Manufactured Housing Association for Regulatory Reform

1331 Pennsylvania Avenue, NW • Suite 512 • Washington, DC 20004 • 202-783-4087 • Fax 202-783-4075 • mharrdg@aol.com

October 20, 2016

VIA FEDERAL EXPRESS

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

Re: Manufactured Home Foundations in Freezing Climates

Dear Ms. Danner:

On April 14, 2016, the Manufactured Housing Association for Regulatory Reform (MHARR) wrote to you, to assert, among other things, its "strenuous objections" to a unilateral April 11, 2016 HUD "Interim Guidance" memorandum on the use of "Frost-Free Foundations or Frost-Protected Shallow Foundations" for manufactured homes. (See, copy attached).

MHARR, in that communication, stressed that this "Interim Guidance" violated controlling federal law in four separate respects:

1. The "Interim Guidance" constituted an "interpretation" of 24 C.F.R. 3285.312 subject to mandatory review by the Manufactured Housing Consensus Committee (MHCC) prior to publication pursuant to 42 U.S.C. 5403(b)(6);
2. The "Interim Guidance" violated 42 U.S.C. 5403(a)(4) (and 24 C.F.R. 3285.1(c)) by unilaterally amending 24 C.F.R. 3285.312 -- effectively removing the disjunctive "or" in sections 3285.312(b)(2)(i) and 3285(b)(3)(i) – thereby, in practical application, requiring compliance with the prescriptive elements of SEI/ASCE 32-01 in each such instance;
3. The "Interim Guidance" failed to provide any evidence that HUD determined or considered either the objective necessity of such a change based upon applicable statutory criteria, or the cost impact of this change as mandated by 42 U.S.C. 5403(e); and
4. The "Interim Guidance" violated the primacy of state authority pursuant to 42 U.S.C. 5404 with respect to the content and interpretation of installation

standards adopted under state law and enforced by state (and/or local) officials under authority of state law, in states with complying manufactured home installation programs.

Based on these violations, MHARR stated, in its communication to HUD, that the April 11, 2016 "Interim Guidance," which was not prompted by an "emergency" as defined by the Manufactured Housing Improvement Act of 2000, "must ... be submitted to the MHCC for review and input prior to its implementation."

Now, according to the "Tentative Agenda" for the impending meeting of the MHCC on October 25-27, 2016, as published in the Federal Register (see, 81 Federal Register No. 187 at pp. 66288-66289) HUD has scheduled this matter -- involving the construction and enforcement of 24 C.F.R. 3285.312(b) -- for review by the MHCC. Although this action potentially addresses MHARR's first objection, as set forth in its communication of April 14, 2016 and restated above, the "recommended guidelines" for manufactured home "foundation systems in freezing climates" that HUD apparently plans to present to the MHCC -- set forth in a report developed by the HUD program's installation contractor, SEBA Professional Services, L.L.C. (SEBA)[1] – do not resolve and, indeed, compound and exacerbate the violations of controlling law set forth in numbered paragraphs 2-4, above. MHARR, accordingly, renews and reasserts its vigorous objections to such substantive revisions (and related inadequate procedures) that would fundamentally alter the character, nature and scope of installation regulation in both approved and default states, and the responsibilities of regulated stakeholders and public officials.

As a threshold matter, it is unclear from the language of the published MHCC Tentative Agenda and from the SEBA Report whether HUD plans to present the contents of the SEBA report (which goes far beyond HUD's April 11, 2016 "Interim Guidance) as a mandatory "interpretation" of 24 C.F.R. 3285.312(b), or as incorporating non-mandatory, permissive, recommended "guidelines." The Tentative Agenda, for example, refers both to "recommended guidelines on foundation system requirements in freezing climates" (emphasis added) and "recommended guidelines for foundation systems in freezing climates." Similarly, the SEBA Report itself simultaneously refers to its content – which varies from and exceeds the express provisions of section 3285.312(b) – as "guidance" and "recommendations" on the one hand, and as mandatory "requirements ... that must be met," in some instances on the same page.[2] In either case, though, given the program's established track record of transitioning so-called voluntary guidelines or "voluntary cooperation" into mandatory requirements subject to prescriptive enforcement and both civil and criminal penalties under applicable federal law,[3] MHARR believes and, therefore,

[1] That SEBA Report, in turn, appears to be substantially – if not exclusively – based on a written report prepared by Mr. Jay H. Crandell, P.E. of ARES Consulting, Inc. (ARES). The SEBA report fails to indicate whether this report was produced pursuant to a paid subcontract with SEBA, a direct contract with HUD, or on some other compensated basis. Nor does the SEBA Report contain any type of transparency disclosure regarding either Mr. Crandell or ARES that would indicate their respective clients or other pecuniary interests that could create a potential conflict of interest.

