MHARR *WASHINGTON UPDATE*

The Manufactured Housing Association for Regulatory Reform is a Washington, DC based national trade association representing the views and interests of producers of manufactured housing

# EXCLUSIVE REPORT AND ANALYSIS

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## HUD PRODUCES WHITEWASH OF DOE ENERGY RULE "COSTS"

In the lead-up to the Manufactured Housing Consensus Committee (MHCC) meetings now scheduled for April and May, 2019 (see, article below), HUD's Office of Policy Development and Research (PD&R) has produced a purported analysis of the cost data underlying the Department of Energy's (DOE) August 3, 2018 Notice of Data Availability (NODA), setting forth possible revised approaches to DOE manufactured housing energy standards. The bare-bones (and obviously hurried), three-page PD&R analysis, however, developed in response to a request by the MHCC, at its September 2018 meeting, for "PD&R to submit a document to the MHCC which includes comparable cost figures similar to [the DOE-published NODA Package Draft Results]," is little more than an unsubstantiated whitewash of "data" derived from the illegitimate and irretrievably tainted manufactured housing energy standards "negotiated rulemaking" conducted by DOE in 2014-2015. While the federal manufactured housing program, as noted in other articles below, has thus progressed to some degree as a result of the regulatory reform policies of the Trump Administration, the HUD bureaucratic "swamp" still exists and still must be confronted and curbed by both the industry and consumers.

PD&R, in its memorandum (dated October 26, 2018, but only released to the public and presumably MHCC members as well on or about February 14, 2019) states that: "in response to the MHCC's request, PD&R staff conducted a review of *relevant documents*" (emphasis added) from the DOE manufactured housing energy standards "public comment webpage, and contacted multiple individuals with expertise in manufactured housing related-energy matters." The PD&R memorandum, however, fails to specifically identify *what* data from the DOE webpage that it reviewed and *which* "individuals" with alleged "expertise in manufactured housing related energy matters," it contacted. Nevertheless, while admitting that "PD&R staff was not able to recreate the survey conducted by the [DOE manufactured housing negotiated rulemaking] Working Group given the short timeframe provided by the MHCC," PD&R, on the basis of three unsupported, conclusory paragraphs in its October 26, 2018 memorandum, states that it "concurs with the [DOE] methodology and resultant cost figures."

As MHARR will set forth soon in greater detail in a comprehensive response, analysis and refutation of the PD&R memorandum in advance of the relevant MHCC subcommittee and full committee proceedings on this matter, however, the underlying data and "information" used to develop the NODA were the same, non-credible, fatally-flawed and irretrievably-tainted data developed as part of, and incident to, the contrived and illegitimate DOE "negotiated rulemaking," as was fully described and exposed by MHARR in its August 8, 2016 comments on DOE's initial proposed manufactured housing energy standards rule and its September 17, 2018 NODA comments. To the extent that the NODA proposals and related DOE cost calculations rely on the same fatally-flawed data, analyses and assumptions (including the now discarded "Social Cost of Carbon" construct) that were the purported basis for the original 2016 DOE proposed manufactured housing energy standards rule, any materials derived by PD&R from the DOE manufactured housing energy webpage or the NODA itself, would necessarily be invalid, illegitimate, irrelevant and baseless. Consequently, PD&R's "concurrence" with DOE's "methodology and resulting cost figures," means – and proves – exactly nothing.

