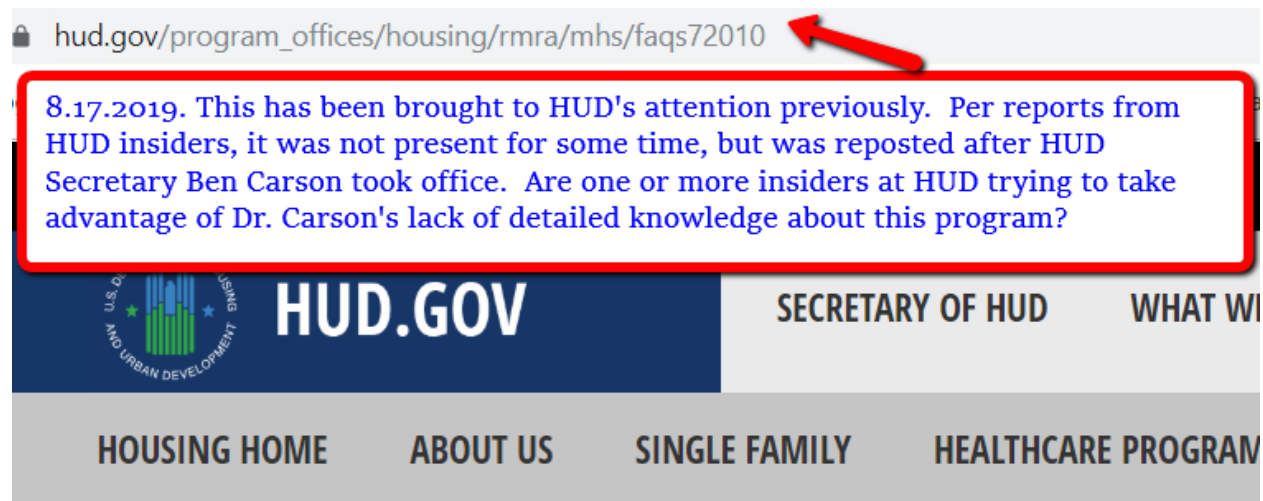


## RECENT PROGRAM ACTIVITY MANUFACTURED HOUSING IMPROVEMENT ACT OF 2000 PAGE ON HUD WEBSITE ON DATE SHOWN



8.17.2019. This has been brought to HUD's attention previously. Per reports from HUD insiders, it was not present for some time, but was reposted after HUD Secretary Ben Carson took office. Are one or more insiders at HUD trying to take advantage of Dr. Carson's lack of detailed knowledge about this program?

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### RECENT PROGRAM ACTIVITY

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The Manufactured Housing Improvement Act of 2000 (2000 Act) significantly amended the Manufactured Housing Construction and Safety Standards Act (the Act) by creating new mandates for manufactured home installation and dispute resolution. Other significant amendments included a requirement that the Secretary establish the Manufactured Housing Consensus Committee (MHCC) and an authorization for the Secretary to appoint a non-career Administrator of the manufactured housing program. Though budget restrictions have slowed the Department's implementation of the new installation and dispute resolution programs, HUD believes it has otherwise fully implemented the requirements of the 2000 Act.

What follows are HUD's responses to a number of questions that have been frequently asked regarding the 2000 Act.

I. Does the Manufactured Housing Improvement Act of 2000 (2000 Act) require HUD to appoint a non-career administrator for the manufactured housing program?

No, the 2000 Act leaves the decision to make this appointment to the Administration. Section 620(a) of the Act grants the Secretary the authority to collect fees from manufactured home manufacturers and use the money to offset the expenses incurred by the Secretary in carrying out the Act. Section 620(a)(1) enumerates seven expenses that these fees funds may be used to offset. As provided in Section 620(a)(1)(C), one of those expenses is "the funding for a non-career administrator within the Department to administer the manufactured housing program." Section 620(a)(2) then repeats that the Secretary may use fee money to pay for the seven expenses listed in 620(a)(1). HUD's General Counsel has concluded that the 2000 Act, in particular Section 620(a)(1), contains no express or implied requirement for the Secretary to appoint a non-career administrator. Outside of Section 620(a)(1)(C), there are no other references to the non-career administrator in the 2000 Act. In contrast, many of the other expenses listed in Section 620(a)(1) have cross citations to the relevant parts of the Act that mandate the Secretary to take action.

