



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

June 7, 2017

VIA FEDERAL EXPRESS AND ELECTRONIC SUBMISSION

Regulations Division
Office of General Counsel
U.S. Department of Housing and Urban Development
Room 10276
451 7th Street, S.W.
Washington, D.C. 20410-0500

Re: Reducing Regulatory Burdens; Enforcing the Regulatory Reform Agenda
Under Executive Order No. 13777 – Docket No. FR-6030 – N – 01

Dear Sir or Madam:

The following comments are submitted on behalf of the Manufactured Housing Association for Regulatory Reform (MHARR). MHARR is a Washington, D.C.-based national trade association representing the views and interests of producers of manufactured housing regulated by the U.S. Department of Housing and Urban Development (HUD) pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5401, et seq.) as amended by the Manufactured Housing Improvement Act of 2000 (2000 reform law). MHARR was founded in 1985. Its members include mostly smaller and medium-sized independent producers of manufactured housing from all regions of the United States.

I. INTRODUCTION

On May 15, 2017, HUD published a Notice and Request for Comment (Notice)¹ seeking public comment – pursuant to Executive Order (EO) 13777 (“Enforcing the Regulatory Reform Agenda”), issued by President Trump on February 24, 2017 -- concerning HUD regulations or portions thereof that are “outdated, ineffective, or excessively burdensome” and, therefore, “appropriate for repeal, replacement or modification.”² In relevant part, EO 13777 provides:

¹ See, 82 Federal Register, No. 92 at p. 22344.

² Id. at p. 22345.

“Section 1. Policy. It is the policy of the United States to alleviate unnecessary regulatory burdens placed on the American people.

Section 3 Regulatory Reform Task Forces *** (d) Each Regulatory Reform Task Force shall evaluate existing regulations ... and make recommendations to the agency head regarding their repeal replacement or modification, consistent with applicable law. At a minimum, each Regulatory Reform Task Force shall attempt to identify regulations that: (i) eliminate jobs or inhibit job creation; (ii) are outdated, unnecessary or ineffective; (iii) impose burdens that exceed benefits; [or] (iv) create a serious inconsistency, or otherwise interfere with regulatory reform initiatives and policies.

(e) In performing the evaluation described in subsection (d) of this section, each Regulatory Reform Task Force shall seek input and other assistance, as permitted by law, from entities significantly affected by federal regulations, including ... small businesses ... and trade associations.”

(Emphasis added).

In accordance with this presidential directive, MHARR – representing small manufactured housing industry businesses “significantly affected” by HUD regulation³ -- asserts and maintains that significant elements of HUD’s existing manufactured housing regulations and related “interpretations,” directives, “guidance,” and other similar pseudo-regulatory pronouncements (enforced against regulated parties by HUD and/or its regulatory contractors), as set forth and detailed below,⁴ are either outdated, inappropriate, unduly burdensome, not cost-effective, or are otherwise inconsistent with governing law (particularly the Manufactured Housing Improvement Act of 2000) and, therefore, should be repealed or amended pursuant to EO 13777.

³ All of MHARR’s member manufacturers are “small businesses,” as defined by the U.S. Small Business Administration (SBA) and “small entities” for purposes of the Regulatory Flexibility Act (5 U.S.C. 601, et seq.).

⁴ Pursuant to section 3(d) of EO 13777, agency Regulatory Reform Task Forces are required to “evaluate existing regulations (as defined in section 4 of Executive Order 13771).” That section, in turn, states that “for purposes of this order, the term ‘regulation’ or ‘rule’ means an agency statement of general or particular applicability and future effect, designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency....” The Administration’s January 20, 2017 order to the heads of executive departments and agencies entitled “Regulatory Freeze Pending Review,” further states that “regulatory action” includes “guidance documents” as well as “an interpretation of a statutory or regulatory issue.” Accordingly, each of the regulations and regulatory actions identified herein, falls within the scope of EO 13777.

II. COMMENTS

A. BACKGROUND OF HUD MANUFACTURED HOUSING REGULATION

Manufactured housing, as both houses of Congress have repeatedly and unanimously recognized, is affordable housing, historically relied-upon primarily by lower and moderate-income families.⁵ In order to maintain that affordability without the need for costly taxpayer-funded subsidies, manufactured housing construction and safety must be regulated at the federal level, while simultaneously maintaining a full partnership with the states. Federal regulation allows the full cost efficiencies and savings of factory-based construction to be passed to homebuyers by ensuring: (1) federal preemption of state and local standards, regulations and requirements, which facilitates interstate commerce and allows manufactured homes to be produced and sited anywhere in the United States; (2) uniform, performance-based standards, incorporating a balance between affordability and protection of homeowners, which facilitate technological innovation to achieve cost savings; and (3) uniform enforcement based on a federal-state partnership which lies at the core of the federal program.

These unique concepts were incorporated by Congress in the National Manufactured Housing Construction and Safety Standards Act of 1974. That law established the basic framework for the current HUD manufactured housing program and most aspects of the federal standards and enforcement system. At the time the 1974 law was adopted, however, manufactured homes were still transitioning from the vehicle-like “trailers” of the Post-War Era to legitimate, full-fledged housing. As a result, Congress based the 1974 law on the existing federal safety law for automobiles, the National Traffic and Motor Vehicle Safety Act of 1966 (NTMVSA), complete with vehicle-like recall provisions (set forth in Subpart I of the current HUD Procedural and Enforcement Regulations – 24 C.F.R. 3282.401, et seq.).

As manufactured housing progressed and evolved into full-fledged housing, however, both Congress and federal program stakeholders recognized the need to reform and modernize the original law to acknowledge and protect manufactured homes as legitimate, affordable “housing” at parity, for all purposes, with other types of housing. At the same time, a string of HUD regulatory abuses involving the adoption and enforcement of de facto standards, regulations and regulatory practices through “interpretations” adopted without notice and comment rulemaking -- which denied the due process rights of manufacturers and simultaneously imposed needless and unjustified regulatory compliance costs on both producers and consumers -- highlighted the need for an open, transparent and accountable process for the development of standards, enforcement regulations, enforcement practices and related activities, as well as other fundamental program reforms.

⁵ The most recent statistics show that 73% of all manufactured home households earn less than \$40,000 (see, e.g., “2012 Manufactured Home Market Facts,” Foremost Insurance Group, at p. 5), while the median income of manufactured home households is \$26,400 (see, “Manufactured Housing Consumer Finance in the United States,” U.S. Consumer Finance Protection Bureau (September 2014)) and 45% of all manufactured home borrowers earned 80% or less of Area Median Income.

Thus, in December 2000, after 12 years of congressional hearings, studies and analysis – and based upon the recommendations of the National Commission on Manufactured Housing⁶– Congress, through unanimous consent in both houses, enacted the Manufactured Housing Improvement Act of 2000. This landmark legislation adopted key reforms to the original 1974 law which, if fully and properly implemented by HUD, would help transform manufactured housing from the “trailers” of the past, to modern, legitimate housing at parity with other types of homes. These reforms include, but are not limited to:

1. Specific congressional recognition of manufactured housing as “affordable” housing and mandatory HUD consideration of affordability in all decisions relating to the standards and their enforcement (section 602);
2. Creation of an independent, statutory consensus committee comprised of representatives of all program stakeholders with defined authority and procedures to consider, evaluate and recommend new or revised standards, enforcement regulations, interpretations and enforcement, and monitoring practices and policies no matter how denominated (section 604);
3. Presumptive Manufactured Housing Consensus Committee (MHCC) prior review of all program policies and practices of general applicability and impact (section 604(b)(6));
4. Mandatory appointment of a non-career manufactured housing program administrator as a statutory “responsibility” of the Secretary (Section 620);
5. Enhanced federal preemption, applicable to all state or local standards or requirements (section 604(d));
6. Specific statutory directives to HUD to: (A) “facilitate the availability of affordable manufactured homes and to increase homeownership for all Americans;” and (B) “facilitate[e] the acceptance of the quality, durability, safety and affordability of manufactured housing within [HUD];”
7. Establishment of installation standards in all states, either under state law or through default federal standards, in conjunction with state-law enforcement or federal enforcement in states without state law installation programs (section 605);
8. Establishment of a federal dispute resolution program for states without a state law alternate dispute resolution program meeting specified criteria (section 623);
9. A prohibition on the use of any such revenues for any purpose not “specifically authorized” by the law as amended (section 620); and
10. Provisions requiring separate and independent contractors for all contract-based program functions including in-plant monitoring and inspections (section 620).

⁶ See, Final Report and Minority Report of the National Commission on Manufactured Housing, August 1, 1994.