Furthermore, the PD&R memorandum, insofar as it: (1) does not identify, in any way, the "multiple individuals with expertise in manufactured housing related-energy matters," that it allegedly contacted; (2) does not indicate or disclose whether those unidentified "individuals" might have – or might represent -- special energy interests or other related special interests; (3) does not indicate or disclose whether it contacted smaller, independent manufactured housing businesses or national representatives of those businesses that would be disproportionately impacted by DOE energy standards (as emphasized by both MHARR and the U.S. Small Business Administration in DOE energy rule comments), particularly in light of information provided to DOE by MHARR showing a retail cost impact for smaller, independent manufactured housing producers approaching $6,000.00 for a multi-section home; and (4) does not indicate or disclose whether it contacted potential manufactured housing purchasers to assess the impact of significantly higher home purchase prices that would result from the DOE proposals -- provides no legitimate factual basis for its supposed "concurrence" with the fatally-flawed DOE cost calculations. As a result, the MHCC should reject – and should advise HUD and DOE that it rejects – the purported "factual" and/or data predicate for both the 2016 DOE proposed manufactured housing energy standards rule and the August 3, 2018 DOE NODA.

## DOE PROCEDURAL CHANGES SHOULD APPLY TO ANY PROPOSED MH RULE

As recently reported by MHARR, the U.S. Department of Energy (DOE), on February 13, 2019, published a proposed rule in the Federal Register that would significantly modify its procedures for developing new or revised energy conservation standards and related testing procedures for consumer products, "appliances," and certain commercial and industrial equipment.

While this proposed rule, as published, does not *specifically* reference standards development and/or testing procedures under section 413 of the Energy Independence and Security Act of 2007 (42 U.S.C. 17071) directly pertaining to manufactured homes, the proposed rule *does*, by its terms, apply to DOE's Appliance Standards Program -- the <u>same</u> program under which the original June 17, 2016 proposed DOE manufactured housing energy standards rule was developed and subsequently supplanted by DOE pursuant to a Notice of Data Availability (NODA) published on August 3, 2018 (<u>see</u>, article above).

Given that the proposed (and still pending) DOE manufactured housing standards were developed under DOE Appliance Standards Program procedures that *are* addressed by the changes proposed in the February 13, 2019 DOE Notice, the procedural modifications noted in that proposed rule <u>should</u> be applied to the manufactured housing proceeding – as MHARR will assert in comments to be filed with DOE. That, in turn, would constitute yet another basis (among many others previously detailed by MHARR) for the withdrawal of any and all previously-proposed versions of the DOE manufactured housing standards – developed under or derived from -- the inherently tainted DOE "negotiated rulemaking" process, and the ultimate development of a new rule (if necessary) based on a legitimate and lawful standards-development process consistent with the regulatory policies of the Trump Administration. The application of the new procedural rule to the manufactured housing energy rulemaking, could also help to assure that any future revisions of that rule are not subjected to the same type of coordination between part of the industry and energy special interests that led to the fatally-tainted and illegitimate "negotiated rulemaking" which resulted in both DOE's original 2016 proposed manufactured housing energy standards rule and subsequent 2018 NODA proposal.

Among other things, the February 13, 2019 proposed DOE procedural rule would: (1) expand various procedural protections to the development of testing standards for regulated products; (2) define "a significant energy savings threshold that must be met before DOE will update an energy conservation standard;" (3) address issues related to the cumulative regulatory burdens imposed on regulated products and consumers of those products; and (4) "clarify DOE's commitment to publish a test procedure six months before a related standards [Notice of Proposed Rulemaking]." This latter provision is particularly significant in relation to DOE's proposed manufactured housing energy standards, insofar as proposed test procedures were not published by DOE until <u>after</u> publication of the June 17, 2016 proposed rule, as was pointed out by MHARR at the time.

Written comments on the proposed DOE procedural rule are due by April 15, 2019. MHARR will provide industry members with copies of its written comments on this matter for consideration and possible use, in advance of the comment submission deadline.

## <u>REVISED DTS PLANS LEAVE MH PERSONAL PROPERTY (CHATTEL) LOANS IN LIMBO</u>

The first annual revisions to the erstwhile "Duty to Serve Underserved Markets" (DTS) implementation plans developed by Fannie Mae and Freddie Mac were approved by the Federal Housing Finance Agency (FHFA) and published recently by the Government Sponsored

Enterprises (GSEs). While Freddie Mac's DTS plan – which provided for only minimal possible purchases of the personal property (i.e., chattel) loans which comprise nearly 80% of all manufactured home consumer loans over its three-year term – was not modified with respect to manufactured housing, the manufactured housing provisions of Fannie Mae's original DTS plan have, in fact, been *substantively modified*, in a manner which could seriously dilute, to the point of virtual insignificance, the already miniscule targeted purchases of manufactured home personal property/chattel loans set forth in its original DTS plan.