## **2. What role does the 2000 Act give to the Manufactured Housing Consensus Committee (MHCC)?**

The MHCC is established in Section 604(a)(3) of the 2000 Act. The MHCC essentially replaced the National Manufactured Home Advisory Council that was established by prior Section 605. The legislative history of the 2000 Act describes the MHCC as "designed to develop and recommend additions, revisions, and interpretations to the Manufactured Home Construction and Safety Standards and enforcement regulations to the Secretary of HUD" (House Report 106-553). Section 604(a)(3)(A), the MHCC's purposes clause, confirms that the MHCC is established to provide the Secretary with recommendations regarding the construction and safety standards and enforcement regulations. Section 604(a)(3)(A)(iv) specifically describes the MHCC as "an advisory committee not composed of Federal employees." Accordingly, the MHCC has been chartered as a Federal advisory committee, subject to the Federal Advisory Committee Act (FACA). That being said, the program office and program counsel have worked closely with the MHCC on all HUD standards and regulations. HUD published an interpretive rule regarding the MHCC process in the Federal Register on February 5, 2010. That rule clarified the statutory language regarding the matters that are subject to MHCC review. Since the Department first chartered the MHCC as a federal advisory committee in 2002, HUD's consistent position had always been that Congress did not intend the MHCC to be more than a HUD advisory committee for standards and regulations. As a private advisory body not composed of federal employees, MHCC members are not required to comply with Federal ethics laws and do not have HUD's responsibilities for public safety and consumer protection. As this interpretive rule makes clear, the Department is not required to involve the MHCC in program decisions unless they would be considered rules under the Administrative Procedure Act (APA). HUD's lawyers have found nothing in the 2000 Act or the Congressional Record that authorizes a broader, more governmental role for the MHCC.

Significant amendments were made to the MHCC charter and MHCC bylaws in January 2010. HUD developed the new charter and bylaws during several months of discussions with the Committee Management Secretariat at the General Services Administration (GSA) and HUD's Office of Ethics Counsel. GSA staff, who monitor all of the nearly one thousand federal advisory committees, are the experts in this field. After carefully reviewing the 2000 Act, GSA agreed with HUD that, despite the complex rulemaking process HUD and the MHCC must observe, Congress did not intend for the MHCC to be anything other than a federal advisory committee. GSA was especially helpful in pointing out provisions in the prior organizing documents that were either unnecessary or otherwise out-of-step with normal federal advisory committee practice. As a federal advisory committee, the members of the MHCC are essentially part time HUD volunteers who play a vital part in updating HUD's standards and regulations. The revised charter and bylaws were expected to bring better organization to the MHCC process so that HUD could maintain a three-year revision cycle as do most other code bodies.

## **3. Does the 2000 Act give the MHCC broad oversight authority and jurisdiction over HUD's Manufactured Housing Program?**

No. Some have claimed that the 2000 Act gave the MHCC broad oversight authority and jurisdiction over HUD's Manufactured Housing Program. However, no oversight authority or jurisdiction is provided for the MHCC by the 2000 Act, nor is it mentioned in the Congressional legislative history of the 2000 Act. The MHCC is actually a HUD Federal advisory committee. Though Congress designed a complex working relationship for the MHCC and HUD regarding standards and regulations, it did not provide the MHCC with the inherently governmental authority to affect the administration and enforcement of the HUD manufactured housing program itself.

#### **4. Does HUD By-Pass the MHCC in the Final Stages of Rulemaking?**

No. Once an MHCC proposal is submitted to HUD, HUD must follow the rulemaking process provided for in the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq. Though HUD may continue to consult with the MHCC after a proposal is submitted, the MHCC is simply not a part of the APA process.

When the MHCC was formed in 2002, it was soon realized that certain language in the 2000 Act regarding MHCC submissions to the Secretary was impractical. Section 604(a)(4)(ii) requires that the MHCC submit proposed revised standards "in the form of a proposed rule, including an economic analysis." It was recognized by all involved that the MHCC did not have the technical expertise to present the Secretary with a rule package that would comply with the requirements of the Federal Register and the APA. As a result, HUD and the MHCC agreed that the MHCC would prepare the rule itself, while HUD would collect the necessary supporting information and then prepare the proposed rule for the MHCC's approval. Once the completed package is approved by the MHCC, it is then subject to a lengthy review and clearance process, first within the Department and then by the Office of Management and Budget (OMB) and finally Congress. Some minor changes are invariably made during this process before the proposed rule is published in the Federal Register for public comment.

Once public comments are received, they are all reviewed by HUD, and the final rule is normally subject to some changes in response to the comments. However, the APA requires the Department to clearly identify all changes in the final rule that affect the substance of the proposed rule. The final rule is then subject to review and clearance both within HUD and at OMB, during which additional changes are possible. Only then can the final rule be published in the Federal Register and become law.