HUD, however, has failed to fully and properly implement these reforms, effectively leaving manufactured homes as second-class “trailers” for purposes of federal regulation, financing, zoning, placement, insurance and other purposes -- subject to overt and specific forms of discrimination that have undermined the availability of affordable manufactured homes and the ability of lower and moderate-income consumers to purchase and own a home that they can truly afford. The HUD manufactured housing program, therefore, as established by law, is well-conceived and absolutely necessary. It is in the implementation of the laws enacted by Congress that HUD and the HUD program have failed. Consequently, and in order to properly implement EO 13777 within the unique context of the federal manufactured housing program, the entire program – and all of its various aspects and practices – must be reviewed by departmental leadership for compliance (or, more precisely, non-compliance) with the 2000 reform law, as well as the regulatory reform objectives and policies enunciated in EO 13777 itself.

MHARR submits that any objective, evidence-based review of the federal manufactured housing program and program regulations for the period following the adoption of the 2000 reform law (and especially for the period since 2014, when the current program administrator, an outsider, was “parachuted” into the program on a career basis in violation of that law), would find that: (1) while the industry, has succeeded in achieving a level of quality, durability and safety (at an inherently affordable price point) that meets and, in fact exceeds the substantive statutory benchmark established by Congress,⁷ resulting in de minimus levels of consumer complaints referred to the federal dispute resolution program established under the 2000 reform law;⁸ (2) HUD – directly and via a 40-year, revenue-driven, “make-work” “monitoring” contractor, continues to expand the scope, extent, intrusiveness and cost of federal regulation, needlessly increasing regulatory compliance burdens and related costs ultimately paid by consumers; (3) as it persists in treating manufactured homes as vehicles – in violation of the 2000 reform law – by prioritizing, structuring and organizing the vast majority of program activity (again, with its 40-year, revenue-driven, “make-work” “program “monitoring” contractor) around the de facto “recall” elements of its Procedural and Enforcement Regulations (24 C.F.R. 3282.401, et seq.) (and successive “interpretations,” “guidance documents,” checklists and other pseudo-regulatory materials developed, in substantial part by its revenue-driven “monitoring” contractor), rather than “facilitating” the availability of affordable manufactured housing and its acceptance within HUD as mandated by Congress in the 2000 reform law.

Put differently, the vast bulk of the existing regulatory apparatus of the HUD manufactured housing program – focusing on the vehicle-like “recall” of manufactured homes – despite the existence, following the enactment of the 2000 reform law, of an integrated consumer protection

⁷ Applicable federal law establishes a benchmark standard of “reasonable” safety, quality and durability for manufactured homes. Accordingly, the law defines “manufactured housing safety” as “the performance of a manufactured homes in such a manner that the public is protected against any unreasonable risk of the occurrence of accidents due to the design or construction of such manufactured home or, or any unreasonable risk of death or injury to the user...” (Emphasis added). Similarly, the law defines a “federal manufactured home construction and safety standard” as a “reasonable standard for the construction, design and performance of a manufactured home which meets the needs of the public including the need for quality, durability and safety.” (Emphasis added). (See, 42 U.S.C. 5402(7) and (8)).

⁸ According to HUD’s dispute resolution contractor, between 2008 and 2014, out of 123,174 manufactured homes sited in HUD-administered dispute resolution states, HUD received only 24 dispute resolution referrals – a referral rate of only .019%. And, of those referrals, only 3 – comprising just .002% -- were found to qualify for dispute resolution under governing law.

system that addresses and resolves nearly all consumer issues within the first year after the installation of the home, is a costly, wasteful, unnecessary and, ultimately, unlawful relic of a bygone era that: (1) needlessly discriminates against manufactured homes, manufactured homebuyers, would-be manufactured homebuyers and manufactured homeowners; (2) needlessly increases the cost of manufactured housing; (3) needlessly excludes millions of Americans from the American Dream of home ownership;⁹ (4) needlessly constrains and limits the availability of affordable manufactured housing for American families in direct violation of the 2000 reform law; (5) needlessly eliminates jobs or inhibits job creation within an entirely domestic manufacturing industry; and (6) needlessly increases the cost of the manufactured housing program itself.

Thus, while the industry, as proven by quantifiable evidence, has achieved the vision of the original 1974 manufactured housing law – providing a safe, durable, quality home at an affordable price – the program, its structure and its fundamental regulatory policies (particularly since the installation of the current program administrator in 2014) continue to deny that objective reality, imposing ever-more stringent and costly regulatory demands, while the broader objectives of the 2000 reform law – to advance the availability, affordability and utilization of manufactured housing, both within HUD and beyond -- have been and are being ignored,¹⁰ or have been distorted beyond recognition by HUD through specious alleged “interpretations.” As a result, much of the good that Congress sought to accomplish through the 2000 reform law – particularly in terms of ending discrimination against manufactured housing and achieving parity between manufactured homes and other types of residential construction -- has not been accomplished. This has not only harmed the industry in terms of lost production,¹¹ technical advancement and its ability to compete with other type of housing, but more importantly, has hurt consumers and especially the lower and moderate-income families that rely on affordable, non-sub manufactured housing the most.

The process mandated by EO 13777 provides HUD with both the opportunity and administrative mechanism to restructure and re-prioritize the federal manufactured housing program to accomplish the key objectives of the 2000 reform law, insofar as the baseline goals of the original 1974 law have already been achieved. That re-structuring should include the repeal or significant modification of the regulations and regulatory activities set forth below, as well as action to appoint a non-career program administrator in accordance with the 2000 reform law and to terminate the revenue-driven, “make-work,” de facto sole-source monitoring contract and arrangement that has been in place since the inception of federal regulation more than 40 years-ago.

⁹ A 2014 study by the National Association of Home Builders (NAHB), presented to the U.S. Department of Energy (DOE) Manufactured Housing Working Group concluded that a \$1,000.00 increase in the purchase price of a new manufactured home would exclude 347,901 households from the market for a single-section home, while the same \$1,000.00 increase would exclude 315,385 households from the market for a double-section home. Insofar as studies conducted by HUD itself have concluded that manufactured homes are the nation’s most affordable source of non-subsidized housing and home-ownership, these consumers would necessarily be excluded from home ownership entirely. See, e.g., U.S. Department of Housing and Urban Development, “Is Manufactured Housing a Good Alternative for Low-Income Families? Evidence from the American Housing Survey” (December 2004).

¹⁰ For example, manufactured housing, regulated by HUD itself, has been ignored as an affordable housing resource in each of HUD’s last two Strategic Plans – i.e., HUD’s 2010-2015 Strategic Plan and its 2014-2018 Strategic Plan.

¹¹ Total industry production reported by HUD in 2016 was 81,136 homes, a decline of over 67% from the 250,366 manufactured homes produced in 2000, the year that the Manufactured Housing Improvement Act of 2000 was enacted.

B. EXISTING HUD MANUFACTURED HOUSING REGULATIONS AND/OR REGULATORY ACTIONS THAT SHOULD BE REPEALED OR MODIFIED

1. Expanded In-Plant Regulation¹²

HUD's program of expanded in-plant manufactured housing regulation, initiated in 2008 with no evidence of systemic deficiencies in the then-existing regulatory model (seemingly designed to sustain and generate substantial additional revenues for the program's entrenched, 40-year, de facto sole-source monitoring contractor in the face of a significant decline in manufactured housing production), and implemented in all phases by HUD in 2014, is the premier illustration of the Department's regulatory over-reach and violation of key reform provisions of the 2000 law – and resulting harm to the program, the industry and consumers of affordable housing.

Originally characterized as “cooperative” and “voluntary” by HUD,¹³ this program which, according to the Department itself, fundamentally changed the focus, basis and emphasis of HUD in-plant production regulation,¹⁴ was subsequently re-characterized as “not voluntary” by the Department, with no public process – in violation of both the 2000 reform law and the Administrative Procedure Act (APA) -- in 2010.¹⁵ Since August 2014, the program has been enforced on a mandatory basis through arbitrary, subjective and costly in-plant “audits” conducted by HUD's “monitoring” contractor,¹⁶ based on criteria exceeding the existing HUD Manufactured Housing Construction and Safety Standards (HUD Code) contained in an agglomeration of non-regulatory and extra-regulatory materials (developed and/or modified at least in part by the same “monitoring” contractor)¹⁷ including, but not limited to, “enhanced” inspection checklists,

¹² “Expanded in-plant regulation,” as referenced in this section, is not a discrete regulation, per se, but rather, a pseudo-regulatory construct of the HUD manufactured housing program, relying on extra-regulatory and ultra vires materials and criteria incorporated within “guidelines,” “field guidance,” “checklists,” “standard operating procedures,” and other similar documents developed by HUD and/or its monitoring contractor that are enforced as de facto regulations against manufacturers, as the primary regulated party within the HUD program. These extra-regulatory materials (see, Attachment 1 hereto) and their de facto criteria and mandates allegedly rest upon interpretations of existing HUD Procedural and Enforcement Regulations (PER), including those addressing the duties and functions of Design Approval Primary Inspection Agencies (DAPIAs) (e.g., 24 C.F.R. 3282.361) and Production Inspection Primary Inspection Agencies (IPIAs) (e.g., 24 C.F.R. 3282.362), but significantly exceed the express terms of those sections.

