homes built prior to the date of your memorandum.

While HUD may properly require AC approval prospectively for home designs that facilitate attached garages – with the differing load-bearing, wind resistance capacity and other considerations that those designs entail – retroactive Subpart I treatment for homes constructed and sold prior to June 12, 2014 is unjustified.

Subpart I of HUD's Procedural and Enforcement Regulations, by definition, applies to certain failures to conform with the HUD Manufactured Housing Construction and Safety Standards. Prior to the Department's June 12, 2014 memorandum, however, there was no guidance, ruling, or indication from HUD that a home designed "to facilitate" an attached garage constituted a failure to conform with the manufactured housing standards. With no such guidance or prior public enforcement activity concerning this specific issue, it is fundamentally inequitable to require manufacturers to engage in notification (and, potentially, correction) procedures with respect to homes sold over an indefinite period into the past that may or may not have been modified by purchasers or intervening parties without the manufacturer's knowledge.

In order to ensure an even playing field among all regulated parties on this matter and a sound approach based on a consensus of all stakeholders, HUD should waive retroactive application of Subpart I to this specific issue pending further consideration via the MHCC process in accordance with the 2000 reform law.

6. Recreational Vehicle Definition – Regulatory Reform

As you know, the Recreational Vehicle Industry Association (RVIA) continues to seek a statutory amendment to the definition of "manufactured home" contained in the National Manufactured Housing Construction and Safety Standards Act of 1974, this time offering a stand-alone bill (H.R. 5658) that would expand the current exclusion for "self-propelled motorhomes" to include towable RVs with no size limit and "Park Model" RV up to and including 400 square feet. While MHARR believes that the recreational vehicle (RV) industry has certain valid concerns, the Association has been consistent in its position that a legislative approach to this issue would give rise to a multitude of unintended consequences and even larger problems, and that this entire matter should instead be addressed on a regulatory basis by HUD, through the MHCC. And, in fact, the U.S. Senate, in its report on the 2015 HUD appropriations bill, agreed with MHARR's position, stating that HUD should "review its [regulatory] definition of what constitutes a recreational vehicle and consider updating the definition through an open, transparent and inclusive [i.e., regulatory] process."

Accordingly, MHARR agrees with the commitment made in your memorandum of October 1, 2014, to bring the issue of the RV exemption to the HUD standards to the MHCC at its December 2014 meeting for debate and appropriate resolution. MHARR, moreover, will soon offer a regulatory reform proposal (via the MHCC submission process) concerning the definition and exclusion of RVs that would thoroughly simplify this process by focusing on the regulatory definition of "dwelling" and the residential versus non-residential character of these two classes of structures, rather than size, dimensions, square footage, or other such criteria.

7. Manufactured Housing Energy Standards

As you know, the Working Group established by the Department of Energy (DOE) to recommend manufactured home energy conservation standards pursuant to the Energy Independence and Security Act of 2007 (EISA) completed its work as of October 31, 2014. The Working Group has submitted a "term sheet" incorporated recommended parameters for those standards to DOE's Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC), which is scheduled to address the Working Group term sheet at a meeting on December 1, 2014.

As it made clear to the Working Group in voting against adoption of the term sheet and will soon document fully in writing, the entire DOE rulemaking process has veered completely off course. As a result, MHARR strenuously opposes both the Working Group recommendations and the DOE process that led to those recommendations, which was irretrievably tainted by undisclosed insider contacts, the impermissible selective disclosure of non-public regulatory "drafts" and other types related activity, which led to the rejection of an initial draft DOE rule by the Office of Management and Budget (OMB) and an OMB directive to DOE to start over. Instead of pursuing a true "fresh start," however, DOE – together with the same "insider" special interests – concocted a 2-1/2 month charade "negotiated rulemaking" designed to legitimize and rehabilitate the prior improper OMB-rejected process and arrive at the same conclusion as that process.

MHARR appreciates HUD's stated commitment to meaningful "consultations" with DOE on this matter as required by EISA and bring DOE's standards proposal to the MHCC in a timely manner for consideration and recommendations in accordance with the cost-benefit balancing requirements of the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended by the Manufactured Housing Improvement Act of 2000. MHARR will soon address this entire matter directly with DOE, OMB and Congress. It will also provide HUD and the MHCC with further relevant information and will urge the MHCC and HUD to thoroughly and properly consider the DOE standards based on their extremely high cost, their extremely long and unrealistic recovery periods and the devastating impact that they would have on the affordability of manufactured housing and the lower and moderate-income consumers who rely on HUD Code manufactured housing as the nation's most affordable type of home ownership. The MHCC and HUD should act as a firewall against this sort of destructive discrimination against -- and imposition upon -- a small struggling industry and on American families that already face daunting challenges in achieving the American Dream of home ownership. Given the common interests of the industry and the Department in facilitating the availability of affordable manufactured homes for all Americans, we will keep the HUD Secretary, Hon. Julian Castro, fully apprised of this critical matter going forward.

All of the foregoing issues involve major impacts on consumers, the industry's smaller businesses, and most especially manufacturers. I will call you soon to schedule the follow-up meeting.

Sincerely,

Danny D. Ghorbani
President & CEO

cc: Hon. Biniam T. Gebre, Acting Assistant Secretary/Federal Housing Commissioner
MHARR Manufacturers