#### **5. Does the 2000 Act require HUD to present its interpretations of the manufactured housing standards and regulations to the MHCC for review and comment before it can enforce them?**

No. The MHCC is a HUD Federal advisory committee for standards and regulations. Accordingly, the Department engages extensively with the MHCC on every rulemaking. HUD added provisions to both the installation and dispute resolution rules to provide the MHCC with continued rulemaking involvement equal to that established in section 604(a)(3)(A) of the Act for the construction and safety standards and regulations.

Once rules are published, however, enforcement of those rules is the responsibility of the Department, not the MHCC. It is a fundamental tenet of administrative law that the agency that promulgates a rule may interpret that rule as necessary for purposes enforcement. Indeed the courts defer to an agency's interpretation so long as it is reasonable. Section 604(a)(3)(A) of the 2000 Act authorizes the MHCC to propose interpretations of the construction and safety standards and regulations to the Secretary. Section 604(b)(2) of the 2000 Act also authorizes the MHCC to propose interpretive bulletins to the Secretary to clarify the meaning of a construction and safety standard or regulation. However, neither section suggests that HUD must suspend enforcement of its standards and regulations while the MHCC develops such proposals. However, if the MHCC disagrees with an

enforcement decision made by HUD, the MHCC may develop and propose its own interpretation or interpretive bulletin for the Secretary's consideration.

## **6. How does HUD justify shifting the emphasis of the manufactured housing program toward quality assurance without the review and approval of the MHCC?**

The 2000 Act does not require HUD to consult the MHCC before it interprets and enforces its own regulations. However, as part of its renewed emphasis on quality assurance and plant certification, HUD did propose to the MHCC that they work together to revise the regulations for the Primary Inspection Agencies (PIAs). Those regulations include the rules that govern quality assurance and plant certification. Though the MHCC had previously worked closely with HUD to develop regulations such as On-Site Completion of Construction for Manufactured Homes, certain members now object that such cooperation with HUD was not permitted by the 2000 Act. HUD then developed revisions to these regulations internally and presented them to the MHCC for their 120 day written comment period as required by Section 604(b)(3)(ii). The MHCC eventually voted not to submit written comments on these revisions.

By way of background: following life-threatening production defects that were discovered in 2006, HUD decided to increase its emphasis on the enforcement of its quality assurance regulations at 24 CFR 3282.203(c) and (d). As part of this emphasis, HUD significantly changed the expectations for its agents that inspect production in the plant, known as PIAs. HUD had previously emphasized code compliance with the PIAs, essentially asking the PIAs to serve as building inspectors of the finished products. The new emphasis asked PIAs to verify that the quality assurance systems for manufacturing required by 24 CFR 3282.203(c) and (d) were in place and effective. Compliance with 24 CFR 3282.203(c) is essential to a manufacturing plant's certification (license) to produce HUD-code homes. More importantly, HUD considers effective quality assurance as the best way to eliminate the defects and imminent safety hazards that can threaten consumer safety and ultimately provide cost savings benefits to the manufacturers. HUD published field guidance for the PIAs, and established a process of cooperative assistance to facilitate the updating of existing quality assurance practices and plant certifications. If the manufacturer elects the cooperative assistance process, no enforcement action is taken by HUD. This process was designed to be a collective effort by all parties to identify elements that may be missing from a manufacturer's quality assurance manual and then ensure that those elements are both updated and implemented in manufacturer's quality control programs and that plant certification is updated accordingly.

## **7. Does HUD discriminate against the industry in selecting MHCC members?**

No. In 2009, the Administration began barring federally registered lobbyists from serving on advisory committees. Accordingly, in 2010 the FHA Commissioner decided not to appoint representatives of industry groups the Manufactured Housing Institute (MHI) or the Manufactured Housing Association for Regulatory Reform (MHARR) to the MHCC. MHARR objected to that decision. However, the producer category included representatives from the following manufacturers: Cavco, Clayton, Cavalier, Champion and ScotBilt. Also in the producer category were two retailers, one of whom previously owned and operated the manufacturer Burlington Homes. The producer category therefore had a full compliment of industry representatives. Also on the MHCC, though in the general interest category, was the former Vice President of Technical Activities for MHI.

## **8. Why has HUD's third-Party administering organization had interruptions in service to the MHCC?**

When the MHCC was first formed in 2002, the Department executed a contract with the National Fire Protection Association (NFPA) as the MHCC's Administering Organization (AO). When this response was prepared in 2010, HUD still maintained a contract with the NFPA for these services. The NFPA is recognized as one of the foremost experts at maintaining the consensus

process established by the American National Standards Institute (ANSI). The 2000 Act requires HUD to follow ANSI procedures and even apply to ANSI for accreditation. This application was denied in 2002 for a number of reasons, the most significant being the lack of the appeals process that ANSI requires.

