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

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VIA FEDERAL EXPRESS

Ms. Nandini Rao
Associate Deputy Assistant Secretary
Office of Risk Management and Regulatory Affairs
U.S. Department of Housing and Urban Development
Room 9162
451 Seventh Street, S.W.
Washington, D.C. 20410

Re: The HUD Manufactured Housing Program Administrator's Defiance of -- and Resistance to President Trump's Regulatory Reform Agenda

Dear Ms. Rao:

Thank you for your letter of July 7, 2017 (see, Attachment A, hereto) responding to my earlier correspondence dated May 5, 2017 (see, Attachment B, hereto). Again, though, your reply represents the same type of formulaic, defensive rationalization of the *status quo* that MHARR received continually during the eight years of the Obama Administration, and is peppered with inaccuracies, misstatements and misinformation (presumably provided to you by the current HUD manufactured housing program administrator, Ms. Pamela Danner) which cannot be allowed to stand. As is explained further below, Ms. Danner, an Obama Administration holdover, must be re-assigned to other duties at HUD and replaced in accordance with the regulatory reform and government reorganization policies of President Trump.

As an initial matter, before turning to the substance of your communication, we ask that you please state when you were appointed (or re-appointed) to your current stated position – Associate Deputy Assistant Secretary, Office of Risk Management and Regulatory Affairs (as stated in your letter of July 7, 2017) – and by whom? Further, if you were appointed to any position at HUD immediately prior to your current position, please state the title of that position, when you were appointed to that position, and by whom you were appointed. In addition, in sending your July 7, 2017 response to MHARR, do you claim that you are acting pursuant to specific delegated authority from "a department or agency head appointed or designated by the President after noon on January 20, 2017?" (See, Memorandum for the Heads of Executive Departments and Agencies from the White House Chief of Staff, January 20, 2017, at paragraph 1). If so, please provide us

with a copy of any document(s) incorporating or reflecting that authority and please state who signed and/or authorized any such delegation. Absent any such appointment or specific delegation, however, it appears from public records that you, yourself, are an Obama Administration holdover at HUD seeking to protect and keep in-place another Obama Administration holdover at HUD – Ms. Danner.

Most importantly, there is nothing *whatsoever* in your response which addresses or even acknowledges the principal concern of the smaller industry businesses that MHARR represents (as clearly expressed in its May 5, 2017 letter -- i.e., that the program, under its current Obama-holdover leadership, is not only failing to implement the regulatory reform agenda of President Trump, but is actually defying and resisting that agenda. Specifically, the President has declared – as is specifically set forth in Executive Order 13777 – that the over-arching regulatory priority of his administration is to "alleviate unnecessary regulatory burdens placed on the American people." This overriding policy priority is particularly critical for the manufactured housing industry and for the lower and moderate-income Americans who rely on inherently affordable manufactured housing the most. For an industry like manufactured housing -- which *must* be federally-regulated because of its fundamentally interstate character – unreasonable and excessive regulation is a job-killer and the difference between economic viability and failure, particularly for smaller businesses which, according to the U.S. Small Business Administration (SBA) are disproportionately impacted and burdened by government regulation. For consumers, in an especially price-sensitive market, excessive regulatory compliance costs can literally mean the difference between owning a home or not.

Complying with the overriding regulatory policy directive of President Trump -- *enunciated more than six months ago* -- would mean *reducing* the level, scope, extent and cost of regulation *wherever possible*. That has not been the case, however, with the HUD manufactured housing program under its current leadership. Indeed, there has been no hint of *any* movement – either verbal or actual – toward any lessening or relaxation of unnecessary regulatory burdens within the program. To the contrary, the current administrator has made a pointed showing of resisting and defying this primary Trump Administration regulatory mandate by pushing relentlessly forward with two particular actions that have been opposed *unanimously* by all industry stakeholders, as reflected both by votes of the Manufactured Housing Consensus Committee (MHCC) and in communications to HUD from affected stakeholders. These regulatory actions, the implementation of HUD's "on-site" construction rule and action to finalize a proposed Interpretive Bulletin (IB) concerning "frost-free" foundations, have – and will – needlessly increase the cost of manufactured housing, while effectively choking-off potential new and expanded markets for HUD Code manufacturers

Instead, therefore, of acting to *decrease* regulatory compliance costs within the HUD program, the program administrator is doing just the opposite – subjecting the industry and consumers to costly and destructive regulatory mandates despite the fact that the industry long ago achieved the original objective of the National Manufactured Housing Construction and Safety Standards Act of 1974 – to provide safe, quality, durable homes, at an affordable price. Such unnecessary regulation is not only kills American jobs within the industry, but is also a factor in record-low levels of home ownership and correspondingly record-high levels of renting (36.6%

head-of-household rentals in 2016 as determined by a Pew Research Center study), due, in large part, to the unavailability of affordable homes.

