Manufactured Housing Association for Regulatory Reform

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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: Manufactured Housing Program
Minimum Payments to States
Docket No. FR-5848-P-01 – RIN 2502-AJ37

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.) (1974 Act) as amended by the Manufactured Housing Improvement Act of 2000 (2000 Reform Law). MHARR was founded in 1985. Its members include independent manufactured housing producers from all regions of the United States.[1]

I. INTRODUCTION

On December 16, 2016, HUD published a proposed rule in the Federal Register (see, 81 Federal Register, No. 242 at pp. 91083-91086) to amend its current regulations governing minimum payments to State Administrative Agencies (SAAs) (i.e., 24 C.F.R. 3282.307 and 24 C.F.R. 3284.10). Pursuant to the proposed rule, section 307 of HUD's Procedural and Enforcement Regulations (PER) would be amended to "allow for payments to states of (1) $9.00 for each transportable section of new manufactured housing that is located in that state, and (2) $14.00 for each transportable section of new manufactured housing that is produced in that state." (See, 81

[1] 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.).

Federal Register, No. 242 at p. 91084, col.1). In addition, 24 C.F.R. 3284.10 would be amended to "ensure participating states (regardless of approval status before December 27, 2000) receive a funding level no less than the cumulative amount that state received in [Fiscal Year] 2014." Id.

For the reasons set forth in greater detail below, MHARR supports the adoption of the proposed rule as a final rule without further modification or alteration.

II. BACKGROUND

In July 2015, HUD informally presented a proposal to alter the distribution of minimum fee payments to SAAs, which perform specific enforcement functions under the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended by the Manufactured Housing Improvement Act of 2000 (2000 law), as part of a federal-state partnership devised and legislated by Congress. That proposal, set forth in a memorandum from the HUD manufactured housing program Administrator to all SAAs, would have increased per section payments from existing levels, but would have reduced total SAA funding for many states by basing payments on current shipment levels rather than the much higher shipment levels that existed at the end of 2000, as is required by the Manufactured Housing Improvement Act of 2000.[2]

Specifically, the July 2015 HUD proposal – which MHARR strenuously opposed – would have: (1) eliminated the existing distinction between full-approved and conditionally-approved SAAs; (2) increased per-section SAA compensation from $2.50 per section manufactured in-state and $9.00 per section shipped in-state to $20.00 and $10.00 respectively (or $30.00 per floor for homes built and sited in the same state); (3) based total SAA compensation on 2014 production rather than 2000 production; and (4) eliminated "supplemental" SAA payments designed to maintain funding at 2000 levels for states that subsequently fell below 2000 base level funding.

As was emphasized by MHARR in subsequent communications with HUD, this initial proposal and resulting deep cuts in SAA funding would have driven a substantial number of SAAs out of the HUD program, undermining the federal-state partnership established by Congress, while further empowering and extending the de facto regulatory functions of HUD's entrenched 40-year "monitoring" contractor (which performs SAA functions in non-SAA states).

In direct response to these objections,[3] HUD developed an "alternative" SAA funding structure, that would provide SAAs $14.00 per section for homes manufactured in-state and $9.00 per section for homes sited in-state (or a total of $23.00 per section for homes both manufactured and sited in-state), with a guarantee of total funding levels no lower than those paid in Fiscal Year (FY) 2014 -- which would be equal to or higher than total funding levels for each state in 2000, by

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[2] Section 620(e)(3) of the 2000 reform law (42 U.S.C. 5419), "Payments to the States," is designed to prevent payment reductions to the states by providing that "the Secretary shall continue to fund the States ... in ... amounts which are not less than the allocated amounts based on the fee distribution system in effect on the day before the effective date" of the 2000 reform law (i.e., December 27, 2000). This provision is worded to make aggregate payment levels -- at the time of the implementation of the 2000 law -- the minimum amount paid to each state SAA.

[3] As confirmed by HUD program officials at the August 2015 meeting of the Manufactured Housing Consensus Committee (MHCC).

virtue of the supplemental payments made in FY 2014. The Regulatory and Enforcement Subcommittee of the MHCC unanimously approved this "alternative" funding plan on October 27, 2015, and the full MHCC approved this "alternative" proposal at its January 2016 meeting. The proposed rule published by HUD on December 16, 2016, according to its preamble, is "consistent" with the "alternative" funding proposal presented to – and approved by – the MHCC. (See, 81 Federal Register, No. 242 at p. 91084, col. 1: "HUD proposes revising payments to states consistent with that proposal through this rule").