From 2002 to 2010, there were two gaps in NFPA's service, one when the original contract expired before the procurement process for the new contract was completed, and another when HUD's Office of Procurement suspended NFPA's service to examine the form of certain payments. During both gaps in service, HUD's manufactured housing program office took on the AO's responsibilities, which included scheduling of teleconference meetings, preparation of meeting minutes, and distribution of numerous documents. While the MHCC members themselves expressed appreciation for the efforts of the program office, others complained that HUD would use these gaps in service to undermine the MHCC. HUD can now say that this concern was completely unwarranted.

#### **9. Does the 2000 Act expand the scope of Federal preemption?**

No, though revised language in Section 604(d) does require that the original preemption provision be "broadly and liberally construed." HUD does in fact take a broad and liberal view with regard to preemption of state and local standards when they actually conflict with HUD's Manufactured Home Construction and Safety Standards (construction and safety standards). Whenever the HUD program office receives information that suggests that a local jurisdiction is trying to enforce its own construction or safety standard against an element of performance that is addressed by HUD's construction and safety standards, a letter is written to that jurisdiction informing them that such local laws are subject to federal preemption under the Act.

Section 604(d) provides that if a home is built to the HUD code, state and local building authorities may not apply their own codes that are "applicable to the same element of performance." HUD has always understood that Federal preemption of state and local codes is one of the biggest competitive advantages the HUD-code manufactured housing industry has over-site built and modular housing. Maintaining the viability of federal preemption is therefore critical to the entire HUD-code business model. For preemption to work, however, the Act requires that HUD's construction and safety standards address the same elements of performance as the International Residential Code (IRC) and other state and local codes. Otherwise local code authorities are free to enforce their own code provisions. The Department and the MHCC therefore concentrate on maintaining preemption by updating the elements of performance addressed by the construction and safety standards.

A good example would be fire sprinkler systems. Fire sprinkler systems are being increasingly required by state and local governments for all new single family homes. Though HUD always had general fire safety standards, HUD had no standard for mechanical fire suppression. HUD has long held that state and local sprinkler requirements are, therefore, not preempted by the general fire safety standards. This left state and local government free to dictate all elements of the sprinkler system that a manufactured home must have in order to be sited in the jurisdiction. The fire sprinklers standard that HUD proposed in 2010 would change all of that. During the MHCC review process, and then again in public during the comment period for the proposed rule, industry experts had the chance to work with HUD to develop, in this case, a cost effective sprinkler system that can be installed during the production process. And this standard would only apply in those jurisdictions that require fire sprinklers. This is an important point because there are concerns that HUD intends to require fire sprinklers in all manufactured homes. That is simply not the case.

#### **10. Does Federal preemption apply to the Model Manufactured Home Installation Standards (installation standards) mandated by the 2000 Act?**

No. The 2000 Act added language to section 604(d) that specifically guarantees that the federal installation standards will not preempt State installation standards:

Subject to section 605, there 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 . . .

Furthermore, the legislative history includes this statement from House Banking and Financial Services Chairman Leach: "The revisions to section 604 would . . . reinforce the proposition that installation standards and regulations remain under the exclusive authority of each state." (Dec. 5, 2000, Cong. Rec. H11987), (emphasis added). In Additional Views that were included in the House Report on the bill, Ranking Member LaFalce noted that ". . . for the first time, we will be setting a national minimum installation standard . . ." H. Rpt. 106-553 pg. 182, (emphasis added). In earlier floor remarks, Rep. LaFalce had said: "States that wish to have their own installation standards may continue to do so, as long as they provide protections comparable to the model standards" (Oct. 24, 2000, Cong. Rec. H10685).

**11. Could HUD have made the installation standards preemptive by publishing them in the same section of the Code of Federal Regulations (CFR) as the construction and safety standards?**

No. As a matter of law, no decision by HUD, including a decision regarding publication of its implementing regulations, could diminish the force and effect of an Act of Congress. Congress clearly stated in the 2000 Act that it did not intend for installation standards to be preemptive of state and local requirements.

**12. Why did HUD publish the installation standards in a new section of the CFR?**

HUD codified the installation standards and regulations in new parts of the CFR as a matter of administrative necessity, in order to maintain the clear distinctions the 2000 Act makes between installation and construction. The regulatory structure Congress has provided in section 605 of the 2000 Act for enforcement of the installation standards is entirely different from the enforcement authority it previously gave HUD for the construction and safety standards. Primary enforcement authority for installation is found only in section 605 itself, which provides limited authority to enforce consumer interests while adding entirely new requirements regarding the licensing and training of installers. Given the relatively broad enforcement authority the Act provides for construction and safety programs, HUD considered separate publication of these standards and regulations as fundamental to maintaining the regulatory separation necessary to administer two such different programs.