As proposed by Fannie Mae, and as approved by FHFA, Fannie Mae's supposed commitment to purchase a sharply limited number of manufactured home personal property/chattel loans as part of a supposed "pilot program" in the out-years of its DTS plan, would be reduced by an alternative option to either "participate in a debt structure," or "guarantee a security" containing manufactured home chattel loans instead. Fannie Mae sought to justify this modification to its original DTS plan by noting its "conclus[ion] that there is limited interest in selling whole [chattel] loans." Instead, it noted that after "extensive industry outreach," "multiple lenders expressed unwillingness to sell loans because they perceived that chattel assets perform well and provide strong returns when kept on portfolio," while another potential seller "indicated that it has sufficient outlets for chattel assets…."

There is no indication, however, as stressed by MHARR in its comments to FHFA on the proposed modifications, that this supposed "extensive outreach" included any potential new lenders not already involved in the manufactured housing personal property/chattel loan market that could become competitors with existing industry-dominant lenders – with resulting market pressure for lower interest rates – if DTS personal property/chattel loan purchases were implemented in a market-significant manner, as MHARR has sought. Instead, it appears from Fannie Mae's own language (in its DTS plan modification request), that this "outreach" was directed at – and to – the existing handful of industry-dominant lenders. These same lenders have benefited from the failure of the GSEs and FHFA to implement DTS to any significant degree with respect to manufactured housing personal property/chattel loans and also possess, but have reportedly failed to provide to the GSEs, Ginnie Mae and FHFA, the type of loan performance data which they all claim to need in order to establish a market-significant manufactured housing personal property/chattel loan securitization program – thus creating a classic "catch-22" for both potential manufactured housing consumers and the broader industry.

Such action, to further minimize the GSEs' already negligible and glacially-paced alleged "commitment" under DTS to support and expand manufactured home personal property/chattel loans -- which, again, comprise the vast bulk of HUD Code consumer lending (as well as a parallel effort to divert DTS from the mainstream of the existing manufactured housing market) is -- and should be -- unacceptable to both the industry and consumers of affordable housing. This is particularly the case insofar as a January 2019 report by the Consumer Financial Protection Bureau (CFPB) entitled "Ability to Repay and Qualified Mortgage Rule Assessment Report," shows that manufactured housing loans, since 2012, have *declined* as a share of home loan originations for *both* large and small lenders. (See, January 2019 CFPB Report, p. 222, Table 39 and related text).

Thus, while Congress intended to bolster GSE support for consumer lending on affordable manufactured homes through DTS to market-significant levels, and thereby increase the availability of affordable manufactured homes for lower and moderate-income American families, the GSEs' continuing failure to comply with that mandate -- particularly with respect to manufactured home personal property/chattel loans -- has actually had an adverse impact on manufactured home consumer lending, and is further indication that the GSEs are not, in fact, interested in providing market-significant support for the personal property/chattel loans that the vast bulk of moderate and lower-income American families rely upon to purchase an inherently affordable manufactured home.

MHARR, accordingly, will continue to aggressively press for the full and market-significant implementation of DTS as FHFA (and oversight of the GSEs) transitions to new leadership appointed by President Trump.

