MHARR WASHINGTON UPDATE

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

REPORT AND ANALYSIS

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HUD-SAA-PIA MEETING EXPOSES ALARMING PROGRAM DETERIORATION

- **INTRODUCTION AND MEETING OVERVIEW:**

The HUD manufactured housing program, on April 7-9, 2015, held its first in-person conference with State Administrative Agencies (SAAs) and state and private Primary Inspection Agencies (PIAs) since 2010. The meeting, designed to highlight and address program changes resulting from the mandatory implementation of expanded in-plant regulation – initiated by HUD on a supposedly voluntary, "cooperative" basis in 2010 -- and changes to subpart I adopted in a final rule issued in October 2013, was remarkable in two critical respects: (1) it illustrated the degree to which continuously-expanding, intensifying and costly regulatory mandates focusing on useless, yet time-consuming paperwork, red-tape and similar procedural minutiae – and program spending on those functions -- have become detached from the reality of proven product performance; and (2) the degree to which the entrenched, revenue-driven program contractor has effectively taken control of the policy direction and de facto management of the federal program, at the expense of overall program accountability, the proper funding and involvement of the states and, ultimately, the industry and consumers.

Both of these over-arching and extremely serious issues, reflect a severe and rapid deterioration of the HUD program – with a concurrent return to the type of impositions and

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abuses that characterized the program prior to the adoption of the Manufactured Housing Improvement Act of 2000 – that flows directly from the program's failure to fully and properly implement all of the reforms mandated by the 2000 law. This includes HUD's failure, for the past ten years, to comply with the law's specific requirement for an appointed non-career program Administrator. Congress, in its wisdom, mandated an appointed non-career program Administrator in the 2000 reform law in order to provide full accountability for the program to Congress and the Administration at any given time – instead of a selected career Administrator that would become a functional part of the program bureaucracy. While HUD initially complied with this mandate, its failure to do so more recently – as indicated by exchanges at the meeting – has allowed compliance with the 2000 reform law to backslide, while the program reverts to the arbitrary methods of its past. A more detailed analysis of this deterioration and its impact on consumers, the industry, the states and other program stakeholders, is set forth below.

- **DISPUTE RESOLUTION DATA EXPOSES FUNDAMENTAL DISCONNECT BETWEEN HOME PERFORMANCE AND EXPANDED REGULATION**

MHARR has long maintained that both expanded in-plant regulation (adopted unilaterally by HUD and without consideration of its cost-impact on consumers, contrary to the Manufactured Housing Improvement Act of 2000), and expanded Subpart I mandates, including costly monthly IPIA "record reviews" and non-conformance concurrences, are unnecessary, "make-work" activity for HUD contractors, as shown by minimal levels of consumer complaints and referrals to federal and state dispute resolution (DR) programs. Indeed, documents produced by HUD in response to an MHARR Freedom of Information Act (FOIA) request, indicated that only a handful of cases were referred to the federal dispute resolution covering twenty-three "default" states. MHARR concluded from this information – covering multiple years -- that initial manufacturer compliance with the HUD standards, nationwide installation regulation and effective resolution of consumer issues had been effective in producing high-quality, compliant homes and, therefore, minimal numbers of "dispute" referrals.

All of this analysis – and more – was confirmed at the meeting through detailed dispute resolution information provided by HUD's new federal DR contractor, Savan, Inc. (Savan). Savan's information confirmed that between 2008 and 2014, of the 123,174 HUD Code manufactured homes placed in "default" states, only 24 -- or .019% -- were referred to federal dispute resolution (then being administered by HUD). And of those 24 referrals, only 3 – or .002% -- were found to qualify for DR resolution. HUD and its contractor, however, instead of attributing this remarkable absence of construction-related disputes to high-quality, compliant homes, proper installation under state and federal standards, and effective consumer service, have attributed it to a lack of consumer "knowledge" of the federal DR program and a lack of "outreach" and consumer "education." As "models" for future "outreach" under its HUD contract, Savan pointed to two state programs – Virginia and Texas – that had engaged in significant "outreach" and "education." In neither state, however, did DR referral levels, with such outreach and education, exceed 1.4% (in 2014).

It is noteworthy that the period covered by the federal DR information began well prior to the "voluntary" implementation of HUD's program of expanded in-plant regulation – and

continued during an extended period of only partial "voluntary" implementation of that expanded regulation, which did not become mandatory until 2014. The entire period, however, fell after the implementation of nationwide installation regulation, designed to address the major source of documented consumer issues prior to the enactment of the 2000 reform law.