¹³ See, Attachment 2, hereto, MHARR March 4, 2010 letter to William W. Matchneer, III, Associate Deputy Secretary for Regulatory Affairs and Manufactured Housing.

¹⁴ See, Minutes, Manufactured Housing Consensus Committee meeting, June 17, 2008 at p. 2. “Inspectors currently look at number of errors rather than a quality system. HUD will be directing their resources to be aimed at quality control system[s].”

¹⁵ See, HUD (William W. Matchneer, III, Associate Deputy Assistant Secretary for Regulatory Affairs and Manufactured Housing) (hereafter “ADAS”) Memorandum dated March 3, 2010.

¹⁶ The Institute for Building Technology and Safety (IBTS) has held the HUD manufactured housing program “monitoring” contract (albeit under differing corporate names) continuously since the inception of federal regulation in 1976 under successive de facto sole-source procurements utilizing evaluation and award criteria tailored to IBTS' specific experience as the program's sole monitoring contractor. IBTS was awarded its most recent five-year “monitoring” contract (with total compensation of \$25,006,546.00) in August 2013. In 2014, according to public federal tax filings, IBTS revenue from the HUD manufactured housing contract accounted for more than one-quarter of its total revenues (i.e., 26.3%).

¹⁷ See e.g., HUD FOIA October 21, 2014 production, July 16, 2009 communication from then-IBTS employee Jason McJury to HUD.

“Standard Operating Procedures,” program “Field Guidance” memoranda,¹⁸ an “Investigation and Reporting of Quality System Issues (QSI)” “guidebook,” and other related materials.¹⁹ Neither these criteria and materials, or the HUD program of expanded in-plant regulation itself, however, was ever subjected to the due process, stakeholder participation, accountability and transparency requirements of the 2000 reform law.

Because the HUD program, prior to the 2000 law, repeatedly relied on “interpretations” developed behind closed doors without the involvement or input of the public, program stakeholders, or regulated parties, to alter the effective meaning of existing standards and regulations, thereby unilaterally imposing new de facto regulatory mandates, Congress required in the 2000 reform law, that: (1) all new and amended standards and/or regulations be presented to the MHCC for consensus review and recommendations;²⁰ (2) that all new “Interpretive Bulletins” concerning the standards and/or regulations be presented to the MHCC for consensus review and recommendations;²¹ and (3) that any “statement of policies, practices, or procedures relating to [the] construction and safety standards, regulations, inspections, monitoring, or other enforcement activities that constitutes a statement of general or particular applicability to implement, interpret or prescribe law or policy,” must be brought to the MHCC for consensus review and recommendations.²² Congress also provided that “any” such “change” – absent a declared public health or safety emergency – adopted without full compliance with the consensus committee procedures of section 604, is “void,”²³ while it mandated specific follow-up steps by the HUD Secretary upon receipt of an MHCC standards recommendation,²⁴ including the publication of all such recommendations, whether accepted or rejected, mandatory action by the Secretary within 12 months of submission, notice and comment rulemaking and sanctions for any failure to act within 12 months) or a proposed regulation or interpretation,²⁵ including publication of an approved recommendation for notice and comment, and a written explanation to the MHCC for any rejected recommendation, together with publication of the reasons for such rejection, or recommended modifications, in the Federal Register.

Given the fact that HUD’s program of expanded in-plant regulation changes program policies, practices and procedures with respect to the focus, extent and basis of in-plant regulation, inspections and monitoring, that program – and all of its constituent elements – regardless of how characterized or denominated by HUD, should have been brought to the MHCC for consensus review and recommendations. No such review, however, has ever occurred. Moreover, when HUD did refer certain proposals related to this program to the MHCC in 2008, those proposals did not gain consensus support and, as a result, were effectively rejected. Rather than returning to the MHCC at any point, however – or publishing the elements of its program for notice and comment

¹⁸ See, HUD ADAS Memorandum dated June 23, 2008.

¹⁹ See, materials included in Attachment 1, hereto.

²⁰ See, sections 604(a)(4), 604(b)(1) and 604(b)(3).

²¹ See, section 604(b)(3).

²² See, section 604(b)(6).

²³ HUD, ironically via an alleged “Interpretive Rule” issued in February 2010 without opportunity for public comment, attempted to emasculate and effectively nullify section 604(b)(6) of the 2000 reform law. Section II B 5, below, addresses this rule and calls for its repeal.

²⁴ See, section 604(a)(4)-(5).

²⁵ See, section 604(b)(4).

-- HUD chose to unilaterally impose its full program of expanded in-plant regulation in violation of the law and its resultant status under the 2000 reform law as a “void” agency action.

Significantly, by circumventing the MHCC and its consensus process, as well as the further requirements of the 2000 reform law regarding mandatory response, publication and notice and comment procedures for any matter emerging from the Committee (and by failing to otherwise publish its program of expanded in-plant regulation as a new or amended regulation or Interpretive Bulletin), HUD purposely evaded the requirements of section 604(e) of the 2000 reform law. That section directs both the MHCC and the Secretary of HUD, in recommending or establishing standards, regulations, or interpretations, to consider both: (1) “the extent to which any such [action would] contribute to carrying out the purposes of” the 2000 law; and (2) “the probable effect of such [action] on the cost of the manufactured home to the public.” Through these directives, the law requires the MHCC and HUD to determine that any change to the regulations and/or their interpretation is both objectively justified in relation to the purposes of the 2000 reform law, and cost-effective from the standpoint of maintaining the congressionally-recognized affordability of manufactured housing.

An analysis of the available evidence relevant to these requirements shows *why* HUD chose to circumvent the MHCC and proper rulemaking. First, there was – and is -- no evidence of any objective need or justification for the wholesale change in regulatory focus and procedures ushered-in by HUD’s program of expanded in-plant regulation. Under the 2000 reform law, alternative dispute resolution programs for manufactured housing “defects” are mandated in every state – either pursuant to state law or a federal “default” program administered by HUD. Insofar as these programs address “defects” reported during the first year after the sale of a manufactured home, DR referrals are a direct barometer of home quality, manufacturer quality assurance and overall compliance with the HUD standards. Information disclosed by HUD, however, shows that between 2008 and 2014 (spanning a period pre-dating the expanded in-plant regulation program to just before its mandatory implementation), of the 123,174 HUD Code homes sited in 23 federally-administered states, only 24 homes – or .019% -- were referred for dispute resolution and of those 24 referrals, only 3 homes – or .002% -- were found to actually qualify for DR resolution under standards (24 C.F.R. Part 3288) adopted by HUD. In two representative states with state administered DR programs (*i.e.*, Texas and Virginia), the DR referral rate was only marginally higher, at 1.4%. From this evidence, it is clear that HUD’s pre-existing in-plant inspection regime already provided manufactured housing residents the “reasonable protection” required by applicable law.

Second, HUD has never offered any evidence or basis to demonstrate that its program of expanded in-plant regulation is cost-justified. Anecdotal evidence available from manufacturers, however, shows that the costs of responding to repeated multi-day production facility audits based on arbitrary and ever-shifting criteria and “monitoring” contractor demands, involving additional employee-hours, documentation, response time and other new and additional costs, is substantial and disproportionately impacts smaller industry businesses.²⁶ Furthermore, to the extent that HUD’s program of expanded in-plant regulation is not objectively justified in relation to the

²⁶ A 2010 report by the U.S. Small Business Administration, “The Impact of Regulatory Costs on Small Firms,” concluded that “small businesses, defined as firms employing fewer than 20 employees, bear the largest burden of federal regulations.”

purposes of the 2000 law, any additional costs that it imposes would be excessive by definition and an unwarranted and unnecessary burden on consumers, particularly the lower and moderate income homebuyers who rely the most upon the affordability of HUD Code manufactured housing.

Nor have the full costs and negative impacts of expanded in-plant regulation been realized to date. Given the extra-regulatory status of the program and the absence of any procedural or substantive safeguards connected to its evolution or enforcement, the program is, effectively, a platform for the imposition of virtually any type of subjective, arbitrary, or capricious demand that HUD and/or its revenue-driven “monitoring” contractor wishes to impose on any regulated party at any time.²⁷ And, insofar as the most recent HUD “monitoring” contract directs the program contractor to “resolve” disputed “quality assurance” issues directly with Primary Inspection Agencies wherever possible, without HUD involvement, the program contractor is free to impose whatever demands it wishes based on its own construction of extra-regulatory criteria and sources with no transparency and/or direct accountability to HUD officials.

Based on all of the above, HUD’s program of expanded in-plant regulation violates the 2000 reform law and has no basis or justification grounded in fact. To the extent that it expands and extends in-plant regulation without basis or justification, it constitutes useless “make-work” for HUD’s monitoring contractor that imposes needless costs on manufacturers with no quantifiable corresponding benefits whatsoever for consumers. To the extent, then, that this program entails all cost and no demonstrated benefits, it should be repealed in toto pursuant to Section 3(d) of EO 13777.