**13. Did HUD's publication of the installation standards in a new section of the CFR deprive the MHCC of future involvement in development of these rules?**

No. The 2000 Act itself does not provide the MHCC with any role for the installation standards beyond the development of an initial proposal for submission to the HUD Secretary. To address this shortcoming of the 2000 Act, HUD added provisions to both the installation standards and regulations that specifically provide the MHCC with continued rulemaking involvement equal to that established in Section 604(a)(3)(A) of the 2000 Act for the construction and safety standards and regulations. (See 24 CFR 3285.1(c) and 24 CFR 3286.15)

**14. Did HUD's publication of the Manufactured Home Dispute Resolution Program (dispute resolution program) rules mandated by the 2000 Act in a new section of the CFR deprive the MHCC of future involvement in development of these rules?**

No. Section 623(g) of the 2000 Act requires the HUD Secretary to establish a dispute - resolution program. As with the installation standards and regulations, HUD chose to codify the dispute-resolution program regulations in new part of the CFR as a matter of administrative necessity. This time it was codified to maintain the clear distinction between the manufactured housing program's enforcement of the installation and construction standards and HUD's administration of a forum for the resolution of disputes among private parties. The 2000 Act provides no role for the MHCC in the development of the rules for this program. Nevertheless, HUD fully included the MHCC in the development of the dispute resolution program rules that were published as final rules in May of 2007. Just as with the installation standards and regulations, HUD specifically added language to the dispute resolution regulations to provide the MHCC with continued rulemaking involvement equal to that established in Section 604(a)(3)(A) of the 2000 Act for the construction and safety standards and regulations. (See 24 CFR 3288.305)

#### **15. Does the 2000 Act require HUD to get approval from Congress to raise the label fee?**

The language that Congressional appropriators included each year since passage of the 2000 Act (" . . . fees pursuant to Section 620 shall be modified as necessary to ensure such a final fiscal year . . . appropriation") had given HUD the authorization necessary to publish a rule proposing to raise the manufactured housing label fee in order to support the appropriated level.

#### **16. What can HUD do to encourage new and advanced technology?**

HUD freely accepts and often grants applications to use innovative technologies under its rules for Alternative Construction of manufactured homes. (24 CFR 3282.14) Some have complained that the Act itself has restraints that limit the technological evolution of manufactured housing. This has generally been in reference to the Act's definition of "manufactured home," which requires construction to be on "a permanent chassis." (Section 603(6)). Any decision to remove the permanent chassis requirement would be a legislative issue for Congress to address, not HUD.

#### **17. How does HUD explain that a single series of companies has held the contract to monitor the performance of its inspection agents since 1976?**

IBTS is a 501(c)(3) organization. Its five member board includes representatives from The National League of Cities, the Council of State Governments, The International City/County Management Association, The National Governor's Association, and The National Association of Counties. While this organization and its predecessors had in fact performed the monitoring function for over 30 years, it had always done so under the competitive bidding processes required and specified under the Federal Acquisitions Regulations (FAR). IBTS and its predecessors had always provided exemplary service to HUD, with an uninterrupted history of unqualified audits.

As required by Section 620(a)(2) the 2000 Act, the Department has competed and awarded separate contracts for services such as training and electronic data management. These functions had previously been part of a larger umbrella contract held by IBTS predecessor Housing and Building Technology. Under new restrictions imposed by Section 620(a)(2), a contractor is only eligible for one contract related to this program. However, there is nothing in the 2000 Act that prevents a contractor from continuing to be awarded any single contract for any set of services required by this program.

The manufactured housing monitoring contract requires performance monitoring of the HUD agents that inspect manufactured home design and production. The contractor must also maintain a library of all manufactured housing design pages, produce and distribute HUD compliance labels, collect HUD compliance label fees, and verify missing label information as requested by lenders, zoning officials and others. These have become highly specialized activities, and it should come as no surprise that few bids have

come when this contact has been competed over the years. Given the restrictions that the 2000 Act has placed on manufactured housing program contractors, HUD does not expect to see an increase in bidders going forward.



The above is part of a report found on MHPRONews at this link below.

<https://www.manufacturedhomepronews.com/state-exec-mainstream-media-news-tip-on-mhi-member-whats-manufactured-housing-institute-response-to-concerns>