Significantly, neither Savan nor HUD would state: (1) the dollar value of Savan's contract with HUD; (2) the dollar value of Savan's subcontract with its "trusted partner," HUD's program monitoring contractor – the Institute for Building Technology and Safety (IBTS) – to perform core DR functions including case intake, case evaluation, mediation and arbitration; (3) what policies or procedures (if any) had been put in place to prevent DR information from being funneled by HUD, IBTS, Savan, or any other party into the Subpart I system overseen by IBTS; or (4) how Savan and IBTS contract activities to expand "education" and "outreach" would be anything other than paid solicitation to seek higher complaint levels, with highly detrimental impacts for the industry and the integrity, accountability and credibility of the federal DR program itself. Even without specific contract information from HUD, though, the Department's two most recent Congressional Budget Justifications seek $300,000 for "contract" dispute resolution "enforcement" in Fiscal Year (FY) 2015 and $500,000 for FY 2016. Based on HUD's own 2008-2014 DR referral rate, that would amount to <u>$100,000</u> per processed referral in 2015 and <u>$166,666.66</u> per processed referral in 2016, but, of course, the actual "per referral" amount per year would be even <u>higher</u>, because the three 2008-2014 referrals were generated over the course of multiple years.

Thus, while HUD continues to <u>significantly</u> underfund state SAAs and PIAs, while simultaneously placing additional enforcement and oversight obligations on those agencies, <u>as repeatedly emphasized by states in attendance</u>, it plans to expend nearly $1 million over two years to fund a virtually unused DR program while, at the same time, intensifying baseless and costly regulatory mandates imposed on manufacturers and, ultimately, homebuyers. This basic factual disconnect, between performance and enforcement – and others – pervaded the <u>entire</u> conference and demonstrates the degree to which the program contractor – and its allies – and <u>their</u> interests are now driving the federal program.

- **<u>BASELESS AND IMPROPER EXPANSION OF SUBPART I</u>**

The meeting further demonstrated that HUD – and especially the program monitoring contractor -- are seeking to drastically expand the scope of Subpart I through unilateral changes to the regulations contrary to the 2000 reform law and other applicable requirements.

Specifically, while HUD's October 1, 2013 Final Rule implementing modifications to Subpart I incorporated reforms to streamline and modernize that regulation first proposed by MHARR in a 2001 Petition for Rulemaking, and most of the recommendations put forward by the Manufactured Housing Consensus Committee (MHCC), which used the MHARR proposal as its base document, the Department made a <u>crucial change</u> to the MHCC recommendations in its Final Rule that is now being used to expand Subpart I beyond all previous limits – and impose needless regulatory compliance costs on the industry and consumers – despite overwhelming evidence showing compliance with the standards, minimal levels of manufactured home

consumer complaints and prompt resolution of complaints when they do occur.

As recommended by the MHCC, section 3282.362(c)(1) of the HUD regulations would have been amended to state that "The IPIA must periodically review the manufacturer's service records for determinations under section 3282.404 to see whether the manufacturer is ignoring or not performing under its approved quality assurance manual...." (Emphasis added). When the final Subpart I rule was published, however, this provision was moved to section 3282.366(b), and the MHCC term "periodic," had been unilaterally changed by HUD to "monthly," prompting an immediate objection by MHARR. That section, accordingly, now reads: "(b) The IPIA must in each manufacturing plant review at least monthly the manufacturer's service and inspection records to verify if appropriate determinations are being made by the manufacturer under § 3282.404 and, if not, take the actions required by this section and § 3282.404." (Emphasis added). HUD, therefore, altered an MHCC consensus recommendation in a final rule without taking that change back to the MHCC or providing for further input from interested parties, contrary to the 2000 reform law and basic due process.

As predicted by MHARR, moreover, this unilateral change, in and of itself, is substantially increasing regulatory compliance costs for manufacturers and consumers – together with "make-work" activity and billing opportunities for HUD's "monitoring" contractor -- with absolutely no showing whatsoever of any resulting consumer benefits. Indeed, all the specific evidence presented at the meeting showed minimal problems and minimal complaint levels already resulting from now-established nationwide installation regulation. Thus, no justification exists or could exist for such extra costs, or the 127% more, per home, that HUD will be paying the monitoring contractor under its next budget, as compared with 2007, the last year that the industry produced nearly 100,000 homes. Further, when questioned by MHARR in 2014 about this change, the program Administrator stated that there had been an objection to the term "periodic" as being non-specific. However, the Administrator and program apparently have no objection to the very same non-specific requirement (in section 3282.416(b)(1)) that SAAs inspect manufacturer Subpart I records (kept under section 3282.417) on a "periodic" basis.