Such defiance by a holdover from the former administration is unacceptable and must be remedied by Secretary Carson.

As for the specific claims set forth in your July 7, 2017 communication:

1. "Leadership Selection:" The fact that the program administrator position was the subject of "a competitive human resources recruitment following an 'open to the public' job announcement," is irrelevant. To the extent that the governing statute (see, point 2, below) requires an appointed administrator, the conduct of a career-based selection process -- even if in full accord with relevant regulations governing such a process -- would be inherently unlawful. Further, the assertion that Ms. Danner "served as a civil service employee for the Department *for several years prior to her most current appointment,*" is both misleading and incorrect. According to the resume posted on the internet website of Ms. Danner's law firm – "Danner and Associates," Ms. Danner served two stints at HUD beginning *forty years ago* (from 1976-1979 and from 1982-1984), not immediately prior to her current employment, as your letter implies. Moreover, during her brief early tenure within the HUD program, Ms. Danner's performance was the subject of widespread criticism and dissatisfaction with the industry.

2. "Non-Career Administrator:" Your communication states, "HUD has been clear and consistent in the position that the {Manufactured Housing Improvement] Act [of 2000] contains no express or implied requirement for the Secretary to appoint a non-career Administrator." Neither clarity nor consistency, however, can establish an interpretation that runs directly *counter* to both the language and structure of section 620 of the 2000 reform law *and* to HUD's initial – correct and precedential – interpretation of that language as reflected in its appointment of the first program administrator under the 2000 law on a non-career basis. The fact, moreover, that the first administrator subsequently sought and obtained career status for health reasons totally unrelated to the 2000 reform law, its purposes, construction, or implementation, is completely irrelevant.

   While MHARR vehemently disagrees with HUD's interpretation, which effectively reads section 620(a)(1)(C) out of the law, it will not restate – yet again – its position in this response but, instead would direct HUD, Congress and other interested parties to the March 16, 2016 (see, Attachment C, hereto, at pp. 10-12) and September 23, 2016 (see, Attachment D, hereto, at pp. 2-3) letters of MHARR's legal counsel, Troutman Sanders, addressing this matter and demonstrating that the 2000 reform law does, in fact, mandate an appointed non-career manufactured housing program administrator by its express terms.

3. "Congressional Mandates:" As with HUD's position regarding an appointed, non-career administrator, mere repetition does not, in itself, establish a false proposition. First, contrary to your assertions, the MHCC has *not* held bi-annual meetings in two of the three years that Ms. Danner has been program administrator. The program convened only *one* MHCC meeting in 2015 and has held *no* meetings to date in 2017. Second, both the manufactured housing

installation and dispute resolution programs were established and implemented in 2008, well *prior* to Ms. Danner's arrival as program administrator.

More importantly, Ms. Danner's tenure has been more remarkable for the mandates of the 2000 reform law that have *not* been met. These include, but are not limited to, the mandates to: (1) "facilitate the availability of affordable manufactured homes and to increase homeownership for all Americans;" (2) "ensure that the public interest in, and need for, affordable housing is duly considered in all determinations relating to the federal standards and their enforcement;" (3) limit the "monitoring" function in accordance with its statutory definition, i.e., "the periodic review of the primary inspection agencies, by the Secretary or by a state agency … for the purpose of ensuring that the primary inspection agencies are discharging their duties under this title;" (4) "ensure that all directly and materially affected interests have the opportunity for fair and equitable participation" in the MHCC (see, point 6, below); (5) bring to the MHCC for review and consensus recommendations "any statement of policies, practices, or procedures relating to construction and safety standards, regulations, inspections, monitoring or other enforcement activities that … implement, interpret, or prescribe law or policy…;" (6) "consider the probable effect of any [any] standard on the cost of … manufactured home[s] to the public;" and (7) "facilitating the acceptance of the quality, durability, safety and affordability of manufactured housing within … [HUD], *among others*.

