January 9, 2020

<u>VIA FEDERAL EXPRESS</u>
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: White House Council on Eliminating Regulatory Barriers to Affordable Housing -- Request for Information – Docket No. FR-6187-N-01

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 as amended by the Manufactured Housing Improvement Act of 2000 (42 U.S.C. 5401, et seq.). MHARR is the only national organization to exclusively represent the interests of smaller, independent manufactured housing industry businesses.[1] MHARR was founded in 1985. Its establishment became essential in order to counter and restrain federal regulatory excesses and abuses – principally, but not exclusively involving HUD – which uniquely and inequitably burdened smaller manufactured housing industry businesses.[2] MHARR's members include manufactured housing producers from all regions of the United States.

I. INTRODUCTION

Through Executive Order (EO) 13878,[3] issued on June 25, 2019, President Trump established the White House Council on Eliminating Regulatory Barriers to Affordable Housing

[1] All MHARR members are "small businesses" as defined by the U.S. Small Business Administration (SBA) and are "small entities" for purposes of the Regulatory Flexibility Act (5 U.S.C. 601, et seq.)

[2] Research conducted on behalf of the U.S. Small Business Administration (SBA) demonstrates that federal regulatory burdens and related regulatory compliance costs disproportionately impact small businesses. See generally, U.S. Small Business Administration Office of Advocacy, "The Impact of Regulatory Costs on Small Firms," (Nicole V. Crain and W. Mark Crain) September 2010.

[3] See, 84 Federal Register, No. 125 (June 28, 2019) at p. 30853, et seq.

(“White House Council” or “Council”). Pursuant to EO 13878, the Council is directed to “address, reduce, and remove the multitude of overly burdensome regulatory barriers” at the federal, state and local level “that artificially raise the cost of housing” and “cause the lack of housing supply.”[4](Emphasis added). Subsequently, on November 22, 2019, HUD published a Request for Information (RFI) in the Federal Register,[5] seeking “public comment on Federal, state [and] local … regulations, land use requirements and administrative practices that artificially raise the costs of affordable housing development and contribute to shortages in housing supply”[6] for consideration and follow-up by the White House Council. Among other types of regulatory barriers to the availability of affordable housing and an affordable housing supply consistent with the needs of millions of American families, both EO 13878 and the November 22, 2019 HUD RFI specifically refer to “overly restrictive zoning … controls,” “excessive energy … mandates” and “outdated manufactured housing regulations and restrictions,” all of which “restrict the supply of housing, particularly unsubsidized middle-market housing affordable to working families.”[7]

As is set forth and explained in greater detail below, each of the following regulatory barriers have significantly impaired the production, supply and utilization of federally-regulated manufactured housing – with correspondingly devastating effects on the availability of affordable homeownership opportunities for moderate and lower-income American families -- and will continue to cause further and additional harm to consumers of affordable housing and irreparable harm to the nation as a whole, unless significantly reduced and/or eliminated prior to the slated termination of the Council on January 21, 2021.[8] Fortunately, however, as is also explained below, in each instance identified by the EO and RFI – i.e., excessive and outdated regulation, overly restrictive zoning edicts and excessive energy mandates – the Executive Branch already has available to it all of the statutory and remedial authority needed to eliminate such regulatory barriers that have needlessly and without legitimate basis hampered and stunted the availability of federally-regulated manufactured housing for decades and have unnecessarily deprived millions of Americans of all the benefits of homeownership.

Such authority is specifically provided – in each applicable instance, and as is further explained below – by two federal laws: (1) the Manufactured Housing Improvement Act of 2000 (P.L. 106-569) which addresses all aspects of the federal manufactured housing program and the construction, production, installation and utilization of HUD Code manufactured housing; and (2) the Duty to Serve Underserved Markets (DTS) provision of the Housing and Economic Recovery Act of 2008 (P.L. 110-289) which requires consumer financing support parity for manufactured homes by the Government Sponsored Enterprises (GSEs) and their federal regulator, the Federal Housing Finance Agency (FHFA).

Based on this authority, MHARR urges the White House Council and HUD to adopt, enact and aggressively pursue, at all applicable levels of government, the policy recommendations set forth below that will preserve and maintain the existing affordability of federally-regulated manufactured housing while expanding the availability of manufactured homes well beyond the

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[4] Id. at p. 30854.

[5] See, 84 Federal Register, No. 226 (November 22, 2019) at p. 64549, et seq.

[6] Id. at pp. 64549-64550.

[7] Id. at p. 64550.

[8] See, 84 Federal Register, No. 125 at p. 30855, Section 7.

historically-low production levels that have characterized the past decade-plus and into the realm of hundreds-of-thousands of homes per year. Further, in support of these recommendations, MHARR seeks and requests an opportunity to present direct, verbal testimony to the White House Council.

II. COMMENTS

A. MANUFACTURED HOMES ARE THE NATION'S MOST AFFORDABLE TYPE OF HOUSING AND HOME OWNERSHIP

Federally-regulated manufactured housing is unique within the specific context of EO 13878 and the mandate of the White House Council to reduce or eliminate excessive regulatory barriers that needlessly increase the cost of housing and homeownership, needlessly constrain housing production, construction and development, and needlessly exclude millions of Americans from homeownership by unnecessarily inflating housing costs. First, manufactured housing is the only type of housing that is directly regulated, as to its production and installation, by the federal government pursuant to federal law and federal regulations adopted pursuant to the original National Manufactured Housing Construction and Safety Standards Act of 1974 as amended by the 2000 reform law. As a result, many (and, indeed, most) of the unnecessary and unnecessarily costly regulatory burdens imposed on manufactured housing originate with – and are subject to the complete control of – the federal government. Therefore, the remediation of those burdens does not rest upon the cooperation or compliance of multiple levels of government but, instead, rests upon federal-level reforms and federal-level compliance.

Second, manufactured housing is unique because it is already – and long has been – the nation's most affordable type of non-subsidized housing and homeownership as determined by HUD itself. A 2004 HUD-sponsored study concluded that consumer-owned HUD-regulated manufactured housing over an eight-year sample period had a mean monthly housing cost that was consistently and substantially lower than the cost of ownership for other types of homes, or even the cost of renting a home.[9] Similarly, data compiled by the U.S. Census Bureau has consistently shown that the average structural price,[10] per square foot, of federally-regulated manufactured homes is far lower than the average per square foot structural cost of a site-built home.[11]

Third, federally-regulated manufactured housing is unique in that it is specifically recognized as affordable housing in federal law and that affordability, moreover, is legally protected by specific mandates incorporated by Congress in the original 1974 National Manufactured Housing Construction and Safety Standards Act, as amended, again, by the 2000

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[9] See, U.S. Department of Housing and Urban Development, "Is Manufactured Housing a Good Alternative for Low Income Families? Evidence from the American Housing Survey" (December 2004).