Worse yet, HUD's contractor is now seeking to use this "monthly" determination review, in conjunction with "implications" from other sections of Part 3282, to claim that IPIAs must "concur" with manufacturer determinations involving non-compliances – a time consuming and costly activity that has never previously been construed as being required by Subpart I. While HUD, in a follow-up statement, seemed to backtrack somewhat from this expansive reading of the regulations, it did not specifically disavow such an interpretation, and the entire sequence made it clear that the contractor is seeking to use this unilateral change to Subpart I as a means to radically expand the duties of manufacturers and PIAs in ways that will result in more unnecessary paperwork, red tape, higher costs and a greater focus on minor issues and procedural minutiae with no corresponding benefits for consumers.

All of this demonstrates, once again, the fundamental disconnect, between actual manufacturer performance and baseless, expanded enforcement, as well as the degree to which the program contractor – and its allies – and their interests are now driving the federal program.

- **ARBITRARY EXPANDED IN-PLANT ENFORCEMENT**

MHARR has consistently opposed the expanded in-plant enforcement initially promoted by HUD on a purportedly voluntary and "cooperative" basis in 2010, but subsequently implemented by the Department on a mandatory basis on the grounds that: (1) it should have been presented to the MHCC prior to implementation under section 604(b)(6) of the 2000 reform law as a change in enforcement practices, policies and procedures; (2) it violates the 2000 reform law in that HUD has never evaluated or properly considered either its objective justification or its impact on the cost of manufactured housing to the public; and (3) it permits the imposition of arbitrary and subjective demands on regulated parties – and especially manufacturers – that exceed the HUD standards and regulations, are vague and ill-defined, and vary from producer to producer, resulting in an uneven regulatory playing field that typically discriminates against smaller and medium-sized manufacturers.

While HUD has touted the "flexibility" of its expanded in-plant regulation, focused on "quality control" systems and issues, the reality, as shown by the meeting and reports from the field, is that this entirely new focus – representing a fundamental change in program enforcement practices, policies and procedures – has granted the monitoring contractor de facto license to impose arbitrary and subjective demands on manufacturers based on unilateral "interpretations" of both the HUD Code standards and program regulations. Thus, by modifying its enforcement practices in violation of the 2000 reform law, and by implementing an entire enforcement program and focus that is largely divorced from the letter of the standards – with no fixed regulatory point of reference for many enforcement demands and mandates – the program is denying regulated parties a reasonable opportunity to conform their conduct with relevant requirements in a way that denies them due process of law and exposes manufacturers, retailers and PIAs to enforcement based on vague and constantly changing criteria, with enforcement rulings and pronouncements that -- according to meeting participants -- are often not communicated among the various SAAs and PIAs.

This arbitrary in-plant regulation – driven by the monitoring contractor with the approval and blessing of HUD -- not only diverts the focus of in-plant inspections to needless paperwork and minutiae at the expense of potentially more important issues, but also leads to unnecessary regulatory compliance costs at a time when consumer complaints have reached minimal levels due, principally, to now well-established national installation regulation, which has effectively addressed installation errors that before the 2000 reform law, had been the largest source of consumer complaints.

Because of the fundamental unfairness of this system and its disproportionately negative impact on smaller and medium-sized producers, MHARR continues to aggressively pursue this matter in all its aspects.

- **ATTACHED GARAGES**

In a specific demonstration of the expanding arbitrariness of the program, HUD, in unilateral pronouncements issued in 2014, changed its preexisting enforcement policy to require

costly Alternate Construction (AC) letters for "garage-ready" homes and/or homes designed to "facilitate attached garages." Despite this specific change in the interpretation of the relevant standards and the AC regulation, HUD failed to bring this matter to the MHCC, in advance, for consensus review and recommendations in accordance with section 604(b)(6) of the 2000 reform law and simply began to enforce this new mandate, together with demands for retro-active Subpart I investigations of homes delivered prior to HUD's new interpretation and policy.