4. "Installation and Dispute Resolution Programs:" MHARR has never contested statutory authorization for manufactured housing dispute resolution programs and, therefore, does not understand the corresponding reference in point 4 of your communication. With respect to installation, you state: "Your interpretation of the 2000 Act's requirement for an installation program reflects a misunderstanding of OMHP's statutory requirements. Under the 2000 Act, HUD must establish model installation standards and an installation enforcement program, which provide the baseline standard for all manufactured home installation in the United States." (Citations omitted). Having participated directly in the process which led to the 2000 reform law and its adoption by Congress, we are well aware of what the law says or, conversely, does not say. While the law does require HUD to develop and enact model manufactured home installation standards and program regulations, and does require state programs to provide the same – or higher – degree of "protection" as a generic "whole," it does *not* authorize or direct HUD (or HUD contractors) to substitute their judgment for that of states with HUD-approved standards and programs by demanding modifications to state-law standards to make them identical to any given parallel federal standard.

   You further state "consistent with your belief that HUD must maintain preemptive authority over the regulation of manufactured housing, it is *illogical* to simultaneously argue that HUD should not exercise its congressionally-mandated authority to set model installation programs and ensure that state programs meet those minimum standards." (Emphasis added). To the contrary, as MHARR has asserted and explained in numerous documents and publications, state authority and autonomy with respect to installation is entirely consistent with the "broad and liberal" application of federal preemption. Indeed, Congress specifically anticipated arguments such as yours, by including – in the preemption section of the 2000 law – an express exemption from federal preemption for state (but not local) installation standards. That language states in relevant part: "… [T]here is reserved to each state the right to establish

standards for the stabilizing and support systems of manufactured homes sited within that state, and for the foundations on which manufactured homes sited within that state are installed, and the right to enforce compliance with such standards, except that such standards shall be consistent with the purposes of this title and shall be consistent with the design of the manufacturer." Broad and liberal federal preemption under the law, consequently, is *entirely consistent* with state installation authority in accordance with this express reservation of power to the states which, in turn, is entirely consistent with the 2000 reform law's clear preference for primary state authority over installation issues.

5. "Office Accomplishments:" You claim, among other things, that "many of the regulatory accomplishments of the Office of Manufactured Housing Programs are the direct result of actions taken to address some of the findings and recommendations made by the Office of Government Accountability and Oversight (GAO) in its report published in 2014, titled 'Efforts Needed to Enhance Program Effectiveness and Ensure Funding Stability.'" While this assertion does not in any way address MHARR's points regarding the Administrator's failure to fully and properly implement key 2000 law program reforms during her tenure – and represents a distraction from those highly consequential issues – even this claim is not supported by the facts.

   First, the GAO report (which was a direct outgrowth of MHARR's persistent requests for a congressional hearing on HUD's implementation of the 2000 reform law), did not direct the Administrator to increase the program label fee by *156%.* Nor did it direct the Administrator to allocate significant portions of those revenues to fund expanded "make-work" activity on the part of unaccountable contractors and various "public relations" activities, as MHARR has fully documented.

   Second, the program has not held "bi-annual meetings of the Manufactured Housing Consensus Committee." As noted above, only one meeting was held in 2015 and *no* meetings have been held or scheduled to date in 2017. And, even if such meetings were held, the Administrator has developed a pattern of ignoring key MHCC recommendations, including recommendations pertaining to on-site construction and HUD's pending "frost-free" foundation Interpretive Bulletin.

   Third, the federal installation and dispute resolution programs, as noted above, were both implemented starting in 2008, some six years prior to the current Administrator's arrival, and fourth, nothing in either the law or the GOA report mandates a "monthly review" which, in itself represents yet another form of unnecessary, unjustified and costly *de jure* and *de facto* regulatory overreach that conflicts with the regulatory reform agenda of the Trump Administration.

   Meanwhile, though, it would appear from your communication that the Administrator has totally failed to address serious "questions and uncertainties" raised by GAO in its report, regarding "HUD's oversight of [the program] monitoring contract, as well as whether the data that were not delivered in a transition plan represents significant noncompliance under the contract." (<u>See</u> GAO Report at p. 32).

Finally, your contention that "HUD's actions have, since 2014, reflected a consistent dedication to full implementation of the 2000 Act," is demonstrably false, as shown in point 3, above.