[10] I.e., the cost of the home itself, exclusive of the cost of the land on which the home is sited.

[11] See, e.g., Attachment 1, hereto, U.S. Census Bureau, "Cost and Size Comparisons: New Manufactured Homes and New Single-Family Site-Built Homes (2012-2017)," showing a 2017 average structural price (i.e., exclusive of land) of $71,900.00 ($50.42 per square foot) for new HUD Code manufactured homes and $384,900 ($111.05 per square foot) for new site-built homes. See also, Attachment 2, hereto, U.S. Census Bureau, "Cost and Size Comparisons: New Manufactured Homes and New Single-Family Site-Built Homes (2007-2016)" for comparable historical data to 2007.

reform law. These laws promote and protect the inherent affordability of HUD-regulated manufactured housing through numerous provisions. This include, but are not limited to: (1) the Act's Statement of Congressional "Findings" which recognizes manufactured housing as "a significant resource for affordable homeownership;"[12] (2) the Act's Statement of Congressional "Purposes" which provides that the Act is designed to "facilitate the availability of affordable manufactured homes and to increase homeownership for all Americans;"[13](3) the Act's Statement of Congressional "Purposes" which provides that the Act is designed "to ensure that the public interest in, and need for affordable manufactured housing is duly considered in all determinations relating to the federal standards and their enforcement;"[14]and (4) the Act's Statement of "Considerations in Establishing and Interpreting Standards and Regulations," which requires the Secretary of HUD to "consider the probable effect of [any] standard on the cost of the manufactured home to the public."[15]

The Act, moreover, in order to protect and preserve the fundamental affordability of federally-regulated manufactured housing from state and local-level regulatory encroachment, includes a "broad and liberal" federal preemption provision, which prohibits states and localities from: (1) establishing or maintaining <u>any</u> manufactured home construction and safety standard applicable to the same aspect of performance of manufactured home performance as a federal standard that is not identical to the federal standard; and (2) since the adoption of the 2000 reform law, from establishing or maintaining <u>any</u> "requirement" (regardless of whether or not the "requirement" is a construction or safety standard) that would "affect the uniformity and comprehensiveness of … the federal superintendence of the manufactured housing industry as established" by federal law.[16]

HUD-regulated manufactured housing, accordingly, unlike <u>any</u> other type of non-subsidized housing, is unique in that it is specifically recognized, protected and <u>defended</u> in federal law as an affordable housing resource that <u>may</u> <u>not</u> have its fundamental affordability unnecessarily or unreasonably impaired or undermined in <u>any</u> respect – <u>i.e.</u>, as to its construction, safety, placement, use, or utilization – by <u>any</u> level of government, whether it be federal, state or local. Nevertheless, in <u>direct contravention of these statutory protections</u>, manufactured housing, manufactured housing producers and manufactured housing consumers are <u>uniquely and unnecessarily burdened</u> at all levels of government -- and are subject to destructive <u>discrimination</u> by class and income, as well as discrimination in favor of larger industry businesses and against smaller businesses – through a repressive, baseless and debilitating combination of dysfunctional and prejudicial regulation, suppression by zoning/placement restrictions and lack of federal and quasi-federal support for acquisition financing.

The most direct, effective and straightforward remedy to remove these institutional obstructions that plague – and have long-plagued – the manufactured housing industry and its consumers is, quite simply, the full, complete and effective <u>implementation</u> of the good laws, stated above, that Congress has <u>already</u> enacted in order to advance the affordability, availability

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[12] <u>See</u>, 42 U.S.C. 5401(a)(2).
[13] <u>See</u>, 42 U.S.C. 5401(b)(2).
[14] <u>See</u>, 42 U.S.C. 5401(b)(8).
[15] <u>See</u>, 42 U.S.C. 5403(e)(4).
[16] <u>See</u>, 42 U.S.C. 5403(d).

and utilization of HUD-regulated manufactured housing and to achieve the full parity in the treatment of manufactured homes, manufactured housing consumers, and manufactured home financing that both the 2000 reform law and DTS were designed to achieve. Put differently, new laws, *per se* are not needed in order to accomplish the goals of EO 13878 (and the goals of EOs 13771 and 13777) in relation to manufactured housing. What *is* needed, is the will, initiative, focus and leadership to fully implement and enforce the positive laws that have already been enacted by Congress.

This means that the White House Council and the federal government more broadly, pursuant to EO 13878 and in accordance with the policies of the Trump Administration -- and utilizing the authority already provided in and by federal statute -- must act, as more fully explained below, to: (1) fully conform the HUD Office of Manufactured Housing Programs (OMHP) and its activities with all remaining reform provisions of the Manufactured Housing Improvement Act of 2000; (2) fully implement Executive Orders 13771 and 13777 by completing the pending "top-to-bottom" review of OMHP standards, regulatory practices and related actions initiated by HUD Secretary Ben Carson and eliminating or substantially revising aspects of the program which impose unnecessary, excessive, or needlessly costly mandates; (3) fully implement Executive Order 13891 "Promoting the Rule of Law Through Improved Agency Guidance Documents (October 9, 2019)[17] and Executive Order 13892 "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication" (October 9, 2019)[18]to retract and/or withdraw multiple HUD "field guidance" or similar sub-regulatory pronouncements issued by OMHP without prior Manufactured Housing Consensus Committee (MHCC) consideration or notice and comment rulemaking as required by applicable law; (4) eliminate the pending threat of excessive, unreasonable, unnecessary and discriminatory federal manufactured housing "energy" standards; (5) prevent states or localities from establishing or maintaining discriminatory zoning or placement edicts which either exclude or baselessly restrict the utilization of federally-regulated manufactured homes (through full implementation of the enhanced federal preemption of the 2000 reform law)[19]; and (6) fully implement the statutory "Duty to Serve Underserved Markets" with respect to the vast majority of manufactured home purchase loans currently served by personal property-based consumer financing. Each of these matters is more fully addressed below.

B. HUD MUST FULLY AND PROPERLY IMPLEMENT ALL REMAINING REFORM PROVISIONS OF THE 2000 LAW

The most fundamental key to eliminating the regulatory barriers (within the federal government and beyond) that have stunted the growth of the manufactured housing industry and have needlessly excluded millions of Americans from all the benefits of homeownership lies within HUD itself. Put succinctly, that key entails the full, proper and consistent implementation of all remaining reform elements of the Manufactured Housing Improvement Act of 2000, supplemented by the full and robust implementation of EOs 13771, 13777, 13891 and 13892, as addressed in subsequent sections. At its core, this means fully and properly implementing the 2000

[17] See, 84 Federal Register, No. 199 (October 9, 2019) at p. 55235, et seq.