2. On-Site Completion of Construction²⁸

HUD, in September 2015, issued a final rule establishing regulations (24 C.F.R. 3282, Subpart M) for the completion of certain manufactured homes at the site of installation. The so-called “on-site” construction rules – effective March 7, 2016 – ostensibly supplanted costly and time-consuming “Alternate Construction” (AC) regulations and procedures that have heretofore been applied to the completion of certain more limited aspects of construction at the home-site.²⁹

A new program for the on-site completion of manufactured homes under procedures that would be faster, more flexible and more economical than the cumbersome AC process was among the earliest issues the industry brought to the MHCC and was the subject of a comprehensive

²⁷ It must also be noted that due to “make work” monitoring contractor activity under HUD’s program of expanded in-plant regulation, annual HUD payments to the monitoring contractor between 2007 and 2014 grew by more than 50%, while per capita direct HUD payments to the monitoring contractor increased by 127%, despite a 32.8% decline in annual industry production over the same period. This ongoing expansion of the role and compensation of the monitoring contractor directly contradicts Congress’ directive in the Report accompanying the Transportation and Housing and Urban Development and Related Agencies Appropriations Bill of 2015, stating: “[T]he Committee recognizes that manufactured housing production has declined substantially since peak industry production in 1998, and continues to decline due to a variety of factors. Expenditures supporting the [manufactured housing] programs should reflect and correspond with this decline, which has specifically reduced the number of inspections and inspection hours required for new units.” (Emphasis added).

²⁸ 24 C.F.R. 3282.601, *et seq.*

²⁹ See, 24 C.F.R. 3282.14 regarding alternate construction of HUD Code homes.

MHCC recommendation submitted to HUD. The on-site regulations ultimately promulgated by HUD, however, are a bureaucratic morass of costly paperwork, record-keeping and red tape that completely undermines the objectives underlying the original MHCC proposal and will eliminate the price and construction flexibility advantages that HUD Code manufactured housing could otherwise offer to consumers in competition with site-built, modular and other types of residential construction, through readily available mortgage-type financing.

One of the central reforms of the Manufactured Housing Improvement Act of 2000 was its matching directives to HUD to: (1) “facilitate the availability of affordable manufactured homes” and (2) to “facilitate[e] the acceptance of the quality, durability, safety and affordability of manufactured housing within the Department” itself. For these statutory directives to have any meaningful market impact for American consumers of affordable housing, they must be read, among other things, as a statutory command to HUD to enable and empower manufactured homes to compete on an equal, non-discriminatory, free-market basis with other segments of the housing industry. And it is only through that unconstrained ability to compete and the corresponding freedom from unreasonable, unnecessary or excessive market or governmental restraints, that the public (and especially lower and moderate-income homebuyers) can realize the full benefits of affordable, non-subsidized manufactured homes, as Congress intended when it adopted the 2000 reform law.

Facilitating this kind of open and robust free-market competition to unlock an important new market segment for manufactured housing, while allowing consumers to take full advantage of all the unique attributes and benefits of HUD Code manufactured housing, was a key motivation driving the industry’s effort to develop and implement new on-site construction regulations to take the place (in most instances) of the existing – and extremely cumbersome, costly and time-consuming – HUD “Alternate Construction” process. And, in fact, a new program for on-site completion of manufactured home construction under procedures that would be faster, more flexible and more economical than the burdensome AC process, while providing expanded access to non-chattel consumer financing, was among the earliest issues brought to and considered by the Manufactured Housing Consensus Committee -- initially in 2003. Following extensive, thorough and painstakingly detailed debate within the MHCC, a consensus recommendation was submitted to HUD, finally leading to a proposed on-site construction rule, published in June 2010.

That MHCC consensus recommendation, consistent with the original objectives of all program stakeholders, was designed to take full advantage of the price and construction flexibility offered by HUD Code construction to enable the industry to compete more effectively with other segments of the housing industry – including site-built homes and the rental housing industry -- through homes eligible for readily-available mortgage-type financing, and thereby provide beneficial new opportunities for consumers of affordable housing. The MHCC recommendation, however, upon reaching HUD, was transformed into a distorted, convoluted caricature of pointless paperwork, needless record-keeping, red-tape and duplicative, costly, multi-layered “inspections,” that has undermined the site-completion market and has pushed manufacturers into the more costly modular housing market in order to meet the needs of consumers seeking site-completed amenities.

Specifically, under the final rule, as detailed by HUD at the January 2016 MHCC meeting, HUD Code manufacturers are responsible for 18 new and separate actions to engage in the on-site

completion of one or more homes, and that number reflects only the steps that would need to be taken before the 100% inspection of all such homes on-site by the manufacturer and the manufacturer's Production Inspection Primary Inspection Agency (IPIA) (or IPIA designee), subject, in turn, to oversight by HUD's 40-year, revenue-driven, "make-work" "monitoring" contractor. Nor does it reflect the multitude of new functions – including substantial new paperwork and record-keeping mandates – that IPIAs and Design Approval Primary Inspection Agencies (DAPIAs) would be responsible for, with significant corresponding costs passed-along to manufacturers and, ultimately, consumers. In addition to creating this time-consuming and costly new on-site bureaucracy -- which will inevitably interfere with the timely and efficient delivery of homes to consumers, leading to needless but predictable disputes -- the HUD final rule is also over-reaching and over-broad in scope, applying to routine finishing items that were not previously subject to the AC system and have previously been completed with little fanfare, cost, regulatory involvement, or -- most importantly – problems for the homebuyer.

Significantly, HUD, during a presentation regarding this rule at the MHCC's January 2016 meeting, indicated that it had failed to specifically quantify or consider costs related to the requirements of the final rule, contrary to section 604(e)(4) of the Manufactured Housing Improvement Act of 2000. Based on this acknowledgment by HUD and recognizing that the HUD final on-site rule represents a gross distortion of the concept it originally envisaged, the MHCC unanimously adopted a resolution calling on HUD to defer enforcement of the rule for 12 months, while the MHCC reviewed its mandates and related costs for possible revisions. HUD, however, has ignored these and other repeated requests for a deferral of the site-completion rule, and has instead moved forward, demanding full compliance with the final rule.

Based on the foregoing, the on-site construction rule adopted by HUD, rather than enhancing the ability of affordable manufactured homes to compete with site-built structures within the free-market, instead stymies any such competition by subjecting manufactured homes to excessive, discriminatory mandates. As a result, it unnecessarily constrains the affordable housing choices available to Americans, it unnecessarily constrains the growth and evolution of the manufactured housing industry and, as a result, unnecessarily inhibits job growth within the manufactured housing industry, contrary to EO 13777. The existing rule, therefore, should be repealed and replaced with a new rule that comports with the recommendations of the MHCC and provides for the on-site completion of manufactured homes in accordance with the federal standards with a minimum of additional regulatory compliance burdens.³⁰

³⁰ In addition to repealing the final "on-site" construction rule, the EO 13777 review process should also repeal HUD's May 10, 2017 unilateral determination that would require Alternate Construction approval of "carport-ready" manufactured home designs or designs to facilitate an "add-on" structure at the home-site. This determination, which clearly alters and modifies prior HUD practice and policy, needlessly restricts the choices and amenities available to consumers and needlessly complicates and increases costs relating to regulatory compliance, again harming consumers. Moreover, as a specific change in previous policy and practice regarding HUD construction and interpretation of its standards and regulations, this action, at a minimum, should have been brought to the MHCC pursuant to section 604(b)(6) of the 2000 reform law. To the extent that it was not, it is preemptively "void" under that same section.

3. Subpart I “Recall” Provisions³¹

Subpart I of the HUD Procedural and Enforcement Regulations is the single most significant driver of unnecessary regulatory compliance costs within the federal manufactured housing program. As currently structured, it is a quagmire of redundant and pointless paperwork, needless “investigations” and reports, and multiple layers of document “reviews” by both third-party inspectors and HUD’s 40-year, revenue-driven, “make-work” “monitoring” contractor, which in 2014 was paid 127% more for each home than it did when the industry was producing far more homes. With no expiration date or statute of limitations and, effectively, no severity threshold (at least for its initial stages), it represents a constant and ongoing regulatory uncertainty that cannot be predicted, accounted-for, or budgeted-for in any meaningful way, thus aggravating its cost impact on manufacturers and ultimately consumers, who pay more but derive little if anything in the way of benefits.

At the same time, Subpart I’s ambiguous and often open-ended mandates, even after the adoption of certain reforms in 2013,³² remain an invitation for abusive and inconsistent enforcement, including increasingly subjective, arbitrary and costly demands imposed on manufacturers by the revenue-driven program “monitoring” contractor in the absence of proper oversight by -- and accountability to -- HUD. Quantifiable evidence, though, demonstrates that Subpart I has outlived any conceivable usefulness to manufactured homebuyers and should be: (1) restructured, to adhere strictly to the express terms of section 615 of the 1974 law; and (2) de-emphasized and de-prioritized as an element of the federal program.