## MH PRODUCTION GROWS IN 2018 BUT STILL SHORT OF 100K BENCHMARK

While the production of HUD Code manufactured homes in 2018 continued to gradually increase from its historic low of just 49,683 homes in 2009, total production for the year still failed to break the benchmark 100,000 home level, last surpassed in 2006. While the consistent production growth achieved by industry manufacturers since 2009 is encouraging, the industry's inability to return to production levels that consistently exceeded 100,000 homes-per-year for decades – often by significant margins – in a strong economy with strong corresponding demand for the type of inherently affordable homeownership that manufactured housing provides, points to continuing problems affecting the manufactured housing market, and particularly its post-production sector, that must be effectively addressed to allow the entire industry to meet its full economic potential.

As reported by the U.S. Department of Housing and Urban Development (HUD), industry manufacturers, in 2018, produced a total of 96,555 homes, an increase of 3.9% over the 92,902 HUD Code homes built by industry manufacturers in 2017. After nearly 85 months of sustained production growth, however, 2018 ended with four consecutive months of year-over-year production declines, leaving the annual production total just short of the 100,000-home benchmark. While overall industry production, therefore, has expanded by a factor of nearly 95% since reaching its low-point in 2009, production over the same period has remained well below not only the 100,000-home benchmark, but also the industry's twenty-year (1999-2018) production average of 166,008 homes per year, and its thirty-year (1989-2018) production average of 169,662 homes per year.

The fundamental question arising from this data is, why is the HUD Code industry – from both a short and longer-term perspective – not doing better (i.e., producing and selling hundreds-of-thousands-of homes per year)? As MHARR has explained in detail, the problem does not currently lie within the industry's production sector. While still burdened by HUD (and other government) regulatory overreach and regulatory compliance costs in various respects, the production (or supply) side of the industry's economic equation is *not* the principal culprit in its failure to return to – and exceed – its historical level of market performance. Rather, objective analysis shows that the principal market-limiting factors for the industry today, are clustered, *almost entirely* on the demand – or post-production -- side of the equation (i.e., once the home leaves the factory), where they have not been addressed either decisively or effectively.

Those market-limiting post-production factors are primarily concentrated in three areas: (1) exclusionary local zoning ordinances and mandates that discriminate against manufactured homes and manufactured homeowners; (2) other types of local placement restrictions or limitations on individual manufactured homes and manufactured home communities; and, most importantly (3) the continuing lack of support for mainstream manufactured home consumer financing – and most particularly manufactured home personal property (i.e., chattel) loans -- by Fannie Mae and Freddie Mac under the "Duty to Serve Underserved Markets" (DTS) mandate, and the Federal Housing Administration (FHA) and Government National Mortgage Association (Ginnie Mae) under HUD's nearly moribund Title I manufactured housing program.

Both individually and in combination, this post-production "brick wall," has created an economic "perfect storm" that especially harms smaller industry businesses and HUD Code consumers, while benefitting only the industry's largest businesses. Being unresolved and left to fester through ineffective national-level representation of the post-production sector, they have taken a cumulative toll on the industry *as a whole*, while eliminating large numbers of potential purchasers from the manufactured housing market and unfairly penalizing the rest. This state of affairs *must* change in order for the industry to reach its full potential. But that will require industry members to demand aggressive action on these and a full-range of other post-production issues, including, but not limited to, national-level marketing, promotion and advertising programs to advance the industry and its homes.

Consistent with this, and as with its in-depth November 1, 2017 study exposing the dire need for an independent, national manufactured housing post-production representation, MHARR will now undertake a new study regarding such much-needed, national-level programs. This subject will then be addressed at the upcoming MHARR Board of Directors meeting.

## FOCUS SHIFTS TO HUD MONITORING CONTRACT

As activity continues at HUD on the implementation of Trump Administration regulatory reform Executive Orders (EOs) 13771 and 13777, a crucial ongoing issue for the *institutional* reform of the HUD manufactured housing program will be the award of a new program "monitoring" contract.