[18] See, 84 Federal Register, No. 199 (October 9, 2019) at p. 55239, et seq.

[19] See, Section II(B)(2), infra.

reform law with respect to: (1) the appointment of a dedicated, non-career OMHP administrator; (2) "enhanced" federal preemption; and (3) fully-competitive procedures for the solicitation and award of the OMHP "monitoring" contract. All of these issues have needlessly continued to fester, while seriously harming the manufactured housing industry and consumers of affordable housing for nearly *two decades* following the enactment of the 2000 reform law, despite the fact that their resolution lies solely and exclusively in the hands of HUD and its senior leadership. The White House Council and the Trump Administration, therefore, could make a tremendous contribution to the availability and utilization of inherently affordable manufactured housing through unilateral executive action within HUD itself – requiring no further authorization or approval from any other branch or authority – to fully and finally implement these remaining 2000 Act reforms, as set forth below.

1. The Law Requires -- and HUD Should Appoint -- a Non-Career OMHP Administrator

Section 620(a)(1)(C) of the 2000 reform law directs HUD to "provid[e] … funding for a non-career administrator within the Department to administer the manufactured housing program." (42 U.S.C. 5419(a)(1)(C)). Congress directed the appointment of a non-career program Administrator not only to increase the accountability and transparency of the federal program, but also to act as a full-time advocate for manufactured housing, to "facilitat[e] the acceptance of the quality, durability, safety and affordability of manufactured housing within the Department." (42 U.S.C. 5419(a)). Since 2004, however, the manufactured housing program has not had a non-career administrator, while HUD has consistently refused pleas from program stakeholders to comply with this critical statutory reform.

Without an appointed administrator, the HUD program today remains what it has always been since the inception of federal regulation in 1976, a "trailer" program, focused on "improving" presumptively deficient manufactured housing (even though the industry today is producing its best, highest quality homes), instead of increasing the availability and utilization of manufactured housing as a superior source of affordable, non-subsidized home ownership as directed by Congress in the 2000 law. This entrenched program "culture" views ever more onerous, burdensome and costly regulation, with no proven benefits for consumers, as the ultimate objective of the program and supports continuing institutional resistance to the regulatory reform policies of the Trump Administration.

This negative program culture harms the public image of manufactured housing, negatively affecting sales, appreciation, financing, zoning, placement and a host of other matters to the detriment of both the industry and consumers. Moreover, at present, with career-level program management, the manufactured housing program is -- and remains -- cut-off from mainstream policy-making within HUD. This isolates manufactured housing from initiatives that could benefit the industry and consumers, allows continuing discrimination against manufactured housing and its consumers within HUD and elsewhere, and leaves manufactured housing in perpetual "second-class" status at HUD.

HUD has maintained since 2004 that the 2000 reform law "contains no express or implied requirement for the Secretary to appoint a non-career administrator." However, this represents a fundamental misreading of the 2000 law. Section 620(a) of the Act, as amended by the 2000

reform law, states that the Secretary of HUD "may -- (1) establish and collect from manufactured home manufacturers a reasonable fee … to offset the expenses incurred by the Secretary in connection with carrying out the responsibilities of the Secretary under this title, including … (A) conducting inspections and monitoring … [and] (C) providing the funding for a non-career administrator within the Department to administer the manufactured housing program." (Emphasis added).

By the plain wording of this section, it is the establishment of the program user fee that is subject to the qualifier "may" and is, therefore, permissive. Once that fee is established, however -- as it has been for decades by HUD regulation -- it is to be used to offset expenses incurred in carrying out the Secretary's "responsibilities" as delineated in section 620(a)(1)(A-G). As a matter of black-letter statutory construction, giving each word of the 2000 reform law its plain, ordinary and common meaning, a congressionally prescribed "responsibility" of a federal official is mandatory, not permissive or discretionary. If HUD's construction of section 620(a)(1) were correct, its "responsibility" to "conduc[t] inspections and monitoring" of manufactured homes, their production and compliance with the federal standards under section 620(a)(1)(A) would be just as discretionary as its "responsibility" under section 620(a)(1)(C), but HUD has never made any such claim or assertion over the entire 43-year history of the program -- nor would it. Thus, construing section 620(a)(1) consistently, as a whole, the Secretary's responsibility to appoint a non-career administrator for the program is every bit as mandatory as the responsibility to conduct inspections and monitoring in order to enforce the federal standards.

And, indeed, HUD has recently recommended, in a "Housing Finance Reform Plan," published on September 6, 2019 in accordance with a Presidential Directive issued on March 27, 2019, that OMHP should be elevated with HUD and that a Deputy Assistant Secretary "should" be "appoint[ed] … to lead it."[20]Assuming that the stated "Deputy Assistant Secretary" would, in fact, be a non-career position in accordance with the 2000 reform law, with direct control and authority over the federal manufactured housing program,[21] HUD is thus on record as implicitly recognizing – and supporting the implementation of -- the non-career administrator statutory directive set forth in the 2000 reform law.

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Accordingly, and consistent with this acknowledgment and undertaking, HUD should expressly acknowledge the mandatory nature of the appointed administrator directive and take action to appoint a qualified non-career administrator, with direct knowledge of the manufactured housing industry, in order to complete the full and proper implementation of all program reforms incorporated in the 2000 reform law, facilitate the acceptance, availability and utilization of HUD-regulated manufactured housing, as provided by that law, and fundamentally modify the program – given the industry's achievement of the safety, quality and durability benchmarks established by Congress in the original 1974 federal law -- to eliminate arbitrary, costly and unnecessary regulatory mandates that needlessly impair the affordability of manufactured housing and needlessly exclude lower-income consumers from the housing market.

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[20] See, U.S. Department of Housing and Urban Development, "Housing Finance Reform Plan, Pursuant to the Presidential Memorandum Issued March 27, 2019" at p. 22.

[21] I.e. a dedicated, full-time, appointed non-career administrator within the program itself, as envisioned by the 2000 reform law, rather than placing OMHP, together with other non-manufactured housing programs under the authority of a Deputy Assistant Secretary with diverse duties including duties unrelated to manufactured housing.