At its core, Subpart I is an antiquated throwback to times when manufactured homes were viewed as a type of specialty vehicle rather than a permanent residence and dwelling. As with much of the original federal manufactured housing law, section 615 of the National Manufactured Housing Construction and Safety Standards Act of 1974 -- which provides the statutory basis for Subpart I -- was derived from the National Traffic and Motor Vehicle Safety Act of 1966. The entire concept of a “recall,” however, is foreign to the housing industry and inappropriate and unnecessary for structures that are designed -- and used -- for permanent occupancy. Moreover, significant elements and aspects of the Subpart I regulations, as detailed below, are either not affirmatively mandated or required by section 615 of the 1974 law, or materially exceed the authority provided by that section.

HUD’s Subpart I regulations (as contrasted with section 615 of the 1974 law) require manufactured home producers to investigate and document virtually any piece of “information,” regardless of its facial credibility, that could indicate the possible existence of a “defect” or standards non-conformance in a manufactured home.³³ In a small number of cases it requires notice

³¹ See, 24 C.F.R. 3282.401, et seq.

³² See, 78 Federal Register, No. 190 at p. 60193, et seq., Final Rule, “Revision of Notification, Correction and Procedural Regulations,” (October 1, 2013).

³³ Section 615 includes no such “investigation” mandate, nor does it, therefore, require the investigation of any and all information possibly or likely indicating the existence of a “defect” or “non-compliance.” Nor does section 615 require or authorize a multitude of other mandates contained in the Subpart I regulations, including, but not limited to: (1) “class” determinations; (2) “periodic” record reviews; (3) monthly service record reviews; (4) multiple IPIA concurrences; (5) notification or correction of a defect in an appliance; and (6) presumptive inclusion of homes in a class unless affirmatively excluded, among other things.

to consumers and, in rare cases, correction of more serious defects, up to and including replacement of the home. This mechanism, however, is, for the most part, a costly exercise in paper-shuffling and red tape that that benefits HUD's entrenched 40-year, revenue-driven, "make-work" "monitoring" contractor, but today adds little or nothing to the multiple layers of protection that homeowners already have as a result of: (1) multi-tiered in-plant manufacturer and IPIA home inspections; (2) third-party (DAPIA) design and quality control approvals; (3) state and federal manufactured housing dispute resolution (DR) programs; (4) manufacturer home warranties; (5) component supplier warranties; (6) manufacturer and/or retailer consumer satisfaction programs; and/or (7) contract, tort, or statutory consumer protection claims that may be available under state law -- and that is without even considering the additional multi-layered protections available to homebuyers under the state and federal installation programs adopted as a consequence of the 2000 reform law.

By forcing manufacturers to hire additional employees and use additional man-hours to "investigate" every conceivable scrap of information, create and review paperwork, by forcing manufacturers to pay for more IPIA time to review and assess that paperwork, and by generating more make-work billing hours for the program contractor to review those reviews, Subpart I adds substantially to the bottom-line cost of manufactured homes, and, therefore, per se, excludes significant numbers of Americans from the benefits of home ownership.

The National Commission on Manufactured Housing (Commission) -- chartered by Congress in 1990 to examine all aspects of the federal program and recommend improvements -- recognized the cost, futility and flawed concept of Subpart I. In its August 1994 Final Report, the Commission, comprised of representatives of all stakeholders in the federal program, recommended a significant curtailment of Subpart I that would have eliminated notification "of defects alone" regardless of the existence of any alleged "class," while requiring investigation and potential consumer notification and correction only for "serious defects," defined as "any nonconformance with [the] national manufactured home construction and safety standards that results in a defect in the performance, construction, or material of a manufactured home that constitutes a safety hazard or that affects the home to the extent that it becomes unsafe or otherwise unlivable." The Commission would thus have limited the scope and reach of Subpart I to "safety hazards," and to "serious" ones, at that. Just as importantly, in recommending a significantly scaled-back Subpart I, the National Commission took pains to note that "improper installation," at that time, was "a more frequent source of defects than manufacturing or design errors."

Ultimately, while the Manufactured Housing Improvement Act of 2000 did not specifically modify section 615 or Subpart I, it did enact nationwide installation regulation and alternate dispute resolution, and those key changes -- as anticipated by Congress and the National Commission -- have fundamentally altered the landscape of consumer protection under the federal law and federal program, as confirmed by the most recent HUD data regarding dispute resolution referrals. Yet, HUD today persists in maintaining and even intensifying the Subpart I of the bygone "trailer" era, imposing new and more costly mandates -- even to the point of altering an MHCC Subpart I reform proposal, at the final rule stage (in 2013), to require expensive, labor-intensive "monthly" Subpart I IPIA record reviews regardless of manufacturer performance.

Given the underlying purpose of the 2000 reform law – to complete the transition of manufactured homes from the “trailers” of yesteryear to legitimate “housing” for all purposes, at all levels of government – Congress affirmatively mandated either state or federal regulation of the installation of every new manufactured home, thus definitively addressing the single largest cause of manufactured home “defects” as determined by the National Commission during nearly two years of hearings. Similarly, by instituting a system of alternate dispute resolution – under either federal or state authority – for issues manifesting during the first year following the initial sale, the 2000 reform law addressed a source of persistent consumer complaints regarding “finger-pointing” between manufacturers, retailers and installers, while providing an additional positive incentive for those regulated parties to effectively resolve consumer complaints affecting new homes.

The results of these changes, for consumers, have been significant. Again, according to HUD information, the number of referrals to dispute resolution in both the federal system for “default” states and representative state systems – which provide a de facto “barometer” for the overall level of consumer complaints – have been minimal. This objective evidence necessarily confirms two key metrics: (1) that manufacturers are producing homes which fully comply with the federal construction and safety standards; and (2) that defects, when they rarely do occur, are being addressed and resolved in a timely and responsive manner by manufacturers. Consequently, “reasonable” consumer protection as mandated by the 1974 Act, as amended, has been achieved under the HUD standards, and that the program’s continuing prioritization – and expansion – of Subpart I mandates is baseless.

Yet, HUD continues to expand and intensify costly Subpart I activity while -- flush with cash from its 156 % label fee increase in 2014 – it creates more “make-work” functions for the program contractor, including, among other things: (1) its baseless mandate for “monthly” (rather than “periodic”) Subpart I paperwork reviews overseen by the contractor; and (2) IPIA Subpart I concurrences for non-conformances and related contractor reviews – within a Subpart I system that the Oregon State Administrative Agency (SAA), in a 2002 memorandum provided to the MHCC, emphasized “does little to assist homeowners with everyday problems” and is “a costly and cumbersome process for manufacturers ... which produces few timely results.”

Seventeen years after the enactment of the 2000 reform law, there is a profound and growing disconnect between the facts demonstrating the superior performance of post-2000 law HUD Code manufactured homes and the direction of the HUD program, with ever more costly, time-consuming and unnecessary paperwork and red-tape (and corresponding focus on minutiae), all redounding to the benefit of its entrenched, 40-year, revenue-driven, “make-work” “monitoring” contractor. The key changes made to the law in 2000 based on the recommendations of the National Commission – i.e., nationwide installation regulation and dispute resolution – have drastically lowered consumer complaint levels and have created an environment where the costly, harsh and arbitrary mandates of Subpart I can and should be significantly curtailed pursuant to EO 13777 to reduce costs and related regulatory compliance burdens for manufacturers.

4. Federalization of Installation

The Department, pursuant to EO 13777, should halt – and reject -- current and ongoing regulatory activity by the federal program to force states with state-law manufactured home installation standards and programs to comply with and adopt federal installation mandates.

Coupled with dispute resolution, the installation provisions of the 2000 reform law were adopted to close significant gaps in the original National Manufactured Housing Construction and Safety Standards Act of 1974, as construed by HUD. Although the industry has always supported sound consumer protection and the safe and proper installation of manufactured homes (which had been at the root of the overwhelming majority of consumer complaints prior to the 2000 law), HUD determined, soon after the enactment of the original 1974 federal manufactured housing law, that it would not address the installation of manufactured homes, because that law did not include specific authorization for such standards.

Recognizing, however, that proper installation is crucial: (1) to the proper performance of a manufactured home; (2) to the value of that home to its owner and consumer finance providers; and (3) to public and government acceptance of manufactured homes as legitimate “housing,” rather than “trailers,” the industry, consumers and other stakeholders worked, for nearly 12 years, to develop the installation provisions that were ultimately included in the 2000 reform law.

The result was a statutory structure, based on the 1994 recommendations of the National Commission on Manufactured Housing, which authorized any state that wished to do so (*i.e.*, a “complying” state), to establish (or continue) a state-law installation program and state-law installation standards, so long as those requirements provided protection that met or exceeded baseline federal standards to be developed by the Manufactured Housing Consensus Committee and adopted by HUD. HUD, by contrast, was authorized to regulate installation only in non-complying (*i.e.*, “default”) states that failed to adopt a state-law installation program within five years of enactment of the 2000 law.

