Manufactured Housing Association for Regulatory Reform

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April 14, 2016

VIA FEDERAL EXPRESS

Ms. Pamela Danner
Administrator
Office of Manufactured Housing Programs
U.S. Department of Housing and Urban Development
Room 9166
451 7th Street, S.W.
Washington, D.C. 20410

Re: HUD Manufactured Housing Installation Directives

Dear Ms. Danner:

We are writing to state our strenuous objections to the latest in a series of unilateral actions by the HUD Office of Manufactured Housing Programs and you, as program Administrator, that will needlessly increase regulatory compliance costs for smaller industry businesses and consumers through "make-work" activity for program contractors, while violating specific mandates of the Manufactured Housing Improvement Act of 2000. We will address these two unilateral actions, regarding installation regulation and enforcement, seriatim.

APRIL 11, 2016 "INTERIM GUIDANCE" MEMORANDUM

The 2000 law, as you know, was designed, among other things, to provide the states with primary regulatory authority over manufactured home installation (supplemented by HUD authority in "default" states) and to require Manufactured Housing Consensus Committee (MHCC) pre-consideration and review of any "statement of policies practices, or procedures relating to … enforcement activities that … implement[s], interpret[s], or prescribe[s] law or policy…." (See, 42 U.S.C. 5403(b)(6)). The same section of the law states that "any change adopted in violation" of this procedural requirement (absent an "emergency" declared in writing by the Secretary), "is void."

On April 11, 2016, a memorandum entitled "Interim Guidance on use of Frost-Free Foundations or Frost Protected Shallow Foundations" was issued under your signature and ostensible authority. That memorandum purports to set forth "recommendations regarding the safe

installation of [manufactured home] foundations in freezing climates." Referencing section 24 C.F.R. 3285.312(b) of the Model Manufactured Home Installation Standards, the HUD memorandum "recommends," among other things, that installers, "for Frost Free Foundations, have a site investigation performed by a soils engineer or geotechnical engineer to verify if the soil condition at each home site is of a non-frost susceptible classification and is well drained." In lieu of such an investigation at each home site, the HUD "Interim Guidance" provides that "crushed stone or course (sic) or dense sand may be provided to the frost line depth."

As an initial matter, the dismal track record of the manufactured housing program – with specific examples over the course of decades – shows that HUD "guidance" and "recommendations," and invocations of "voluntary cooperation," have a history of evolving into mandatory, enforced dictates, while circumventing the procedural protections and guarantees provided to regulated parties under applicable law.

That said, the April 11, 2016 HUD "guidance," issued unilaterally, violates the law in at least four respects. First, the "guidance" represents, at a minimum, an "interpretation" of 24 C.F.R. 3285.312 that should have been brought to and reviewed by the MHCC for consensus input to HUD prior to issuance pursuant to 42 U.S.C. 5403(b)(6). Second, the "guidance" memorandum – to the extent that it is now, or in the future, may be construed as mandatory -- unilaterally modifies 24 C.F.R. 3285.312 by effectively removing the "or" in section 3285.312(b)(2)(i) and requiring compliance with the prescriptive elements of the SEI/ASCE 32-01 standard in each instance instead of as an available option (and also by eliminating local jurisdiction soils approvals), in violation of 42 U.S.C. 5403(a)(4). Third, there is no indication or evidence that HUD has considered the cost impact of this change as affirmatively required by 42 U.S.C. 5403(e). Fourth, the memorandum violates the primacy of state authority with respect to the interpretation and construction of installation standards adopted pursuant to state law and enforced by state officials under authority conferred by state law in states with complying manufactured home installation programs as provided by the 2000 Act in 42 U.S.C. 5404. While the Part 3285 standards are model standards that provide a baseline for state standards to provide "protection that equals or exceeds" the model federal provisions, the Act provides no mechanism or basis for the imposition of unilateral HUD interpretations of the model federal standards on state officials enforcing state standards under color and authority of state law.

As with so many other actions taken during your tenure as program Administrator, this measure, in clear defiance of the procedural requirements and protections of the 2000 law, will unnecessarily and arbitrarily increase the cost of manufactured housing while needlessly undercutting the ability of the industry – and particularly its smaller businesses -- to compete with other types of housing in a highly-competitive market.