The Manufactured Housing Improvement Act of 2000 mandates, among other things, two major institutional reforms of the HUD manufactured housing program -- (1) the appointment of a non-career administrator to run the program; and (2) the competitive selection of an independent "monitoring" contractor, responsible for the statutorily limited and defined function of evaluating the performance of Primary Inspection Agencies. And while MHARR continues to urge HUD to appoint a non-career program administrator as required by the 2000 reform law, and addressed that issue at a recent meeting with HUD Assistant Secretary Brian Montgomery, only a few months remain before HUD solicits and awards a new contract for program "monitoring" services, which directly impacts in-plant regulatory (and regulatory-related) activity.

As was previously reported by MHARR, the last multi-year HUD manufactured housing monitoring contract expired in mid-2018. In November 2017 HUD hosted an "Industry Day" event for potential bidders, which attracted several interested firms. With the Trump Administration's reassignment of former program Administrator, Pamela Danner at the end of 2017, however, the procurement of a long-term replacement contract did not take place. Instead, HUD issued a one-year, sole-source, "bridge contract" to the incumbent contractor – the Institute for Building Technology and Safety (IBTS). That non-competitive contract, however, will expire soon, meaning that HUD will once again be faced with soliciting a new replacement contract.

While "monitoring"-related abuses within the program appear to have abated somewhat, over the short-term, due in part to oversight by the Trump Administration and HUD Secretary Ben Carson, as well as apparent caution on the part of the incumbent contractor with the award of a new contract hanging in the balance, the reality is that this abatement in a long-term history of regulatory abuses, ever-expanding contract functions and baseless, costly intrusions in the factory-based construction process -- with a resulting program "culture" that needlessly stifles innovation and additional cost savings that could be passed to consumers -- could (and, most likely, would) turn on a dime and return to, or even exceed, unacceptable past levels. It is essential, therefore, that the Trump Administration fully comply with the 2000 reform law in soliciting and awarding the next full-term monitoring contract, and that it act decisively to end the 40-year-plus de facto contract monopoly of the incumbent contractor, IBTS.

Indeed, for any of the Trump Administration's regulatory reform agenda to have a real or lasting impact on the federal manufactured housing program, the 40-year-plus monitoring contract monopoly *must* be ended, and the contracting process itself *must* be reformed in order to produce full and fair competition, as required by law throughout the federal government. Put differently, real and *lasting* change for the federal program will require a *fundamental* shift in the way that the program does business with respect to the monitoring function, including the monitoring contract itself, the nature and scope of the monitoring function, and ultimately, hiring a new program monitoring contractor.

The contract manipulation that has sustained this de facto monopoly and the resulting domination of the program over the course of its existence by one entrenched, self-serving contractor, has had a ruinous effect on the HUD manufactured housing program, the industry itself and consumers in particular, as the purchase price of manufactured homes has needlessly been inflated by unnecessary, unjustified and baseless expansions of regulatory compliance burdens at the initiative and behest of the entrenched contractor. The needless regulatory costs and burdens imposed because of the contractor, moreover, disproportionately impact and harm smaller industry businesses (and consumers of affordable housing) while conversely benefitting the industry's largest producers, which can spread spurious pseudo-regulatory costs over a larger base of production.

If this is to change and if the HUD manufactured housing regulatory "swamp" is to be "drained," the program must conduct an open, competitive and unbiased monitoring contract solicitation, leading to full and fair competition and, most importantly, a new contractor.

## CONGRESS RENEWS GSE REFORM DEBATE

The institutional reform of the housing finance market – and federal government involvement with that market -- has once again emerged as a potential issue both in Congress and within the Trump Administration.

In Congress, the Chairman of the Senate Banking Committee has offered a summary "blueprint" for reform of the two Government Sponsored Enterprises (GSEs) – Fannie Mae and Freddie Mac. Similarly, there have been indications that the Treasury Department and/or the Federal Housing Finance Agency (FHFA) – soon to be under the leadership of a new Director appointed by the Trump Administration -- could unilaterally propose and implement unspecified changes to the role and/or activities of the GSEs via existing administrative oversight and enforcement authority.