This structure was consistent with the nearly-universal view of program stakeholders that varying soils and other installation-related conditions in different geographical areas made states the best and most appropriate party to regulate the siting of manufactured homes. The 2000 reform law, consequently, allows states to take the lead role in the regulation of installation, with HUD assuming that duty only in default states that fail to adopt and implement a conforming state-law program.

What the 2000 reform law does not do, however -- again recognizing, as it does, the unique competence and ability of the states and state authorities to determine proper installation systems and techniques within their own borders – is authorize or direct HUD to substitute its judgment for that of state authorities regarding the specific details and elements of any given state installation standard. Put differently, the 2000 law allows HUD to determine whether a state-law installation program and state-law installation standards as an integrated “whole” provide consumers with a level of protection equal-to-or-greater-than the HUD standards for default states at the time of the initial acceptance of those programs, but does not provide back-door authority for HUD to micro-

manage state-law programs and/or standards or over-ride state judgments regarding the need for - or content of -- any specific installation requirement.

As early as 2004, MHARR voiced concern that HUD, contrary to the structure, language and intent of the 2000 reform law, was committed to “totally federaliz[ing] installation regulation ... under its control.” And, in fact, HUD has consistently sought to undermine the law’s clear division of federal-state responsibility and its preference for state regulation of installation (including an express reservation of state installation authority added to the preemption section of the law), beginning with its separation of the baseline federal installation standards and program from the preemptive Part 3280 Federal Manufactured Housing Construction and Safety Standards, thus giving rise to the “re-codification” of installation, which MHARR vigorously opposed.

Now, HUD – through a double-edged process – is attempting to effectively federalize manufactured home installation regulation in all fifty states and thereby nullify the federal-state partnership that lies at the core of the HUD program as envisaged by Congress. In one part of this process, HUD (both directly and via a non-accountable installation contractor) is attempting to use the State Plan approval and re-certification process to over-ride and replace – or compel state officials to revise, modify and replace – state-adopted installation standards in complying states, based upon the “equal or greater protection” language of the 2000 law. In the second part of this process, HUD has asserted – for the first time since the inception of installation regulation under the 2000 reform law – that new HUD interpretations of the federal installation standards for default states are binding, not only in those default states, but in states with compliant state-law installation standards and programs. Pursuant to this scheme to undermine state authority as specifically incorporated within the 2000 reform law, HUD has proposed – and presented to the MHCC – a supposed “Interpretative Bulletin” that, in fact, would substantively modify provisions of the federal installation standards for default states regarding manufactured home foundations in freezing climates.³⁴

MHARR has directly and strenuously objected to both of these actions as a blatant abuse of HUD’s authority and has called for both actions to be halted.³⁵ HUD’s intentional distortion and misapplication of the installation mandate of the 2000 reform law – seeking to undermine, restrict and ultimately abolish the legitimate role and authority of the states as established by Congress,³⁶ will result in significant harm for the industry and consumers, and impose needless and excessive regulatory compliance costs. Accordingly, both elements of this effort to negate state installation authority should be terminated pursuant to EO 13777.

³⁴ See, proposed Interpretative Bulletin I-1-17.

³⁵ See, Attachment 3 hereto, MHARR December 9, 2016 comments regarding proposed Interpretative Bulletin I-1-17. See also, Attachment 4 hereto, MHARR April 14, 2016 correspondence to Pamela Danner, manufactured housing program administrator.

³⁶ The importance of preserving state authority as a counterweight to excessive or unreasonable federal regulation, was addressed by House of Representatives Majority Leader Kevin McCarthy, in an article published June 1, 2017: “[S]ome parts of Washington have gathered up power for decades while simultaneously shedding accountability. States, which have always been more accountable to the people, were reduced to implementers of federal policy. *** People have more power when states have more power because states are, by their nature, closer and more responsive to the people.” See, Majority Leader Kevin McCarthy, “Washington’s Power Shift: How Congress is Enacting Trump’s Call to Drain the Swamp.”

5. 2010 Interpretive Rule Regarding Matters Subject to MHCC Review

The Manufactured Housing Consensus Committee, as recommended by the National Commission on Manufactured Housing, was established by Congress as the centerpiece program reform of the 2000 law. The MHCC was designed to have presumptive authority to review and comment on virtually all HUD actions affecting the federal standards and enforcement regulations, and their interpretation, and to develop its own standards and enforcement proposals.³⁷ The 2000 law thus includes specific statutory mandates as to what types of matters that must be brought before the MHCC (i.e., proposed new or revised standards or enforcement regulations, interpretations, and changes to enforcement-related policies and practices) and when those matters must be brought to the MHCC (i.e., in advance, or be deemed “void” under section 604(b)(6)). It also establishes specific substantive (i.e., section 604(e)) and procedural requirements (i.e., section 604(a)) for MHCC consideration of those matters, as well as actions the Secretary must take with regard to MHCC recommendations (i.e., sections 604(a)(5) and 604(b)(3)-(4)), which can only become operative with the approval of the Secretary.

HUD, however, has attempted to severely limit its substantive role of the MHCC through an unduly narrow interpretation of the 2000 reform law. First, in a May 7, 2004 opinion letter, HUD interpreted the 2000 law to limit the review and comment authority of the MHCC solely to the federal standards and those enforcement regulations that “seek to assure compliance with the construction and safety standards.” Thus, by unilateral interpretation of the 2000 law, HUD emasculated the statutory authority of the MHCC to consider and address crucial program matters such as regulations related to the program user fee, payments to the states, program budgeting, use of contractors and use of separate and independent contractors, among others, together with a host of other decisions, policies and practices affecting the cost and availability of manufactured housing, but not constituting a formal standard, regulation or Interpretive Bulletin.

Subsequently, on February 5, 2010, HUD issued an “interpretive rule,” without public comment, which effectively divested the MHCC of nearly all its authority under section 604(b)(6) of the 2000 law to review and comment on a wide range of HUD actions involving enforcement policies and practices that do not fall under the formal Administrative Procedure Act (APA) definition of a “rule.”³⁸

Through these two related actions, HUD has effectively excluded from MHCC consensus review and comment significant program decisions concerning enforcement, inspections and monitoring (such as its entire program of expanded in-plant regulation and the delegation of de facto governmental authority to its program monitoring contractor) which substantially impact the cost and affordability of manufactured housing for consumers – contrary to the letter of the 2000 law and to the ultimate detriment of consumers and other program stakeholders.

³⁷ This expansive view of the authority and jurisdiction of the MHCC was embraced by all the program stakeholder groups represented on the MHCC (see, February 17, 2004 MHCC letter to HUD Secretary Alphonso Jackson, paragraph 2 and related August 11, 2004 MHCC Resolution) and the entire manufactured housing industry (see, June 1, 2004, Coalition to Advance Manufactured Housing, “Analysis of HUD’s Interpretation of the Role and Authority of the Manufactured Housing Consensus Committee” generally and at pp.7-8).

³⁸ See, 75 Federal Register No. 24, February 5, 2010, “Federal Manufactured Home Construction and Safety Standards and Other Orders: HUD Statements That Are Subject to Consensus Committee Processes.”

HUD has claimed, in support of these actions, that “as a private advisory body not composed of federal employees, the MHCC does not have HUD’s responsibilities for public safety and consumer protection.” Thus, according to HUD, “the Department must ... remain free of the MHCC process to make program decisions that would not be considered rules under the Administrative Procedure Act.” This issue, however, was fully addressed during the legislative process leading to the 2000 law, and is precisely why the MHCC issues recommendations that do not gain the force of law unless they are approved by the Secretary and promulgated through notice and comment rulemaking.

Since the power of the MHCC is statutorily confined to recommendations, the law is very broad in identifying the types of HUD actions that must be brought to the MHCC for review and comment. In addition to standards, enforcement regulations and interpretations of both, as addressed by sections 604(a) and 604(b) respectively, the “catchall” section of the 2000 reform law, 604(b)(6), was designed to ensure that virtually all quasi-legislative actions of the Department -- as contrasted with quasi-judicial enforcement activities -- whether characterized as a “rule” or not, to establish or change existing standards, regulations and inspection, monitoring and enforcement policies or practices, would be subject to review, consideration and comment, prior to implementation, by the MHCC. This section, which deems any such action “void” without prior MHCC review, was specifically included in the law – and broadly stated -- as a remedy for past abuses where major changes to enforcement procedures and the construction of the standards were developed behind closed doors and implemented without rulemaking or other safeguards.