2. HUD Should Fully Implement the Enhanced Federal Preemption of the 2000 Reform Law

HUD-regulated manufactured housing is the nation's most affordable source of non-subsidized homeownership. Recent data from the U.S Census Bureau shows that approximately 22 million Americans live in manufactured homes, and that manufactured homes account for 71% of all new homes sold for under $125,000.00. Not surprisingly, therefore, manufactured housing is a key homeownership resource for lower and moderate-income Americans, with the Consumer Financial Protection Bureau (CFPB) finding that the median net worth of families living in manufactured homes was $26,000.00, approximately one-quarter of the median net worth of families residing in site-built homes.[22]

The same databases, however, indicate that HUD-regulated manufactured homes, despite their unparalleled, inherent affordability for Americans at every rung of the economic ladder, constituted just ten percent of all new housing starts in 2017,[23]and account for only six percent of all occupied housing in the United States,[24]at a time when the number of Americans with "worst-case" housing needs, as defined by HUD (i.e., renters with very low incomes who do not receive government assistance and pay more than one-half of their income for rent or live in severely inadequate conditions, or both),[25]rose to 8.3 million households in 2015, just slightly below the record number of 8.5 million households in 2011 and up from 7.7 million households in 2013.[26]Thus, despite its inherent affordability for a large potential universe of American homebuyers, HUD-regulated manufactured housing constitutes a comparatively small segment of the overall housing market.

In substantial part, this disparity between manufactured home affordability – and thus availability to a large population of Americans -- and relatively low proportional utilization rates, is attributable to federal policies that have allowed a proliferation of local zoning and placement restrictions, which have resulted in the discriminatory exclusion (or severe restriction) of HUD-regulated manufactured homes in many jurisdictions around the United States.[27] Indeed, exclusionary zoning measures and related land-use restrictions have prevented the construction of most new manufactured home communities in the United States for decades, have produced a significant net loss of community spaces for HUD Code manufactured homes, and have likewise prevented the expansion of existing communities to accommodate new homes and new homeowners.[28] At the same time, the adoption of new discriminatory zoning and land-use

[22] See, U.S. Consumer Financial Protection Bureau, "Manufactured Housing Consumer Finance in the United States" (September 2014), at p. 17.

[23] See, Attachment 1, supra.

[24] See, U.S. Consumer Financial Protection Bureau, supra at p.10.

[25] See, U.S. Department of Housing and Urban Development, "Worst Case Housing Needs – 2017 Report to Congress" (August 2017) at pp. ix-x.

[26] Id. at p. x.

[27] Greater utilization of HUD-regulated manufactured housing is also seriously impaired by discriminatory consumer financing securitization and secondary market policies maintained by Fannie Mae, Freddie Mac, the Federal Housing Finance Agency (FHFA) and the Government National Mortgage Association, as addressed in Section II(F), infra.

[28] See e.g., ManufacturedHomes.com, "Discriminatory Zoning Prohibits Manufactured Home Placement in Communities Across America" (September 7, 2016): "According to Frank Rolfe, co-owner of the 5th largest manufactured [home] community owners in the United States, new manufactured home park construction is

restrictions have forced the closure, sale, or abandonment of many existing manufactured housing communities in other jurisdictions.[29]The result has been a significant decline in the number of places and locations where inherently affordable manufactured homes can be sited, causing extreme hardship for existing manufactured home owners, the exclusion of large numbers of Americans from the manufactured housing market (and homeownership altogether), and the imposition of significant de facto limits on the growth of the manufactured housing industry in the United States.[30]

Both President Trump (in EO 13878) and Secretary Carson have specifically recognized the direct correlation between restrictive local zoning and land-use measures, and the unavailability of affordable housing and homeownership in many areas of the country. Speaking on January 31, 2018 before the Policy Advisory Board of the Harvard University Joint Center for Housing Studies, Secretary Carson stated that HUD would seek to: "identify and incentivize the tearing down of local regulations that serve as impediments to developing affordable housing stock," including "[o]ut-of-date building codes, time consuming approval processes, [and] restrictive or exclusionary zoning ordinances," among other things. (Emphasis added). Shortly thereafter, HUD's Office of Policy Development and Research (PD&R) expressly acknowledged the connection between such "restrictive or exclusionary" zoning mandates, the discriminatory exclusion of HUD-regulated manufactured housing, and the unavailability of affordable, non-subsidized housing in many areas, stating: "Zoning that excludes manufactured housing also contributes to affordability challenges, because manufactured housing potentially offers a more affordable alternative to traditionally-built housing without compromising building quality and safety."[31]

Given the direct link between zoning and land-use restrictions that discriminatorily exclude manufactured homes from large swaths of the United States or discriminatorily restrict the placement of manufactured homes in certain areas, and the lack of affordable housing for large numbers of Americans, HUD should: (1) specifically and expressly acknowledge that the enhanced federal preemption language of the Manufactured Housing Improvement Act of 2000,[32]which provides HUD the authority to preempt state and local "requirements" which interfere with its superintendence of the manufactured housing industry and the accomplishment of the legislative purposes of the 2000 reform law (including Congress' directive to "facilitate the availability of affordable manufactured homes and to increase homeownership for all Americans") includes the preemption of local zoning and/or land-use ordinances which discriminatorily exclude or discriminatorily restrict or limit the placement of HUD Code manufactured homes; and (2) take action to enforce that enhanced federal preemption against jurisdictions that do not voluntarily

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effectively banned in almost every major city in the U.S. [and] 'there are less than ten [manufactured] home parks built per year in the entire nation combined.'"

[29] See e.g., MHProNews.com, "'Unconstitutional Taking,' 'Gentrification on Trial' in Recent Oak Hill Manufactured Home Community Ruling" (July 8, 2018).

[30] The domestic manufactured housing industry produced a modern low of just over 49,000 homes in 2009 and since that time has experienced only a slow recovery, reaching a production level of 96,555 homes in 2018, still well below historical annual production levels.

[31] See, U.S. Department of Housing and Urban Development, Office of Policy Development and Research, "Evidence Matters: Regulatory Barriers and Affordable Housing," (Spring 2018) at p. 5.

[32] See, 42 U.S.C. 5403(d).

allow for the zoning approval or placement of HUD-regulated manufactured homes (both on individual lots and in manufactured housing communities) in compatible residential areas.

The rationale and basis for such a position is straightforward and firmly rooted in both the express language of the 2000 reform law and contemporaneous congressional statements regarding the purposes and intent of that law's preemption provision, as amended.

As originally enacted, the preemption section of the National Manufactured Housing Construction and Safety Standards Act of 1974 referred to the preemption of state and local construction and safety "standards" that were not identical to the federal manufactured housing construction and safety standards promulgated by HUD, stating: "Whenever a federal manufactured home construction and safety standard … is in effect, no State or political subdivision … shall have any authority … to establish … any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the federal … standard." (Emphasis added).