6. "Small Business Representation:" You state, in part, that OMHP appointments to the MHCC have provided "adequate and proportional representation of small businesses" on the Committee. MHARR strongly disagrees. First, HUD, since at least 2010, has refused to provide for the collective representation of smaller and medium-sized independent HUD Code manufacturers through appointments to the MHCC. While staff members from both MHARR and the Manufactured Housing Institute (MHI) were appointed to the MHCC upon its formation and subsequently served multiple terms – again reflecting HUD's initial and correct construction of the 2000 reform law -- HUD relying on Obama Administration guidance regarding the appointment of registered federal lobbyists to federal advisory committees, has since refused to appoint collective industry representatives despite the fact that: (1) the prior Obama Administration "guidance" was effectively repealed on August 13, 2014; (2) other interest groups represented on the MHCC, such as users (i.e., consumers) have long had – and continue to have – multiple collective representatives on the MHCC; and (3) non-lobbyist MHARR staff members have applied for appointment to the MHCC and have applications currently pending. This failure to appoint collective industry representatives denies producers – and particularly the smaller and medium-sized independent producers that MHARR represents – the benefit of the institutional knowledge, know-how and memory that they have developed in Washington, D.C. through MHARR. It also subjects manufacturing company appointees to the MHCC – representing the primary regulated parties under current federal law -- to potential regulatory retribution by HUD based on their public votes and positions while on the MHCC. To claim that such a construct provides those businesses with "adequate" representation on the MHCC flies in the face of reality.

   Further, the approval or disapproval of the Administrator's actions by individual businesses is irrelevant to the issues raised by MHARR's previous communications to Secretary Carson and to you. Positive subjective statements by individual company representatives are inherently suspect – and far from probative – given HUD's inherent regulatory power over those businesses and the potential for regulatory retribution, harassment, or retaliation at the hands of HUD itself or its various pseudo-regulatory contractors. The sole germane issue at this time is whether Ms. Danner's administration of the HUD manufactured housing program is consistent with the 2000 reform law and the regulatory reform agenda of President Trump. MHARR has adduced plentiful evidence, including currently-pending matters, such as the "frost-free" foundation IB, which clearly show that it is not, and that Ms. Danner is – and will continue to – defy and resist that agenda if she remains program administrator.

7. "HUD Strategic Plan:" The fact – as you concede – that HUD Code manufactured housing, the nation's most affordable non-subsidized source of home-ownership, as determined by HUD's own research and analysis, was not included in the Department's last two strategic plans, represents and reflects yet another failure by the Department to comply with the key "facilitation" directives of the 2000 reform law. While these reports were indeed published prior to – and, in the second instance, contemporaneously with Ms. Danner's arrival as program Administrator -- there is no indication, and you offer no evidence, that she made any attempt

to supplement or modify those plans, or otherwise acted to include manufactured housing within any HUD housing program. Moreover, other than one "informational campaign" on HUD's computer intranet in 2017, *after MHARR publicly called for Ms. Danner to be re-assigned and replaced*, we have been provided with no evidence of internal or external efforts by Ms. Danner to facilitate the acceptance of HUD-regulated manufactured housing, nor would any such efforts – in any event – offset her multiple violations of the 2000 reform law and needless yet destructive regulatory mandates.

8. "Home Production:" The fact that manufactured housing production has experienced modest growth since its historic low in 2009, again, is irrelevant to full compliance with the law and the regulatory reform policies of the Trump Administration. Production levels over the course of Ms. Danner's tenure have remained well below 100,000 homes per year, a benchmark that was *regularly* met and exceeded prior to 2009. Given the urgent national need for affordable housing and home ownership – again as reflected by HUD's own research and analysis, in this instance its most recent "Worst Case Housing Needs" report to Congress – manufactured housing production *should* be in the hundreds of thousands of homes per year, not still lingering far below historic production levels.

9. "Disputes:" Through your letter, HUD continues to maintain the counter-intuitive and illogical position that minimal referral levels to the federal (and representative state) dispute resolution system(s) "are not all that relevant to industry-wide levels of consumer satisfaction and industry compliance." You state, in support of this position: "... the Dispute Resolution program administered by HUD is only in 23 states and is the last option after the manufacturer, retailer, the installer, the SAA or state administer (sic) consumer redress programs have failed to resolve the problem."