In conjunction with these reports, some within the industry have touted the alleged need for – and ostensibly have begun to pursue as part of the GSE "reform" process – new statutory provisions to supposedly spur institutional GSE (or GSE-successor organization) support for manufactured home consumer lending. New laws, however, are not only unnecessary, given the good laws that the industry already has on the books, but represent a distraction and diversion from the effort that is genuinely needed and, in fact, essential for manufactured housing to realize its full economic potential, i.e. – (1) the full and market-significant implementation of all aspects of the Duty to Serve Underserved Markets (DTS) addressing manufactured housing but, most particularly, the full implementation of DTS with respect to the personal property loans/chattel which constitute the vast bulk of the manufactured housing consumer finance market; and (2) the full and proper implementation of all remaining reform aspects of the Manufactured Housing Improvement Act of 2000, including the appointment of a non-career program administrator and a "top-to-bottom" reform of the process for the solicitation and selection of a new monitoring contractor, leading to an end to the existing 40-year-plus monopoly on that contract.

Simply put, there is no legitimate need to "reinvent the wheel" with respect to either manufactured home consumer financing or the full, proper and final reform of the HUD manufactured housing program in accordance with the 2000 reform law. In each case, the industry -- and relevant federal government agencies -- have all the statutory authority that they need to accomplish the ends that Congress intended. (And in the case of GSE reform, MHARR has already researched and drafted relevant statutory reform language, which was previously included in a proposed GSE reform bill, S. 1217, entitled "The Housing Finance Reform and Taxpayer Protection Act of 2014" -- in the event that such language is ever needed.) What is needed now, however, is not a new statutory diversion, but a legitimate, focused and aggressive effort to fully implement the good laws that have already been enacted to spur the growth of the HUD Code manufactured housing industry and the availability of affordable manufactured homes for millions of American homebuyers. MHARR is fully committed to such an effort, and, accordingly, will develop new and additional approaches to this matter for consideration at its upcoming Board of Directors meeting.

## HUD ANNOUNCES MHCC AND SUBCOMMITTEE MEETINGS

HUD, in a series of notices published in the February 14, 2019 edition of the Federal Register, has announced the next in-person meeting of the full Manufactured Housing Consensus Committee (MHCC) (April 30, 2019 to May 1, 2019) and teleconference meetings of both he MHCC's Regulatory Enforcement (April 2, 2019) and Technical Systems subcommittees (April 3, 2019). Based on the tentative agendas published together with the meeting notices, the April 2, 2019 Regulatory Enforcement Subcommittee meeting will focus primarily on the revised manufactured housing energy standards proposed by the U.S. Department of Energy (DOE) in its August 3, 2018 Notice of Data Availability (NODA), while the April 3, 2019 Technical Systems Subcommittee meeting will focus primarily on issues (including de-regulatory proposals) relating to HUD's proposed Interpretive Bulletin (IB) concerning "frost-free" foundations. The full MHCC meeting, in turn, will address a long list of pending log items left-over from the MHCC's September 2018 in-person meeting, including numerous de-regulatory proposals growing out of HUD's Executive Order 13771 and 13777 regulatory review processes, as well, possibly, as any recommendations flowing from the subcommittee meetings in early April.

In addition, with the end of the partial federal government shutdown, HUD has named new members to the MHCC -- including a new producer-member -- although the names of the new appointees (as of press time for this Update) have not yet been made public by the Department.

MHARR, as always, will fully participate in all MHCC and MHCC subcommittee proceedings to ensure that the interests of the industry's independent manufactured housing businesses – as well as manufactured housing consumers – are fully represented and protected. In addition, as noted previously, MHARR will prepare and distribute, in advance of the MHCC meetings, a comprehensive analysis and refutation of a HUD Office of Policy Development and Research (PD&R) memorandum concurring with DOE data and methodologies underlying its August 3, 2018 NODA proposals for manufactured housing energy standards (see, article above).