The most often litigated issue under this standard-to-standard preemption was whether a state or local standard addressed the "same aspect" of manufactured home "performance" as a federal standard. For example, in Liberty Homes, Inc. v. Department of Industry, Labor and Human Relations, 125 Wis.2d 492, 374 N.W.2d 142 (1985), the Wisconsin Court of Appeals, in a decision upheld by the Wisconsin Supreme Court,[33] ruled that a state ambient-air formaldehyde standard for manufactured homes was preempted by the then-newly adopted federal "product" standard for formaldehyde emissions, as both standards addressed the "same aspect" of manufactured home performance, albeit in different ways. Even within the confines of standard-to-standard preemption, though, HUD rarely exercised its preemptive authority, based on an extremely narrow interpretation of the key phrase "same aspect of performance," as admitted in HUD legal memoranda obtained by MHARR under the Freedom of Information Act (FOIA).

Subsequently, in 1997, HUD published two preemption-related policy documents in the Federal Register – a January 23, 1997 "Notice of Staff Guidance"[34] and a May 5, 1997 "Statement of Policy"[35] (collectively, "HUD 1997 rulings"). Taken together, these documents, formulated prior to the preemption amendments of the 2000 reform law, establish three central tenets of what has been -- and still remains -- HUD policy regarding federal preemption and discriminatory exclusion: (1) that federal manufactured housing law imposes no duty on HUD to "enforce" federal preemption; (2) that the exclusion of manufactured housing by a local jurisdiction "fall[s] outside the scope of preemption" under the Act, unless that exclusion is based "solely on a construction and safety code different than that prescribed" by HUD under federal law; and (3) that "federal preemption cannot be based on a general purpose of the [manufactured housing] Act."

Congress, though, was well aware of this microscopic HUD approach to federal preemption under the 1974 Act when it enacted the Manufactured Housing Improvement Act of 2000. As a result, it made two key changes to the federal preemption provision of the original 1974

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[33] See, Liberty Homes, Inc. v. Department of Industry, Labor and Human Relations, 136 Wis.2d 368, 401 N.W.2d 805 (1987).
[34] See, 62 Federal Register, No. 15, January 23, 1997, at p. 3456, et seq.
[35] See, 62 Federal Register, No. 86, May 5, 1997, at p. 24337, et seq.

law, which legislatively overrule HUD's entire pre-2000 approach to preemption, including its interpretation of the original preemption provision and the HUD 1997 rulings which rest on those interpretations.

The first and most obvious change in the 2000 reform law – targeted at the heart of HUD's historically narrow application of federal preemption -- is the directive to HUD to "broadly and liberally" construe the scope of federal preemption.[36] Such an express statutory directive from Congress stands as a direct rebuke -- and congressional rejection of – HUD's historical position on the scope of preemption under the Act. For purposes of discriminatory exclusion, however, the even more important amendment is the addition of state and local "requirements" -- of any kind -- to the category of state or local actions that are federally preempted. Because every word in a statute must be given its ordinary and customary meaning, the 2000 reform law thus extended the standard-to-standard preemption of the original 1974 Act to the preemption of any state or local "requirements or standards" that could negatively impact "federal superintendence of the manufactured housing industry" as defined by Congress, including the national policy purposes of the law. (Emphasis added).

That this amendment to the preemption language of the law was intended by Congress to extend federal preemption to the invalidation of discriminatory local exclusion or restrictive placement measures against HUD-regulated manufactured housing, was made clear by key congressional proponents of the 2000 reform law in November 13, 2003 correspondence to HUD.[37] That correspondence states, in relevant part:

> "We are writing to express our deep disappointment in HUD's July [2003] rejection of the Manufactured Housing Consensus Committee recommendation, which addresses the problem of discrimination in the siting of manufactured homes. ***
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> "[W]e believe that HUD should have taken this opportunity to use its expanded legal preemption authority under the 2000 Act to develop a Policy Statement or regulation to make it clear that localities may not engage in discriminatory practices that unfairly inhibit or prohibit development and placement of manufactured housing.
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> "[T]he 2000 Act expressly provides, for the first time, for federal preemption [to] be 'broadly and liberally construed' to ensure that local 'requirements' do not affect 'federal superintendence of the manufactured housing industry.' Combined with the expansion of the findings and purposes of the Act to include for the first time [facilitating] the 'availability of affordable manufactured homes' … these … changes give HUD the legal authority to preempt local requirements or restrictions

[36] See, 42 U.S.C. 5403(d) as amended by the Manufactured Housing Improvement Act of 2000: "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).

[37] See, Attachment 3, hereto.

which discriminate against the siting of manufactured homes (compared to other single-family housing) simply because they are HUD-Code homes.

(Emphasis added).

Put simply, this unequivocal statement confirms that the enhanced federal preemption of the 2000 reform law – both in letter and intent -- sweeps away HUD's previous objections to preempting the discriminatory exclusion or restriction of HUD Code homes via local zoning or other "requirements," making it clear that, as amended, the enhanced preemption language of the 2000 reform law does reach and include discriminatory exclusion measures, and that the new preemption language was designed and intended to achieve that result.

Nevertheless, following the 2000 reform law, in yet another "guidance"[38] document HUD maintained that the 2000 law actually changed nothing regarding preemption. In that document regarding "Recent Program Activity,"[39] HUD stated: "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.*" (Emphasis added).

HUD's assertion that it was already taking a "broad and liberal view" of preemption before the 2000 reform law is demonstrably false. The courts in two cases consistently cited by HUD as the basis for its construction of the scope of federal preemption – Chrysler Corp. v. Tofany, 419 F.2d 499 (2d Cir. 1969) and Chrysler Corp. v. Rhodes, 416 F.2d 319 (1st Cir. 1969) -- concluded that similar "same aspect of performance" language contained in the National Traffic and Motor Vehicle Safety Act (NTMVSA) statute should be construed *narrowly*. The Tofany court, in fact, expressly stated: "we conclude that the 'aspect of performance' language in the preemption section of the Act must be construed *narrowly*." (Emphasis added). For HUD to claim, then, that before the 2000 law it was already construing preemption "broadly," under cases which specifically state that preemption is to be construed "narrowly" – and that the enhanced preemption of the 2000 reform law is merely a directive to continue that alleged "broad and liberal interpretation -- is absurd and disingenuous.

Rather, the "broad and liberal" interpretation provision of the 2000 reform law *directly overrules* HUD's unduly narrow pre-2000 interpretation of federal preemption. Moreover, for HUD to claim, without any basis whatsoever, in this erstwhile "guidance," that the 2000 law did not expand the scope of preemption under the law – when Congress specifically added "*requirements*" to the *type* of state or local enactments that could be preempted, is again, a misrepresentation of the 2000 reform law.

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[38] Like so many other HUD "guidance" documents or interpretive pronouncements, this construction of 42 U.S.C. 5403(d) was neither submitted to the MHCC for review and recommendation, nor published for notice or comment.