The 2000 reform law, consequently, addresses the claims made in HUD’s 2004 opinion letter by limiting the power of the MHCC to recommendations, not by severely limiting the actions subject to MHCC review as HUD claims. Moreover, to construe section 604(b)(6) to apply only to formal rules – as in HUD’s 2010 “interpretive rule” -- makes no sense, because such rules are, by definition, already subject to rulemaking and public comment anyway under the Administrative Procedure Act (“APA”). Further, such a construction, effectively construing section 604(b)(6) to simply be a restatement of sections 551 and 553 of the APA, violates basic canons of statutory construction. Given that Congress, in enacting the 2000 law, is presumed to have been aware of the relevant, pre-existing APA sections, such a construction: (1) improperly renders section 604(b)(6) mere surplusage; (2) fails to give (the common and ordinary) meaning to every word and provision of the 2000 law; and (3) fails to broadly and liberally interpret a clearly remedial provision.

Both the plain language of the relevant provisions and the structure of section 604 show that section 604(b)(6) was designed to ensure an opportunity for MHCC consensus comment and review or comment. HUD, accordingly, has misconstrued the law and unlawfully limited the role of the MHCC as envisaged by Congress.

As a result, HUD’s February 5, 2010 “Interpretive Rule,” which unlawfully negates section 604(b)(6) of the 2000 reform law, is a regulatory action that should be repealed pursuant to EO 13777.

6. HUD's Exclusion of Collective Industry Representation On the MHCC Diminishes and Dilutes the MHCC's Regulatory Recommendations to the Secretary

Because of its crucial role within the HUD regulatory structure under the 2000 reform law, it is essential that the MHCC allow for the voting participation and the full, fair and free expression of the views, concerns and interests of all program stakeholders. As the National Commission stated, "The consensus collaborative process ... is a critical component of the Commission's mechanism for change. A balance of all interests on the consensus committee guarantees the integrity of the standards." (Emphasis added). This is particularly important for HUD Code manufacturers, which are the primary focus of-- and bear the highest direct costs under -- both the federal standards and HUD's established regulatory structure. A de facto HUD ban on collective industry representation on the MHCC since 2009, however, has kept the Committee bereft of the institutional knowledge, know-how, perspective and memory that such representation would provide during Committee debates, thereby diminishing the MHCC process and denying industry members full and proper representation on the MHCC.

When the MHCC was organized in 2002, HUD correctly and properly appointed, among seven "producer" category representatives, one full-time staff employee each from the industry's two national trade organizations (MHARR and the Manufactured Housing Institute) in order to ensure that the Committee would have the benefit of the industry's collective perspective and viewpoint. HUD, though, for nearly a decade, has barred collective industry representatives from voting membership on the MHCC based -- ostensibly -- on a June 18, 2010 Presidential Memorandum barring registered federal lobbyists from voting membership on federal advisory committees. Under an extension of this policy, HUD has also refused to appoint otherwise qualified, non-lobbyist full-time staff employees from the two collective national industry organizations to the MHCC (including a full-time MHARR staff employee who has submitted repeated applications), with the ability to provide essential knowledge, expertise, know-how and institutional memory on behalf of the industry, while other interest groups on the MHCC have continually been represented by multiple collective representatives, including full-time national association staff.

There is, however, no legal basis for this discriminatory ban on collective MHCC representation for the principal regulated parties under the HUD program. First, 2011 guidance from the Office of Management and Budget ("OMB") implementing the 2010 Presidential Memorandum clearly demonstrates that HUD's exclusion of non-lobbyist employees and officials from the MHCC is invalid and unlawful. Specifically, the OMB guidance states: "Q2: Does the policy restrict the appointment of individuals who are themselves not federally registered lobbyists but are employed by organizations that engage in lobbying activities? A2: No, the policy established by [Presidential] Memorandum applies only to federally registered lobbyists and does not apply to non-lobbyists employed by organizations that lobby." (Emphasis added).³⁹

Second, and more importantly, OMB issued "revised guidance" in 2014 clearly stating that the lobbyist ban does not apply to persons serving on an advisory committee in a "representative capacity," as is the case with the MHCC. That revised guidance provides, "The lobbyist ban does

³⁹ See, 76 Federal Register, No. 193, October 5, 2011 at pp. 61756-7.

not apply to lobbyists who are appointed in a ‘representative capacity,’ meaning that they are appointed for the express purpose of providing a committee with the views of a non-governmental entity, a recognizable group of persons or non-governmental entity (an industry sector, labor unions, or environmental groups, etc.), or a state or local government.”⁴⁰

HUD’s unlawful ban, moreover, has severely impacted the representation of the industry on the MHCC, depriving it of the benefits of the collective knowledge, know-how, expertise and institutional memory that it has assembled in Washington, D.C. to advance the industry’s collective views and positions on standards and regulatory issues, while ensuring that the MHCC functions in full compliance with law. Although HUD has appointed representatives of individual industry businesses to the MHCC, those businesses are regulated by HUD and face potential regulatory backlash and retribution. In addition, individual company representatives are inevitably affected by company-specific concerns, as contrasted with collective industry representatives, who have a duty to act in accordance with broader industry interests.

Thus, industry businesses and most particularly smaller businesses which, for years, have entrusted such functions to collective representatives, have a right – equal to any other MHCC interest group – to be represented on a collective basis. Consequently, in order to restore the effective representation of industry producers and to restore the balance of the MHCC required by the 2000 law, HUD should: (1) publicly confirm that collective industry MHCC representation is permissible and proper under applicable law; (2) publicly confirm that candidates representing collective national industry interests are eligible to apply for voting MHCC membership; and (3) appoint one or more such full-time staff employee collective industry representatives to the MHCC for terms beginning in 2018.

7. Formaldehyde Warning Notice⁴¹

Although HUD-regulated manufactured homes utilize the same construction materials as site-built and other types of homes and, unlike site-built and other types of homes, have been subject to stringent and effective formaldehyde emissions standards since 1984,⁴² the HUD standards include a discriminatory requirement that each manufactured home (including model homes at retailer locations) “prominently” display a red formaldehyde “Health Notice.”⁴³ This notice requirement has been maintained by HUD for over three decades, despite the fact that: (1) the substantive HUD formaldehyde emissions standards have been successful in eliminating the vast majority of formaldehyde-related complaints by homeowners; and (2) the red formaldehyde “Health Notice” negatively impacts the marketability of manufactured homes despite the fact that both manufactured and site-built homes are constructed of exactly the same materials. With HUD

⁴⁰ See, 79 Federal Register, No. 156, August 13, 2014 at p. 47482. MHARR has provided HUD with a copy of this OMB guidance, but the Department has failed to change its position on this matter during the tenure of the current career administrator.

⁴¹ See, 24 C.F.R. 3280.309.

⁴² See, 24 C.F.R. 3280.308.

⁴³ See, 24 C.F.R. 3280.309(a). By regulation, the “Important Health Notice” is required to state, in part: “Some of the building materials used in this home emit formaldehyde. Eye, nose and throat irritation, headache, nausea and a variety of asthma-like symptoms, including shortness of breath, have been reported as a result of formaldehyde exposure. Elderly persons and young children, as well as anyone with a history of asthma, allergies, or lung problems may be at greater risk. Research is continuing on the possible long-term effects of exposure to formaldehyde.”

statistics indicating minimal levels of formaldehyde-related consumer complaints in federally-regulated manufactured homes, there is no longer any basis or justification for the health notice mandated by the HUD standards, and the regulation requiring that notice for manufactured homes should be repealed.

Under the HUD manufactured housing formaldehyde emissions standards – in effect since 1984⁴⁴-- “plywood materials” utilized in manufactured homes may “not emit formaldehyde in excess of 0.2 parts per million (ppm) as measured by [an] air chamber test method” specified elsewhere in the HUD standards. Similarly, formaldehyde emissions from “particleboard materials” utilized in manufactured homes may not exceed 0.3 ppm, as measured by the same testing methodology. Together, these standards -- developed by HUD to balance consumer protection and the affordability of manufactured housing as required by both the original 1974 manufactured housing law and the 2000 reform law -- have reduced the number of formaldehyde-related complaints regarding HUD manufactured homes to de minimus levels, as shown by HUD’s own program statistics, while preserving their fundamental affordability.⁴⁵

Moreover, in December 2016, the U.S. Environmental Protection Agency (EPA) adopted a final rule that would further reduce the permissible formaldehyde emission from plywood, particleboard and medium-density fiberboard used in all types of residential construction. While this rule is currently under review at EPA pursuant to Executive Order 13777, and its implementation has been deferred pending that review, HUD, under, the Formaldehyde Emissions Standards for Composite Wood Products Act,⁴⁶ would be required to amend its own manufactured housing formaldehyde emissions standards to “reflect” any ultimate formaldehyde emissions standard implemented by EPA, within 180 days after its promulgation. Accordingly, if and when such EPA standards are ultimately implemented, composite wood materials used in all homes – including manufactured homes – would have to meet more stringent formaldehyde emissions criteria, applicable to a wider array of composite wood products, than are currently in place. This would have the inevitable effect of further reducing the already de minimus number of formaldehyde-related complaints involving HUD-regulated manufactured homes, and would further undermine any basis for retaining the HUD formaldehyde “health notice.” Indeed, HUD itself presented a “working draft” of a proposed rule to the MHCC at its October 25-27, 2016 meeting that would eliminate this formaldehyde “Health Notice.”

