ARKANSAS MANUFACTURED HOUSING ASSOCIATION

August 22, 2016

Mr. Edward L. Golding
Principal Deputy Assistant Secretary
Office of Housing
Department of Housing and
Urban Development
451 7th St. SW
Washington, DC 20410

Ms. Helen R. Kanovsky
General Counsel
Department of Housing and
Urban Development
451 7th St. SW
Washington, DC 20410

Re: **HUD's Preemption Policy Regarding Manufactured Housing**

Dear Mr. Golding and Ms. Kanovsky:

I am writing on behalf of the Board of Directors and members of the Arkansas Manufactured Housing Association (AMHA) and the hundreds of very low, low, and moderate income families in Arkansas who choose manufactured homes as affordable, non-subsidized housing each year - to bring to your attention the on-going practice of cities and towns in this state of prohibiting or unduly restricting the placement of manufactured housing within their boundaries. It is my sincere hope that the Department will work with the manufactured home industry to promote fair and affordable housing and to eradicate unreasonable regulatory barriers against HUD-Code homes - often based on outdated myths, misconceptions and stereotypes about the product and the people that live in the product.

It is my understanding that the Department has met with industry representatives on this matter, and has challenged the industry to prove that the Department can offer more assistance in the future.

I believe that the Department has not only the authority, but also the responsibility to work to remove barriers to the use of manufactured housing as an affordable housing resource, as evidenced here:

PREEMPTION IN THE ACT OF 1974

Prior to the enactment of the Manufactured Housing Improvement Act (MHIA) of 2000, the Manufactured Home Construction and Safety Standards Act (MHCSS) of 1974 [42 U.S.C. 5403 (d)] read:

(d) Supremacy of Federal standards

Whenever a Federal manufactured home construction and safety standard

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> established under this chapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding the construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

This clause has been cited time and again by the Department of as the specific basis of the program's 'preemption power' over state and local jurisdictions' authority to establish or continue in effect construction and safety standards which are not identical to the Federal standards – provided that a Federal standard governing the same aspect of performance exists.

The Department has also established its regulatory authority under the preemption power created under the Act in a more general nature – by determining that states (and political subdivisions of the states) "may not take any action that could interfere with the Federal superintendence of the industry as established by the Act". [24 CFR 3282.11]

NOTICE OF INTERNAL GUIDANCE

HUD addressed this 'supremacy clause' in its *Notice of Internal Guidance* – published in *The Federal Register* on January 23, 1997. In the notice by Stephanie A Smith, General Deputy & Assistant Secretary for Housing – Federal Housing Commissioner, the Department stated its positions on the preemptive nature of the Act relative to a number of specific circumstances: *installation, zoning, state enforcement, utility providers*, and *state construction and safety standards*.

In this document, the Department stated specific preemptive power over disparate state and local standards which address aspects of performance which are covered by Federal standards ***and*** the more general authority over the Federal superintendence of the program. The notice reads:

> **2. Superintendence**. It is also possible that a State or local law may be preempted even though the local rule does not meet the differing aspect of performance standard. As stated above, 24 CFR 3282.11(d) sets forth an additional standard of preemption. A State rule must give way if it impairs the Federal superintendence of the manufactured home industry as established by the Act.
>
> **Thus, for example, a local requirement that all homes be constructed on site, while not covering any aspect of performance, would be so fundamentally in conflict with the Federal standards as to impair the Federal superintendence of the manufactured home program. Such a requirement would be preempted under the HUD regulations.** *[Emphasis added]*
>
> The scope of this regulatory provision is limited by the language ``as established by the Act''. This language limits the Federal superintendence of the industry, since section 604(d) of the Act limits the preemption of standards to only those issues dealing with the same aspects of performance.

STATEMENT OF POLICY 1997-1

The Department followed-up the Notice of Internal Guidance with its *Statement of Policy 1997 -1, State and Local Zoning Determinations Involving HUD-Code* published in *The Federal Register* on May 5, 1997. In this notice from Nicholas Retsinas, Assistant Secretary for Housing – Federal Housing Commissioner, the Department again clearly stated its preemptive authority over state and local construction and safety standards governing aspects of performance which are covered by the

Federal standards.

The Statement of Policy was more narrowly-worded than the Notice of Internal Guidance.

In the Statement of Policy, HUD focused on a couple of terms which appear to further restrict the Department's preemptive power found in 42 U.S.C. 5403. In the Statement, the Department addresses zoning ordinances or enforcement decisions that are "based ***solely*** on a construction and safety code that is different from the Federal standards" and "excluding or restricting ***only*** manufactured homes built to the Federal standards*". [Emphasis added]*

Additionally, the Statement of Policy references structures meeting state or local codes – *units over which the Department has no regulatory authority* – as 'manufactured homes meeting other standards' or 'manufactured homes built to State or local codes'. Congress introduced the term 'manufactured home' into the enabling legislation for the Construction and Safety Standards Program in 1980 – eliminating the term 'mobile home' – recognizing the inherent differences between structures which met the Federal standards and those which did not. The Department's inclusion of an example in the Statement of Policy which refers to structures - 320 square feet or more, built on a permanent chassis – confuses 'manufactured homes' as defined in 42 U.S.C. 5402 (6) with units which could be more correctly defined as 'modular homes' or even certain 'park models'.

While the Statement of Policy clearly addresses the lack of State and local authority to establish standards for manufactured homes which are "different from the Federal standards" – it fails miserably by appearing to grant localities a 'de-facto right to discriminate', provided that all forms of factory-built housing are equally excluded or restricted:

> "If under the local zoning laws the locality accords the same treatment to all structures that meet the Act's definition of a ''Manufactured home''(42 U.S.C. 5402(6)), the locality is not in conflict with the preemptive provisions of the Act.