[39] This "Recent Program Activity" document, while clearly inconsistent with – and obviously designed as a mechanism to undermine a key program reform of the 2000 Act – is *still* posted on HUD's OMHP webpage, notwithstanding EOs 13771 and 13777. To date the only "obsolete or superseded guidance documents" removed from HUD's OMHP website pursuant to EOs 13771 and 13777, are 13 meaningless editions of the OMHP "The Facts" newsletter. See, 84 Federal Register, No. 66 (April 5, 2019) at p. 13695, 13709.

HUD, therefore, for two decades after the enactment of the 2000 reform law, has maintained the unsupportable fiction that the 2000 law did not make any *real* change to federal preemption and that, as a result, it did not need to change its administrative approach to that preemption. This position not only conflicts with the plain meaning and legislative history of the changes made in the 2000 reform law but has resulted in significant harm to both the HUD Code industry and the lower and moderate-income American families who depend on manufactured housing as the nation's premier source of affordable, non-subsidized home-ownership. By continuing an unduly narrow approach to federal preemption, HUD has allowed localities to use various types of mandates, including supposed "zoning" ordinances and requirements, to effectively exclude and discriminate-against the industry, its products and, most importantly, the Americans who seek to purchase and own a manufactured home of their own.

The time has come for HUD to conduct a thorough and intellectually-honest reassessment of the state of enhanced federal preemption under the 2000 reform law, in order to make it consistent, logical and predictable, to preserve legitimate state authority as provided by the 2000 reform law, and to accomplish the laudable and *necessary* goals of that legislation. Accordingly, MHARR asks that the White House Council direct HUD to: (1) expressly and formally withdraw – (a) its January 23, 1997 "Notice of Staff Guidance" regarding federal preemption; (b) its May 5, 1997 "Statement of Policy" regarding federal preemption; and (c) its post-2000 reform law statement titled "Recent Program Activity" regarding the scope of federal preemption; (2) issue a new policy statement providing for the full and liberal construction of the enhanced federal preemption of the 2000 reform law, including, but not limited to its applicability to and invalidation of state and local zoning provisions or other requirements which discriminatorily exclude or restrict HUD Code manufactured housing from certain local jurisdictions or specific areas of local jurisdictions; and (3) take concrete action to federally preempt zoning restrictions which discriminatorily exclude the placement of HUD Code manufactured homes.

3. HUD Should Fully Implement the Contracting Improvements Mandated by the 2000 Reform Law

The HUD manufactured housing program has had the same monitoring contractor (i.e., the same continuing entity, with the same personnel, albeit under different names -- initially the "National Conference of States on Building Codes and Standards" then "Housing and Building Technology," and now the "Institute for Building Technology and Safety") since the inception of federal regulation in 1976. Although the monitoring function contract is subject, nominally, to competitive bidding, the contract is a de facto sole source procurement. Because the federal program is unique within the residential construction industry and no other entity has ever served as the monitoring contractor, no other organization has directly comparable experience. Thus, solicitations for the contract have been based on award factors that track the experience and performance of the existing contractor, effectively preventing any other bidder from competing for the contract. Moreover, the one time that another organization did submit a bid, its lower-priced offer was subject to a second round of analysis that ultimately resulted in an award to the incumbent contractor.

As it has been structured by the program since the inception of federal regulation four decades ago, the monitoring contract is not only fatally-flawed in its process — i.e., its failure to

generate full and fair competition as required by applicable law — but is also substantively flawed, in that it creates a distinct financial incentive for the contractor to find fault with manufactured homes (regardless of whether any fault actually exists) and to pursue the expansion and extension of regulatory and pseudo-regulatory mandates in order to increase revenues.

Beyond these fatal structural flaws, without new ideas and new thinking, the program effectively, remains frozen in the 1970's and has not evolved along with the industry. This is one of the primary reasons that the federal program, government at all levels and other organizations and entities continue to view and treat manufactured homes as 'trailers," causing untold difficulties for the industry and consumers, including financing, zoning, placement and other issues. The 2000 reform law, moreover, was designed to assure a balance between reasonable consumer protection and affordability. But the HUD program and the entrenched incumbent contractor have a history of continually ratcheting-up regulation, with more detailed, intricate and costly procedures, inspections, record-keeping, reports and red-tape, despite the fact that consumer complaints regarding manufactured homes, as shown by HUD's own data, are not only minimal, but on a downward trend.

For the manufactured housing industry to recover and advance substantially from the decline of the past two decades, this cycle must be broken and the federal program must be brought into full compliance with the objectives and purposes of the 2000 reform law. For decades MHARR has documented the slow but steady accretion of more and more program functions in that one and only "monitoring" contractor which – according to the specific definition of "monitoring" included by Congress in the 2000 reform law to specifically limit the power and authority of the monitoring function and contractor[40]– is supposed to ensure the proper performance of the program's third-party Primary Inspection Agencies. Along with these extended functions have come a steady increase in power, authority and influence within the program, as reflected by multiple contractor-initiated and/or contractor-developed pseudo-regulations (e.g., "Acceptable Quality Level," " Computer Coded Items" and others), *de facto* standards and expanded in-plant regulation, as well as multiple layers of costly, time-consuming policies, procedures, practices, criteria, "checklists" and *de facto* "interpretations" of virtually every aspect of the HUD regulatory program, *none* of which have ever gone through notice and comment rulemaking, as required by law, *or* been proven to produce corresponding benefits for homeowners.

HUD program officials have continually denied that the monitoring contractor exercises substantial discretionary power within the program – the very hallmark of inherently governmental authority – just as they have denied the continually-expanding role and pervasive influence of the monitoring contractor, even as both have clearly evolved and grown over the past 40 years. Those same officials – also for decades – routinely dismissed (or ignored) complaints of systematic abuses by the "monitoring" contractor ranging from arbitrary, subjective and baseless regulatory demands, to excessive paperwork and red tape that needlessly inflate regulatory compliance costs to the ultimate benefit of exactly no one (except the contractor and its bottom line). Worse yet, in a disturbing number of cases, regulated parties that approached HUD were targeted for reprisals

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[40] See, 42 U.S.C. 5402(20): "'monitoring' means the process of periodic review of the primary inspection agencies, by the Secretary or by a State agency … which process shall be for the purpose of ensuring that the primary inspection agencies are discharging their duties under this title."

and retribution. And now, with the domination of the program by a paid contractor reaching a critical stage, others in the industry – and consumers – can no longer afford to be bystanders.

As with so many other matters, the law is squarely on the side of industry members and consumers. Based on aggressive MHARR documentation and education efforts in Congress during the 1980s and 1990s, as well as MHARR's participation in and exposure of these issues at National Commission on Manufactured Housing, in numerous industry forums and at multiple congressional hearings, Congress, took significant steps in the Manufactured Housing Improvement Act of 2000 to curb the power of all contractors within the HUD program – but especially the entrenched "monitoring" contractor -- to prevent any one contractor, in the future, from amassing so many program functions that it effectively controls the policy and direction of the program based on its own self-interest.