III. COMMENTS

Increased funding for state SAAs, and corresponding reductions in funding levels for revenue-driven program contractors, has been a consistent priority for MHARR since the enactment of the Manufactured Housing Improvement Act of 2000. Unlike private contractors -- which HUD has allowed to drastically expand their role, functions and influence within the manufactured housing program (effectively setting program policy and needlessly increasing regulatory compliance costs with little or no benefit to consumers and little or no accountability or oversight by the HUD program) -- SAAs, as state entities, are broadly accountable to their respective governments, and ultimately to the voters and public in each such state. Yet, HUD funding for the program monitoring contractor increased by nearly 30% between 2005 and 2014, while budgeted HUD payments to SAAs fell by 50% over the same period.

Thus, when HUD, in May 2014, proposed an unprecedented 156% increase in the certification label fee paid by HUD Code manufacturers, MHARR, in its May 22, 2014 written comments, specifically called on HUD to use additional program revenues to increase funding for all state SAAs. MHARR stated:

> "Unlike the program monitoring contractor which monitors only a significantly-reduced number of new homes ... SAAs constitute the first line of protection for a growing number of both new and existing manufactured homes. *** With a substantial number of states facing critical difficulties providing funding for SAA operations, it is essential that additional HUD funding be provided and provided soon. Consequently ... any additional program revenues should be utilized to increase payments to the SAAs and thereby preserve the federal-state partnership that is the bedrock of the program."

(Emphasis added).

While HUD continues to significantly and needlessly overpay program contractors for pseudo-regulatory "make-work" activity that carries little or no benefit for consumers -- substantially increasing regulatory compliance costs for manufacturers at a time when federal and state consumer dispute resolution program data shows minimal levels of consumer complaints – the amendments set forth in the December 16, 2016 proposed rule appear to be consistent with the mandate of the 2000 reform law that requires minimum SAA funding levels no less than "allocated amounts based on the fee distribution system in effect on the day before [the] effective date" of the 2000 law, i.e., December 27, 2000. By providing for minimum payments to SAAs, regardless

of their approval status, "based on the amount a state received in Fiscal Year (FY) 2014, which is at least the same amount that each fully-approved state received as of December 27, 2000," the proposed rule appears to be "consistent with" the "alternative" HUD proposal considered and recommended by the MHCC. MHARR, accordingly, supports the proposed rule as stated.

With respect to the specific questions posed by HUD in the preamble to its proposed rule, MHARR responds as follows:

1. "In determining a revised equitable fee distribution formula, what methods should HUD consider to increase the amounts paid to the states? For example, should HUD rely on the past three years or more of fee income data received by both fully approved and conditionally approved states in assessing the amount of the increase of payment to each SAA?"

A. MHARR does not object to distribution increases based on an aggregate of cumulative in-state production and in-state shipment data reflecting a reasonable time-defined period, so long as the minimum per annum distribution level to any state – regardless of approval status – does not fall below the minimum level mandated by the 2000 law.

2. "Should fully approved states be entitled to higher levels of payments than conditionally approved SAAs?"

A. No. The HUD "alternative" proposal approved by the MHCC – which HUD maintains is "consistent" with the December 16, 2016 proposed rule – set forth a formula under which "whether a state was fully or conditionally approved would cease to affect funding." (See, 81 Federal Register, No. 242 at p. 91084, col. 1). Funding distinctions based on SAA approval status should not be re-introduced via such a modification of the rule as proposed.

3. "Should HUD revise 24 C.F.R. 3282.307(b) to allow the amount of the distribution of fees among the states to be established by Notice in order to more timely address changes or fluctuations in production levels, in order to assure that the states are adequately funded for the inspections and work they perform?"

A. No. Pursuant to section 620(d) of the 2000 law (42 U.S.C. 5419(d)), "the amount of any fee collected under this section may only be modified – (1) as specifically authorized in advance in an annual appropriations act; and (2) pursuant to rulemaking in accordance with section 553 of title 5, United States Code." Insofar as subsection (a)(1)(B) of the same section specifically addresses "funding to states" using fee revenues collected thereunder, any such utilization of those fees for payments to the states is similarly subject to the requirements of subsection (d). Accordingly, modifications via notice only would contradict the statute and would be unlawful.

IV. CONCLUSION

For all of the foregoing reasons, MHARR supports the proposed rule as stated in the Federal Register. A final rule adopting this long-delayed proposal and long-needed update and enhancement of fee distributions to the states should be implemented without any further delay. While the federal program was designed and intended by Congress to operate as a federal-state partnership, HUD, in recent years, has done everything in its power to eclipse the authority and operations of state SAAs, while effectively turning over more and more elements of the manufactured housing program (with an corresponding expansion of needless make-work activity) to revenue-driven contractors. With this rule and with new leadership at HUD under the Trump Administration, state funding can hopefully be restored to appropriate levels, while funding for entrenched program contractors is reduced accordingly.

Very truly yours,

Mark Weiss
President and CEO