MHARR, in a November 12, 2014 communication with the program Administrator, objected to retro-active investigations following a unilateral change in HUD policy, as well as the misuse of AC procedures for homes in full compliance with the standards when they leave the factory. When this matter was brought before the MHCC at its December 2014 meeting, the MHCC agreed and called on HUD to suspend enforcement pending a full review of "attached garage" issues. HUD, however, has refused to suspend enforcement and continues to target this issue which remains pending at the MHCC.

As an exchange with HUD personnel at the meeting made clear, however, there is no definition of a "garage-ready home" or a home designed to "facilitate" an "attached garage" in the standards or regulations, and both HUD and its program contractor are operating on the basis of a concept that is vague, ambiguous and arbitrary, while imposing substantial costs on manufacturers and consumers to jump through new regulatory hoops adopted without any semblance of the procedure and cost-benefit considerations mandated by the 2000 reform law. Indeed, in exchange-after-exchange, unable to state a specific standard or regulatory basis for this mandate (other than a reference to "add-ons," which are not expressly addressed by the AC regulation), HUD personnel simply fell-back on an undefined "obligation to protect the public" – effectively arguing that the "ends justify the means" in a throwback to the type of abuses that marked the program prior to enactment of the 2000 reform law.

The attached garage issue thus illustrates the degree to which the program is increasingly flouting the requirements of the 2000 reform law and – driven by its entrenched monitoring contractor – has turned "flexibility" into arbitrary, capricious, and subjective regulation that imposes needless compliance costs on the industry and consumers.

- **CONCLUSION**

The meeting, accordingly, illustrates a system that has become so "flexible" that it is largely disconnected from reality (i.e., the proven performance of today's HUD Code manufactured homes) and the procedural and due process requirements of applicable law (i.e., MHCC review of enforcement changes, requirements for non-ambiguous regulatory requirements and an opportunity for public – and MHCC – review of changes to "final" regulations, among other things). That system, with policies, practices and procedures largely developed by – and designed to benefit – an entrenched revenue-driven program contractor, are driving-up regulatory compliance costs paid principally by manufacturers and homebuyers, while providing few, if any substantive benefits through endless paperwork "reviews," re-reviews and re-re-reviews involving "determinations" and investigations of either minor or non-existent issues.

This deviation from the 2000 reform law, moreover, and reversion toward the program abuses of the past are attributable in significant part to the absence of an appointed non-career program Administrator and the direct accountability that such an Administrator would provide, as envisioned and mandated by Congress.

The lack of a specific, principled, factual and regulatory basis for much if not most of this activity: (1) validates MHARR's aggressive rejection of expanded in-plant regulation from the start; and (2) demonstrates the urgent need for HUD to fully and properly implement all aspects of the 2000 reform law – both of which MHARR will continue to aggressively pursue in all available venues as recently re-affirmed by its membership.

MHCC CONTINUES CONSIDERATION OF MULTI-FAMILY HUD CODE HOMES

The General Subcommittee of the Manufactured Housing Consensus Committee is now scheduled to meet via telephone conference call on May 5, 2015 to continue its consideration of various aspects of multi-family HUD Code manufactured housing. The meeting will address recommendations assembled by a Subcommittee Task Force to define "multi-unit" manufactured housing as well as substantive requirements that could apply to multi-unit HUD Code homes, with potentially larger numbers of occupants using separate and distinct living areas.

When the HUD program Administrator issued a "Guidance Memorandum" on October 3, 2014 threatening enforcement action against homes designed for other than "single-family use" based on section 3280.2 of the HUD standard, MHARR immediately objected on the grounds that the National Manufactured Housing Construction and Safety Standards Act of 1974 (as amended) does not limit HUD Code manufactured housing to "one-family" or "single-family" use and that HUD Code producers, retailers and communities should not be exposed to potential litigation or fines based on what does – or does not – constitute a "single-family." At its December 2014 meeting, the MHCC agreed with MHARR's concerns and tasked its General Subcommittee with addressing potential issues relating to aspects of multi-unit HUD Code homes. The Subcommittee, in turn, formed a Task Force to begin developing relevant definitions and consider potential substantive requirements.

During a two-hour telephone conference call on March 26, 2015, the Task Force ultimately settled on recommendations for multi-unit homes including up-to three independent living units, as well as substantive criteria for: (1) fire-stopping; (2) ventilation; (3) and electrical power safety, among other things.

Following consideration and debate by the General Subcommittee, it is expected that final recommendations will be presented to the full MHCC for review and possible action at its next in-person meeting, during either July or August 2015. As it has since this issue first surfaced, MHARR will continue to closely monitor this matter and will provide further reports as developments unfold.