   Whether dispute resolution is the first step or the last step is irrelevant as to whether the level of DR referrals are a barometer of overall compliance levels and consumer satisfaction. As a matter of basic common-sense, if there was a steady deluge of non-compliance with the federal standards or a routine pattern or practice of the same, or a routine practice of ignoring consumer complaints, the federal dispute resolution program – based on the 123,174 HUD Code homes shipped to federally-administered DR states – would have necessarily experienced a referral rate (between 2008 and 2014) greater than the .019% (i.e., 24 homes) reported by HUD's DR program contractor. This extremely low number, moreover, is consistent with reported results from two representative state DR programs – also as reported by HUD's DR contractor – with a DR referral rate of 1.4% in both Texas and Virginia.

   The fact that so few DR filings are occurring within *both* federal and state DR programs – with homeowners having the right to initiate DR complaints – is direct evidence of both a low number of non-compliances *ab initio*, and responsive customer service on the part of manufacturers and retailers. HUD's failure, moreover, to acknowledge this unavoidable fact, is simultaneously evidence of its bad faith approach to manufactured housing, viewing it – since the inception of federal regulation in 1976 -- as an inherently deficient product in need of "improvement." Indeed, if the number of referrals to DR were extremely high, there is no doubt that HUD would be using that as purported evidence of the need for more stringent

regulation and enforcement, rather than dismissing it as "not a valid measure of overall product compliance or customer satisfaction."

10. "Monitoring Contract:" You state that "all procurements for the services provided by the chosen monitoring contractor have been competitively procured in an open competition." We are, of course, aware that the monitoring contract has been procured through a nominal "open" bidding process. But again, the *results* of that process belie HUD's claims. In this instance, the "results" are a supposedly "competitive process" that has produced the *same contractor* (albeit under differing corporate names) – and virtually no competition – for over *40 years*. This is unheard of in federal service contracting and reflects an illegitimate process with award criteria tailored to the incumbent contractor's unique "experience" as the program's one and only monitoring contractor.

    Further, your contention that MHARR's points regarding contractor "make-work" are invalid because the monitoring contract is a "Firm Fixed Price contract," is itself specious. HUD statistics show that between 2005 and 2015, production of HUD Code homes fell from 146,881 homes in 2005, to 70,544 homes in 2015, or a contraction of just under 52 percent. Instead of a corresponding contraction in contractor revenues, HUD budget justifications to Congress show that budgeted payments to the program monitoring contractor remained effectively constant until FY 2010. In FY 2011, however, budgeted contractor funding increased and, since that time, has increased by a factor of *65.6%*, from $3,200,000 to $5,300,000 in the HUD FY 2018 program budget request. So even though industry production, in total annual numbers, has fallen significantly since FY 2005, with corresponding decreases in the number of manufacturers, production facilities and retailers, funding for the program monitoring contract has been significantly higher. Meanwhile, since 2005, the *cumulative* rate of inflation has been 23.2 percent. Even adjusted for inflation, therefore, budgeted payments to the monitoring contractor, since 2005, have grown by more *than 40%* in real dollars.

11. "State Partners:" While MHARR has supported the currently-pending proposed rule regarding SAA funding, that rule has been – and continues to be -- unnecessarily delayed, with no final action to increase SAA funding since *2002* and for the entire duration of Ms. Danner's current tenure at HUD. So, despite the pending proposed rule, SAAs, thanks to MS. Danner's policies, continue to be financially squeezed between increased duties and static funding levels. This activity, which appears clearly designed to force states out of the HUD program while their duties are taken-over by HUD contractors, has already led to the defection of one state from the program, and could well lead to others, directly contrary to Congress' vision of a federal-state partnership for manufactured housing regulation.

In summary, your groundless effort to protect Ms. Danner as program administrator – and to promote her continuation in that role – effectively amounts to discrimination against the manufactured housing industry (and particularly its smaller businesses), as well as the millions of moderate and lower-income American families, who will be deprived of the cost savings and related benefits of President Trump's signature regulatory reform agenda if Ms. Danner remains. Ms. Danner's continuation as program administrator is thus unacceptable. She should and *must* be reassigned within HUD and replaced with a qualified, knowledgeable individual in accordance with the 2000 reform law.

Thank you.

Sincerely,

Mark Weiss
President and CEO

cc: Hon. Dr. Benjamin Carson
Hon. Tim Scott
Hon. Sean Duffy
Hon. Mick Mulvaney
Hon. Paul Compton
Mr. Gary Cohn
Mr. Rick Dearborn
Ms. Sheila Greenwood
Ms. Maren Kasper