[2] See e.g., SEBA Report at p. 2, "Executive Summary." See also, for example, SEBA Report: at p. 5 ("recommendations for manufacturers;" "a site-specific soil test is required."); p. 6 ("recommendations for design professional and DAPIAs;" "FFF installations that rely exclusively on surface drainage ... are not acceptable. ...designs of this type should be removed for use ... and DAPIA approval withdrawn.");

[3] E.g., HUD's program of expanded in-plant regulation, initially presented and characterized as "voluntary" and "cooperative," only to be later re-defined by HUD as "not voluntary." See e.g., Memorandum from William W.

assumes that the prescriptive assertions set forth in the SEBA Report are – or will be – regulatory mandates subject to enforcement by HUD and/or its contractors. Consequently, all procedures required by law – including those set forth in 42 U.S.C. 5403 (MHCC review, MHCC consensus recommendations to the HUD Secretary, approval, rejection or modification by the HUD Secretary, followed by notice and comment rulemaking), the Administrative Procedure Act (APA), 5 U.S.C. 553 (notice and comment rulemaking) and 24 C.F.R. 3285.1(c) ("consultation" with the MHCC, MHCC review, MHCC consensus recommendations to the HUD Secretary, approval, rejection or modification by the HUD Secretary, followed by notice and comment rulemaking) – apply and must be followed.

Beyond this threshold issue, a review of the SEBA Report demonstrates that – if adopted -- it would materially and significantly alter 24 C.F.R. 3285.312(b)(2) and (b)(3) in ways that extend well beyond a mere "interpretation" of that standard for purposes of enforcement. Specifically, the construction of those sections set forth in the report – based on the assertions and apparent conclusions of just <u>one</u> individual[4]-- would effectively eliminate the disjunctive "or" in sections 3285.312(b)(2)(i) and 3285.312(b)(3)(i) which currently, and since the time of final adoption of Part 3285, nine years ago, in October 2007, has allowed HUD Code manufacturers to <u>elect</u> between monolithic slab systems and insulated foundations in "freezing climates"[5] designed by a registered professional engineer or registered architect in accordance with <u>either</u> "acceptable engineering practice to prevent the effects of frost heave," <u>or</u> Structural Engineering Institute/American Society of Civil Engineers (SEI/ASCE) standard 32-01 (Design and Construction of Frost-Protected Shallow Foundations). The SEBA Report accomplishes this by creating an apparently mandatory functional equivalence between "acceptable engineering practice" and the prescriptive requirements of SEI/ASCE 32-01that effectively eliminates any discretion or professional judgment on the part of the "registered professional engineer or registered architect" referenced in sections 3285.312(b)(2) and (3).

Matchneer, III, Associate Deputy Assistant Secretary for Regulatory Affairs and manufactured Housing, dated March 3, 2010. The program has also, in the past, specifically couched enforcement mandates in as "recommendations" in order to avoid required procedural safeguards. <u>See, e.g.,</u> Memorandum from James C. Nistler, Deputy Assistant Secretary for Single Family Housing, dated April 11, 1985: "To assist IPIAs in their compliance with the regulatory requirement, memos were issued ... which set forth a schedule for increasing inspections.... However, I have recently been advised by HUD's Office of General Counsel that there is a question as to whether ... these memos should have been published in the Federal Register. Therefore ... the ... memos should be treated by IPIAs <u>as recommendations rather than mandatory requirements.</u> *** <u>Adherence to the recommendations contained in the ... memos will ensure [the] IPIA will receive an acceptable rating with respect to this function</u>." (Emphasis added).

[4] <u>I.e.,</u> Mr. Crandell and/or ARES as a corporate entity. MHARR does not discount, however, the potential yet undisclosed involvement of other individuals and/or entities with specific pecuniary interests in the development, revision, or completion of the SEBA Report. MHARR, accordingly, seeks full disclosure and full transparency from HUD – at or before the time that the SEBA Report is presented to the MHCC – regarding all individuals and/or entities that participated in the development, revision or completion of that report, including the nature and scope of their participation as well as any and all amounts paid to those individuals and/or entities.

[5] MHARR notes, in addition, that the SEBA Report would change the predicate condition for the applicability of 24 C.F.R. 3285.312(b)(1), (2) and (3). Specifically, section 3285.312(b) currently prefaces subsections (1), (2) and (3) with the predicate that they apply in "freezing climates." The SEBA Report, however, states that its proscriptions apply to "new manufactured homes in <u>frost-susceptible</u> climates" (<u>see,</u> SEBA Report at p. 2), which would appear to set a lower threshold predicate than the current language, thereby expanding the area geographical subject to such dictates and expanding the number of states subject to attempted HUD interference with approved state installation programs.