The Statement of Policy was *"issued as an initial step toward the elimination of barriers to the use of manufactured housing...".* After almost two decades, the industry believes that it is time for the Department take another long-awaited step toward that goal, by updating its guidance and policy on Federal preemption to incorporate changes to the 1974 Act made in the Manufactured Housing Improvement Act (MHIA) of 2000.

THE MHIA OF 2000...

With the adoption of the Manufactured Housing Improvement Act (MHIA) of 2000, a number of items contained in HUD's Notice of Internal Guidance and the Statement of Policy from 1997 became obsolete.

Now, nearly twenty years later, it is time for the Department to revisit these documents and formulate guidance and policy which carries out the directives given to HUD in the 2000 Act's 'Findings and Purposes' section and ensures that the Federal superintendence of the industry is not impaired by state or local laws, regulations or ordinances which exclude or unduly restrict the placement of manufactured homes.

The adoption of the MHIA of 2000 directly addressed a number of items contained in the 1997 Notice of Internal Guidance – specifically, the establishment of model manufactured home installation standards (MMHIS) and additional grants of authority for states to institute installation programs, industry education and dispute resolution.

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In 1997, there was no 'universal' installation guideline and state programs were designed to deal primarily with notice and correction of construction defects. The 2000 Act has resulted in the development of model standards for the installation of new homes and charged states with developing programs for installation monitoring and dispute resolution as state administrative agencies of 'default states'. The Notice of Internal Guidance is obsolete on these issues, and should be updated.

And, in the area of 'preemptive power', the MHIA of 2000 added important language to 42 U.S.C. 5403 (d), which was amended to read:

> **(d) Supremacy of Federal standards**
>
> Whenever a Federal manufactured home construction and safety standard established under this chapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding the construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard. **Federal preemption under this subsection shall be broadly and liberally construed to ensure that disparate State or local requirements or standards do not affect the uniformity and comprehensiveness of the standards promulgated under this section nor the Federal superintendence of the manufactured housing industry as established by this title..."**
> *[Emphasis added]*

It is important to note the inclusion of a new term in this section – 'State or local ***requirements*** or standards'. *[Emphasis added]* The addition of the word 'requirements' has been overlooked - or ignored - by the Department in its post-2000 interpretations of the scope of preemption. The existence of the term in this section indicates Congress' intention that the preemption power created here would apply to local conditions or restrictions – other than construction 'standards' – which could affect the Federal superintendence of the manufactured home industry.

To the contrary, the Department's interpretation of this amendment language has been limited to "disparate state or local requirements or standards" which the Department has narrowly interpreted to be construction and safety standards **only** – largely ignoring Congress' intent that preemption under the amended Act be "broadly and liberally construed" to apply to "state or local requirements" that affect the "Federal superintendence of the manufactured housing industry".

In rejecting a proposed recommendation for a regulation concerning land use regulation by the Manufactured Housing Consensus Committee in 2003, the Department narrowed its interpretation of the language from the 2000 Act even further - to apply **only** to construction and safety standards referenced in 24 CFR 3280 – stating: *"The amendment did not modify the basic substance of the statutory preemption provision. By its specific terms, the provision apply (sic) to construction and safety standards, generally codified in 24 CFR part 3280. It does not apply to other regulations, including the Manufactured Home Procedural and Enforcement Regulations in 24 CFR part 3282."*

Since that time, the Department has consistently taken the most narrow approach to the application of the term "broadly and liberally construed" – maintaining that the other portions of the manufactured home program, *(including installation standards and dispute resolution)* somehow do not fall under the 'preemptive powers' of the Department's Federal superintendence of the industry.

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The Department has also appeared to side-step the Congressional directive found in the 2000 Act's 'Findings and Purpose' section: "*to facilitate the availability of affordable manufactured homes and to increase homeownership for all Americans"* – by re-stating its narrow interpretation that preemption applies ***only*** to construction standards.

CONCLUSION

What began as an attempt by the Department to provide guidance for staff and clearly state HUD's policy on the authority of State and local jurisdictions to set disparate construction and safety standards AND regulations which exclude or restrict manufactured homes – ***which the Department held in early 1997 would impair the Federal superintendence of the manufactured home industry*** – has become more and more limited through HUD's interpretation of statue and regulation --- even as the enabling legislation defining the preemptive nature of the program has been amended to expand the scope and reach of preemption and to direct the Department to 'do more' to promote manufactured housing as an affordable housing resource.

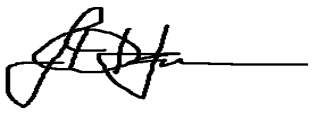
The array of state and local activity which Department clearly believed it had authority to prohibit under the 'Federal superintendence' clause in 1997 has been eroded by self-imposed interpretations of the limits of the scope preemption.

It is far beyond time that the Department of Housing and Urban Development review its commitment to providing affordable housing opportunities to all Americans – particularly those low-to-moderate income families who choose to pursue 'The American Dream' of homeownership by purchasing a manufactured home.

Reducing the discriminatory regulations, ordinances and practices of certain local governments through the broad and liberal application of preemption power by the Department of Housing and Urban Development would be a 'next step' that is many, many years overdue.

The Arkansas Manufactured Housing Association (AMHA) is committed to working with the Department on this issue of utmost importance to the industry and working families of our state.

Respectfully submitted,



J.D. Harper
Executive Director
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