These limiting provisions include, among others: (1) the "separate and independent contractors" requirement of section 623, which was the basis for the recent termination of the "monitoring" contractor's dispute resolution subcontract; (2) the definition of "monitoring" inserted in section 603, which specifically restricts the "monitoring" function to the "periodic review of … primary inspection agencies … for the purpose of ensuring that the primary inspection agencies are discharging their duties" under the law; (3) section 604(b)(6), which requires that all changes to program policies, procedures and practices be brought to the MHCC and subjected to notice and comment rulemaking, regardless of what they are called or how they are characterized by HUD and/or the "monitoring" contractor; and (4) the provision for an appointed, non-career program Administrator, in order to assure strong, transparent and responsive program accountability in all matters, including contracting and the proper (limited) role of program contractors.

The 2000 reform law, therefore, *if* fully and properly implemented, has the necessary safeguards to break the accumulated power of the entrenched "monitoring" contractor and move the program back to a healthy, lawful and effective contracting structure and regimen, where a genuine "monitoring" contractor would perform the limited ministerial function of "periodically review[ing]" the PIAs and accountable HUD officials – subject to federal government ethics law and regulations -- would be in firm control of program policy and direction, rather than a self-interested revenue-driven private actor. But, as has been the case with far too much of the 2000 law, its key contracting reforms have been honored more in the breach than in actuality. Not surprisingly, then, the Government Accountability Office (GAO) in its July 2014 report on HUD's implementation of the 2000 reform law, pointed out significant "questions and uncertainties about HUD's oversight of the monitoring contract…."

In order to expose and document the true and full extent of the de facto domination of the HUD program by the "monitoring" contractor, MHARR in a comprehensive September 2012 Freedom of Information Act (FOIA) request to HUD, sought multiple categories of documents relating to the activities and program functions of the contractor, including its current contract. And although HUD's response took over two years, it nevertheless disclosed, for the first time, a full copy of the most recent "monitoring" master contract (executed in 2013). That contract, covering up to five years for a total of $25 million-plus, provides confirmation of the pervasive and improper role of the monitoring contractor. While boilerplate recitations in the contract pay

lip service to the narrow and limited "monitoring" function described in the 2000 reform law, the actual contract work tasks go well beyond that limited function. Thus, among other things, the "monitoring" contractor, is tasked with:

- *Developing* in-plant audit procedures under HUD's unilateral program of expanded in-plant regulation;
- Reviewing IPIA responses in disputed matters and preparing written counter-replies *for HUD*;
- Drafting IPIA Performance Reviews *for HUD*;
- Providing responses *for HUD* in disputes with IPIAs;
- Proposing revisions to the Audit Procedures Manual and the Procedural and Enforcement Regulations to "improve the process;"
- Preparing reports on "potential" design or quality assurance deficiencies found during DAPIA reviews and *seeking to "resolve"* such items – sending a report to HUD only if the item cannot be resolved between the DAPIA and the contractor;
- Providing "recommendations" for specific HUD corrective or *enforcement* actions against DAPIAs;
- Developing checklists to be used in evaluating State Administrative Agency procedures and methods;
- Conducting post-production inspections to "verify" retailer compliance;
- Preparing evaluation reports *for HUD* in connection with consideration of the acceptance of new or modified State Plans;
- Participating in research, review and developing proposed action and follow-up for "special design and construction requests;"
- Conducting unspecified "special investigations;"
- Analyzing and researching "technical issues" *for HUD*;
- *Evaluating* findings to "determine the validity and strength of evidence collected during audits;"
- Providing "expert testimony" and "engineering support" to "assist" HUD;
- Reviewing any application by a state or organization to be approved as a new IPIA, DAPIA or SAA; and
- Preparing a "draft" acceptance report on any such application *for HUD*.

(Emphasis added).

In examining these functions both individually and collectively, it is evident that for large portions of the regulatory authority of the federal manufactured housing program, the so-called program "monitoring" contractor, contrary to the 2000 reform law -- and broader federal law on the delegation of inherently governmental authority -- is, in actuality: (1) the "legislature," developing de facto requirements, procedures and qualifications; (2) the de facto judge *and* jury, gathering evidence, evaluating that evidence, and drawing conclusions that are then submitted for HUD to rubber-stamp; and (3) a de facto enforcer, with the power to impose its own interpretation of everything and anything on regulated parties without HUD ever being involved.

Of course, the tasks specified in the 2013 "monitoring" contract are phrased in language designed to foster the *impression* that the contractor does not exercise inherently governmental *discretionary* authority. But, as the above list of contract functions demonstrates, a multitude of discretionary issues are effectively decided by the contractor without action or involvement by HUD. And even when such actions and decisions do go back to HUD, it is evident that HUD is so pervasively dependent on the contractor that the contractor's decisions and "recommendations" are, effectively, final in a way that is rejected by relevant guidance from the Office of Management and Budget (OMB) and other federal agencies: "*even where Federal officials retain ultimate authority to approve and review contractor actions, the contractor may nonetheless be performing an inherently governmental action if its role is extensive and the Federal officials' role is minimal*." (Emphasis added).

The impact of this excessive, revenue-driven contracting system on the HUD program, HUD's erstwhile state partners, the industry and, most importantly, consumers, has been devastating, excessively costly and ruinous, and is getting worse. Indeed, HUD's failure to facilitate one of the two *primary* goals of the 2000 reform law – to "facilitate the availability of affordable manufactured homes and … increase homeownership for all Americans" – is a direct outgrowth of this distorted, dysfunctional and arguably illegal contracting system.

It is thus essential that the program ensure that there is full and open competition for the monitoring contract. Accordingly, the monitoring contract must be re-solicited pursuant to fundamentally modified award criteria that that do not penalize or ward off new bidders without direct pre-existing program experience, and a structure that does not provide a financial incentive for excessive or punitive regulation. Instead, any new program "monitoring" contract should: (1) drastically reduce the functions assigned to the "monitoring contractor;" (2) totally eliminate any discretionary or pseudo-regulatory functions; (3) limit "monitoring" functions to the evaluation of PIAs in accordance with the statutory definition of "monitoring" set forth in the 2000 reform law; and (4) in accordance with these reforms, significantly reduce funding for the monitoring contract.