HUD therefore, should confirm, pursuant to EO 13777, that the “Formaldehyde Health Notice” required by 24 C.F.R. 3280.309 will be repealed, and should expedite that process to bring about such a repeal prior to the end of 2017.

⁴⁴ See, 24 C.F.R. 3280.308.

⁴⁵ Thus, HUD’s Ninth Report to Congress on the Manufactured Housing Program (October 1996) shows that in 1991 – seven years after the implementation of the HUD formaldehyde standards – formaldehyde-related complaints from homeowners constituted just 1.3% of the specifically-categorized complaints reported (i.e., just 38 of 2,896 complaints). By 1994, that figure had decreased to just 1% (i.e., 35 of 3,478 reported complaints), even though at that time, the nation’s manufactured housing stock included a much larger number of pre-1984 -- and, therefore, pre-formaldehyde standards – units than it does today. Indeed, according to a 2012 market study conducted by the Foremost Insurance Group, only 6% of the manufactured homes in use at that time were purchased prior to the implementation of HUD’s formaldehyde emissions standards in 1984, and that number would be even further reduced today.

⁴⁶ See, 15 U.S.C. 2697.

8. Compliance with Appointed Administrator Mandate

Section 620(a)(1)(C) of the 2000 law directs HUD to “provid[e] ... funding for a non-career administrator within the Department to administer the manufactured housing program.” Congress directed the appointment of a non-career program Administrator not only to increase the accountability and transparency of the federal program, but also to act as a full-time advocate for manufactured housing, to “facilitat[e] the acceptance of the quality, durability, safety and affordability of manufactured housing within the Department.” Since 2004, however, the manufactured housing program has not had a non-career administrator, while HUD has consistently refused pleas from program stakeholders to comply with this critical reform.

Without an appointed administrator, the HUD program today remains what it has always been since the inception of federal regulation in 1976, a “trailer” program, focused on “improving” presumptively deficient manufactured housing (even though the industry today is producing its best, highest quality homes), instead of increasing the availability and utilization of manufactured housing as a superior source of affordable, non-subsidized home ownership, as directed by Congress in the 2000 law. This program “culture” views ever more onerous, burdensome and costly regulation, with no proven benefits for consumers, as the ultimate objective of the program.

This negative program culture harms the public image of manufactured housing, negatively affecting sales, appreciation, financing, zoning, placement and a host of other matters to the detriment of both the industry and consumers. Moreover, at present, with career-level program management, the manufactured housing program is -- and remains -- cut-off from mainstream policy-making within HUD. This isolates manufactured housing from initiatives that could benefit the industry and consumers, allows continuing discrimination against manufactured housing and its consumers within HUD and elsewhere within the government, and leaves manufactured housing in perpetual “second-class” status at HUD.

HUD has maintained since 2004 that the 2000 reform law “contains no express or implied requirement for the Secretary to appoint a non-career administrator.” However, this represents a fundamental misreading of the 2000 law.

Section 620(a) of the Act, as amended by the 2000 law, states that the Secretary of HUD “may -- (1) establish and collect from manufactured home manufacturers a reasonable fee ... to offset the expenses incurred by the Secretary in connection with carrying out the responsibilities of the Secretary under this title, including ... (A) conducting inspections and monitoring ... [and] (C) providing the funding for a non-career administrator within the Department to administer the manufactured housing program.” (Emphasis added).

By the plain wording of this section, it is the establishment of the program user fee that is subject to the qualifier “may” and is, therefore, permissive. Once that fee is established, however -- as it has been for decades by regulation -- it is to be used to offset expenses incurred in carrying out the Secretary’s “responsibilities” as delineated in section 620(a)(1)(A-G). As a matter of black-letter statutory construction, giving each word of the 2000 law its plain, ordinary and common meaning, a congressionally prescribed “responsibility” of a federal official is mandatory, not permissive or discretionary. If HUD’s construction of section 620(a)(1) were correct, its “responsibility” to “conduc[t] inspections and monitoring” of manufactured homes, their

production and their compliance with the federal standards under section 620(a)(1)(A) would be just as discretionary as its “responsibility” under section 620(a)(1)(C), but HUD has never made any such claim or assertion over the entire 36-year history of the program -- nor would it. Thus, construing section 620(a)(1) consistently, as a whole, the Secretary’s responsibility to appoint a non-career administrator for the program is every bit as mandatory as the responsibility to conduct inspections and monitoring in order to enforce the federal standards.

As part of its EO 13777 review of the HUD program, therefore, HUD should acknowledge the mandatory nature of the appointed administrator directive and take action (at the very least) to reassign the current administrator – “parachuted” into the program from outside by the Obama Administration in 2014 -- and appoint a qualified non-career administrator, with direct knowledge of the manufactured housing industry, in order to complete the full and proper implementation of all program reforms incorporated in the 2000 reform law, facilitate the acceptance, availability and utilization of HUD-regulated manufactured housing, as provided by that law, and fundamentally modify the program – given the industry’s achievement of the safety, quality and durability benchmarks established by Congress in the original 1974 federal law -- to eliminate arbitrary, costly and unnecessary regulatory mandates that needlessly impair the affordability of manufactured housing and needlessly exclude lower-income consumers from the housing market.

9. Competitive Program Contracting

The HUD manufactured housing program has had the same monitoring contractor (*i.e.*, the same continuing entity, with the same personnel, albeit under different names – initially the “National Conference of States on Building Codes and Standards” then “Housing and Building Technology,” and now the “Institute for Building Technology and Safety”) since the inception of federal regulation in 1976. Although the monitoring function contract is subject, officially, to competitive bidding, the contract is a *de facto* sole source procurement. Because the federal program is unique within the residential construction industry and no other entity has ever served as the monitoring contractor, no other organization has directly comparable experience. Thus, solicitations for the contract have been based on award factors that track the experience and performance of the existing contractor, effectively preventing any other bidder from competing for the contract. Moreover, the one time that another organization did submit a bid, its lower-priced offer was subject to a second round of analysis that ultimately deemed the incumbent contractor’s proposal best for HUD, based on its years of direct program experience.

As it has been structured by the program since the inception of federal regulation four decades ago, the monitoring contract is not only fatally-flawed in its process – *i.e.*, its failure to generate full and fair competition as required by applicable law, resulting in a 40-year *de facto* sole source contract that, based on MHARR research does not and has not existed anywhere else in the federal government for a pseudo-regulatory contractor – but is also substantively flawed, in that it creates a distinct financial incentive for the contractor to find fault with manufactured homes (regardless of whether any fault actually exists) and to pursue the expansion and extension of regulatory and pseudo-regulatory mandates in order to increase revenues.

Beyond these fatal structural flaws, without new ideas and new thinking, the program effectively, remains frozen in the 1970’s and has not evolved along with the industry. This is one


of the primary reasons that the federal program, government at all levels and other organizations and entities continue to view and treat manufactured homes as “trailers,” causing untold difficulties for the industry and consumers, including financing, zoning, placement and other issues. The 2000 law, moreover, was designed to assure a balance between reasonable consumer protection and affordability. But the HUD program and the entrenched incumbent contractor have a history of continually ratcheting-up regulation, with more detailed, intricate and costly procedures, inspections, record-keeping, reports and red-tape, despite the fact that consumer complaints regarding manufactured homes, as shown by HUD’s own data, are minimal. This is a result, in part, of an enforcement and contracting structure that provides an incentive for the monitoring contractor to find fault with manufactured homes.

For the manufactured housing industry to recover and advance substantially from the decline of the past two decades, this cycle must be broken and the federal program must be brought into full compliance with the objectives and purposes of the 2000 law. It is thus essential that the program ensure that there is full and open competition for the monitoring contract. Accordingly, the current monitoring contract should be terminated for the convenience of the government and re-solicited pursuant to 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.

III. CONCLUSION

In accordance with the foregoing, HUD should either repeal or modify the elements of the federal manufactured housing program detailed above pursuant to EO 13777 in order to maintain consumer protections mandated by applicable law, while eliminating unnecessary regulatory burdens and compliance costs that needlessly increase the cost of HUD-regulated manufactured housing, needlessly exclude lower-income Americans from the benefits of homeownership, and needlessly impair the growth and evolution of the manufactured housing industry, thereby inhibiting job growth within a uniquely domestic industry.

Sincerely,



Mark Weiss
President and CEO

cc: Hon. Dr. Ben Carson
Hon. Mick Mulvaney
Hon. Gary Cohn (Chairman, National Economic Council)
Mr. Rick Dearborn (White House Deputy Chief of Staff for Policy)
Manufactured Housing Industry Manufacturers, Retailers and Communities