Thus, for example, the SEBA Report states that "an approved installation design" must comply "with [the] SEI/ASCE 32 standard," or comply "with accepted engineering practice to prevent the effects of frost heave in a manner equivalent to the SEI/ASCE 32 standard."[6] (Emphasis added). The underlined language, however, significantly changes the existing regulation. First, the shift from "acceptable" engineering practice, as stated in the existing regulation, to "accepted engineering practice," while subtle, acts to preclude any design or design related activity that is not already "accepted" – i.e., compliant with SEI/ASCE 32-01 – whereas the term "acceptable" engineering practice clearly allows for innovation and technical advancement based on the professional judgment and knowledge (particularly including knowledge of climate and soil conditions in the area of the home site) of individual registered (i.e., state-licensed) professional engineers or architects. Second, the "in a manner equivalent to the SEI/ASCE 32 standard" language is not present at all in either 3285.312(b)(2)(i) or (b)(3)(i), and, again, effectively nullifies the professional judgment of licensed engineering and architectural professionals, while binding them, effectively, to the prescriptive terms of SEI/ASCE 32-01, as well as the judgments and determinations underlying that standard. Such a profound and elemental change to an existing standard does not constitute an "interpretation" of the standard, but rather a substantive amendment that can, should and must comply with the procedural requirements and safeguards of all applicable law, as noted above. Therefore, MHCC consideration of the SEBA Report may be a prelude to the development of a proposed rule concerning appropriate consensus modifications to section 3285.312(b), but is not a substitute for all required procedures under the 2000 reform law and other applicable statutes and regulations.

Consequently, the provisions of the SEBA Report, if mandatory and subject to enforcement in any respect against any regulated party under Part 3285, must be presented to the MHCC as a proposed rule, with clear and specific terms that are expressly stated and not subject to the type of fundamental ambiguity that is inherent in the SEBA Report. Any such proposed rule, moreover, must comply with the requirements of section 604 of the 2000 reform law, 42 U.S.C. 5403(e).

That section, in relevant part, requires that the "consensus committee, in recommending standards, regulations and interpretations ... shall – (3) consider whether any proposed standard is reasonable for ... the geographic region for which it is prescribed; [and] (4) consider the probable effect of such standard on the cost of the manufactured home to the public."[7] The SEBA Report, however, fails to provide any information relevant to an analysis of these two fundamental issues.

First, the SEBA Report fails to provide any evidence showing the alleged insufficiency of the current standard or current practice under that standard and whether its unilateral changes are "reasonable" for any given region. Nine years after the promulgation of the final installation standards rule, the SEBA Report fails to cite any evidence of either systemic failures resulting from the 3285.312(b) standards as originally stated and enforced, or an objective justification of any sort, showing the need for such material and significant alterations.[8]

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[6] See, e.g., SEBA Report at p. 12.

[7] The express applicability of section 604(e) is not limited to a circumscribed type or class of manufactured housing "standards" or "regulations" and, therefore, on its face, extends to revisions to the installation standards as described in 24 C.F.R. 3285.1(c).

[8] Nor does the Crandell/ARES appendix to the SEBA Report provide any such evidence.

Second, the SEBA Report fails to provide any evidence showing the cost of any such change, which would be substantial given the Report's apparent mandate for, among other things, a site-specific soil test "to determine frost susceptibility" in each instance, site-specific groundwater tests, and other related preparatory work and determinations.

Accordingly, the SEBA Report fails to comply with the most fundamental requirements of the 2000 reform law for the modification of existing federal manufactured housing standards, and, therefore, cannot – and does not – provide a legitimate basis for any such change or the proper consideration and analysis of such changes by the MHCC. There is thus no legitimate statutory basis for MHCC recommendations or other actions(s) premised on the SEBA Report.

Even more significantly, though, the "recommendations" and "guidance" of the SEBA Report appear to be a unilateral power-grab by HUD to supplant the primacy of state authority over installation in states with approved installation programs. In stating "recommendations" for "Local Regulatory Officials and Inspectors,"[9]the SEBA Report -- like HUD's April 11, 2016 "Interim Guidance" – does not distinguish between officials in HUD-approved and default states, and appears to impose affirmative mandates (either de jure or de facto) on state and/or local officials acting on the basis of approved state-law installation standards under color of state law. As MHARR stated in its April 14, 2016 communication to HUD, however, "while the Part 3285 standards, pursuant to 42 U.S.C. 5404, are model standards that provide a baseline for state standards to provide 'protection that equals or exceeds' the model federal provisions, the law 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." Nor does that statute provide any mechanism or basis for HUD to impose a specific federal standard, modification of a specific federal standard, or interpretation of a specific federal standard on a state program that, in the aggregate, has been approved as providing a degree of protection that equals or exceeds the model federal program. Put differently, the applicability, interpretation and enforcement of state manufactured housing installation standards, following their adoption and approval by HUD, are a matter within the sole authority and discretion of state officials and not subject to unilateral dictates by HUD or by HUD contractors.

For all of these reasons, while MHARR supports HUD's engagement of the MHCC in this matter, as set forth in its April 14, 2016 communication, the SEBA Report does not provide a proper, sufficient or adequate basis for any MHCC recommendations concerning this matter, and may not be the basis for the imposition of any mandatory requirements on any party regulated under Part 3285, any approved state installation program and/or state or local regulatory officials acting under such a program.

Very truly yours,

Mark Weiss
President and CEO

[9] See, SEBA Report at p. 7, "Recommendations for Local Regulatory Officials and Inspectors."

cc: Hon. Julian Castro
Hon. Helen Kanovsky
Mr. Edward Golding
Manufactured Housing Consensus Committee Members
MHARR Legal Counsel

Manufactured Housing Association for Regulatory Reform

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April 14, 2016

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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