This "guidance," accordingly, which was not prompted by an "emergency" and, as acknowledged in your own memorandum, is still under HUD review, should and must – under the 2000 reform law – be submitted to the MHCC for review and input prior to its implementation.

APRIL 8, 2016 NOTICE REGARDING INSTALLATION MANUAL "REVIEWS"

Similarly, in an April 8, 2016 communication, you unilaterally advise Primary Inspection Agencies that: (1) a HUD contractor, SEBA Professional Services (SEBA), "will be assisting the Department with the review of installation manuals for manufactured homes;" (2) that SEBA will use "a design review process based on the design review process used by HUD's monitoring contractor;" (3) that "upon review of an installation manual, SEBA will transmit a finding report to the appropriate DAPIA that outlines the issue and requests action; (4) that "upon receipt of a SEBA finding(s) DAPIAs will have 15 business days to respond....; and (5) that "findings that are refuted or require comment will result in a dialogue with SEBA and HUD, as applicable, to find a resolution." (Emphasis added).

As with the HUD April 11, 2016 "Interim Guidance" directive, this new, unilateral mandate will needlessly increase regulatory compliance costs for smaller industry businesses and consumers, and undermine the industry's ability to compete with site-builders and other competitors, while it violates key reforms of the 2000 law and other applicable authority.

First, your letter provides no legal basis or authority for the "review" described therein, nor does your letter describe the nature, purpose, objective or extent of this 'review," effectively granting a private entity an open-ended, unrestricted and unaccountable writ to impose unilateral demands and costs on regulated parties, DAPIAs and, by extension, consumers. Thus, among other things, precisely what are the manuals being "reviewed" for, what are the qualification(s) of SEBA or specific SEBA personnel to conduct such a review, and under what authority is that "review" being conducted?

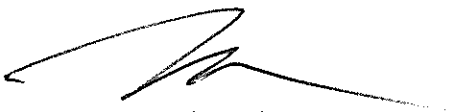
Second, your letter provides no factual or cost basis, or justification for such reviews which appear to be duplicative of DAPIA monitoring currently conducted by HUD's monitoring contractor. Pursuant to sections 3282.452(e) and 3282(b)(10), DAPIA activities, including installation instruction approvals, are subject to monitoring "on a random basis" at levels of "at least 10 percent." Given minimal complaint levels, as illustrated by documents disclosed by HUD in response to MHARR Freedom of Information Act (FOIA) requests and other related dispute resolution information, there is nothing to indicate that any such new, additional and/or duplicative reviews are cost-justified, as required by the 2000 reform law, or that HUD considered such costs in relation to this activity (see, 42 U.S.C. 5403(e)). Moreover, to the extent that such enforcement-related activity constitutes a change in program practices or procedures – by either supplanting, supplementing, or in any other way changing current monitoring activity relating to installation instruction approvals -- the 2000 law is clear that any such change must be presented to and considered by the MHCC prior to implementation (see, 42 U.S.C. 5403(b)(6)).

Third, there is no basis or authority for SEBA (or any other HUD contractor) to make unilateral "findings" with respect to any regulated activity, including any aspect of installation instructions, their approval by a DAPIA, or their compliance with any relevant federal standard, or to otherwise exercise inherently governmental authority with respect to a "dialogue" concerning those "findings," or their imposition in the absence of adequate "refutation" as determined by the said contractor. As relevant guidance from the Office of Management and Budget (OMB)

provides, the exercise of discretionary authority by a private contractor that is barred by the delegation doctrine, but "even where Federal officials retain ultimate authority to approve and review contractor actions, the contractor may nonetheless be performing an inherently governmental action if its role is extensive and the Federal officials' role is minimal." (Emphasis added).

Based on all of the foregoing, these documents involve HUD action that exceeds its authority under the Manufactured Housing Improvement Act of 2000 and otherwise violates provisions of that law and other applicable governing authority. Accordingly, those documents should be withdrawn and the issues addressed by those documents should be presented to – and considered by – the MHCC, as required by law.

Very truly yours,



Mark Weiss
President and CEO

cc: Mr. Edward Golding (HUD)
Members, Manufactured Housing Consensus Committee
HUD Code Industry Manufacturers