C. HUD MUST FULLY IMPLEMENT ALL RELEVANT EXECUTIVE ORDERS WITH RESPECT TO OMHP AND HUD CODE MANUFACTURED HOUSING

In addition to EO 13878 creating the White House Council, President Trump has issued four other Executive Orders which directly and significantly impact the HUD manufactured housing program and the federal regulation of HUD Code manufactured housing. These are, EO 13771 ("Reducing Regulation and Controlling Regulatory Costs"),[41] EO 13777 ("Enforcing the Regulatory Reform Agenda"),[42] EO 13891 ("Promoting the Rule of Law Through Improved Agency Guidance Documents")[43] and EO 13892 ("Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication").[44]MHARR, since 2017, has submitted extensive comments to HUD – both directly and through the statutory MHCC – concerning the specific application of these EOs, and the Trump Administration policies

[41] See, 82 Federal Register, No. 22 (February 3, 2017) at p. 9339, et seq.

[42] See, 82 Federal Register, No. 39 (March 1, 2017) at p. 12285, et seq.

[43] See, 84 Federal Register, No. 199 (October 15, 2019) at p. 55235, et seq.

[44] See, 84 Federal Register, No. 199 (October 15, 2019) at p. 55239, et seq.

that they represent, to the operation of OMHP and to the regulation of HUD Code manufactured housing. Each relevant set of MHARR comments regarding the application of these EOs, is attached to this document as an exhibit, and the content of each such comment document is hereby incorporated herein as if restated in full.[45]

Pursuant to those EOs, and for the reasons more fully-stated and explained in those comment documents, MHARR has – and continues -- to seek specific HUD regulatory and de-regulatory actions, as well as the withdrawal of multiple sub-regulatory and pseudo-regulatory OMHP actions as identified therein. These actions include, but are not limited to:

1. Repeal of all elements of HUD's program of expanded in-plant regulation;
2. Repeal and modification of HUD's September 2015 "On-Site Construction" Rule;
3. Amendment of Subpart I of HUD's Procedural and Enforcement Regulations[46]to fully comply with applicable law;
4. Halt the imposition of improper federal installation mandates on compliant states;
5. Repeal of the February 2010 HUD Interpretive Rule regarding matters subject to MHCC review;
6. Restoration of collective industry representation on the MHCC;
7. Rejection of <u>any</u> fire sprinkler standard, whether mandatory or allegedly "voluntary;"
8. Adoption of federal standards for the construction of multi-family HUD Code homes;
9. Adopt of regulations to provide increased payments to State Administrative Agencies;
10. Withdraw of all outstanding "guidance" regarding the scope of federal preemption, including HUD's post-2000 reform law "guidance" on "Recent Program Activity;
11. Withdrawal and rejection of HUD's pending "frost-free" guidance and proposed Interpretive Bulletin;
12. Withdrawal of all "field guidance" and similar documents issued without MHCC consideration or notice and comment rulemaking, including, but not limited to:
    a. "Frost-Free Guidance" memorandum;
    b. Field Guidance and related Operating Procedures and memoranda concerning expanded in-plant regulation;
    c. Remaining memoranda concerning attached garages and "add-ons;"
    d. Field Guidance on attic insulation;
    e. Field Guidance on air ducts;
    f. Memorandum on single-family use;
    g. Memorandum on electrical connection workmanship;
    h. Memorandum on mixing valves;
    i. Memorandum of deviation reports;
    j. Memorandum on chassis bonding connections;
    k. Memorandum regarding off-line fabrication;

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[45] <u>See</u>, MHARR Comments to HUD dated June 7, 2017 ("Reducing Regulatory Burdens; Enforcing the Regulatory Reform Agenda Under Executive Order No. 13777 – Docket No. FR-6030-N-01")(Attachment 4, hereto); MHARR Comments to HUD dated February 20, 2018 ("Regulatory Review of Manufactured Housing Rules – Docket No. FR-6075-N-01")(Attachment 5, hereto); MHARR Comments to HUD dated April 25, 2018 ("Repeal of HUD February 5, 2010 'Interpretive Rule' and Related HUD Manufactured Housing Sub-Regulatory 'Guidance' Documents")(Attachment 6, hereto); and MHARR Comments via the MHCC dated October 21, 2019 ("MHARR Regulatory Reform Comments")(Attachment 7, hereto).

[46] <u>See</u>, 24 C.F.R. 3282.401, <u>et seq</u>.

l. Memorandum regarding on-site completion;
m. Memorandum on professional engineer/registered architect seals for wind zone II and III structural designs

Based on EOs 13771, 13777, 13891 and 13892, the White House Council should ensure: (1) that HUD completes and implements, in a timely manner, its "top-to-bottom" manufactured housing program regulatory review; (2) that HUD, pursuant to EOs 13771 and 13777, either withdraws or substantially modifies each of the regulatory actions identified by MHARR in its applicable comments; (3) that HUD, pursuant to EOs 13891 and 13892, withdraw or retract all sub-regulatory and pseudo-regulatory documents issued by OMHP without prior MHCC review and notice and comment rulemaking; that HUD, in connection therewith, (4) publish unequivocal notice in the Federal Register announcing the withdrawal and invalidation of those documents and advising regulated parties that they are no longer binding or operative in any respect; and (5) issue a further public directive stating that no further such documents shall be issued by OMHP and that any such documents issued without prior MHCC review and notice and comment rulemaking are null, void, and of no effect, ab initio.

D. HUD MUST RESTORE THE FULL PARTICIPATION RIGHTS OF ALL INTERESTED PARTIES IN PROCEEDINGS OF THE STATUTORY MHCC

Beyond the foregoing issues raised previously by MHARR in its various regulatory reform comments, HUD should also take specific and immediate action to protect the legitimacy and validity of the MHCC and its procedures.

The statutory MHCC was established as one of the premier program reforms of the 2000 law. It was designed to provide HUD with accurate, factual, and informed input and information on regulatory and enforcement matters, and to promote effective consumer protection based on a consensus of consumer, industry and other affected interests. Unlike the ineffective "Manufactured Housing Advisory Council" established by the original 1974 federal manufactured housing law, the MHCC was envisioned by Congress as a bulwark against regulatory abuses documented by MHARR during the 2000 reform law legislative process, and as an essential, vital and mandatory component of the process for the development, revision and interpretation of HUD's manufactured housing standards, enforcement regulations and related activities. The 2000 reform law thus requires the MHCC to reflect a balance of the various interests affected by the HUD regulatory program[47] and affirmatively requires that all new or amended standards[48] or enforcement regulations and related interpretations,[49] practices, policies and procedures[50] to be brought to the MHCC for prior review, input and recommendations to the Secretary.

In order to ensure that the MHCC would have available to it the institutional knowledge, know-how, experience and information possessed by the industry's collective representatives, the MHCC, as originally constituted and for nearly a decade after its first establishment -- based on a

[47] See, 42 U.S.C. 5403(a)(3)(E).
[48] See, 42 U.S.C. 5403(a)(4).
[49] See, 42 U.S.C. 5403(b)(1), (2).
[50] See, 42 U.S.C. 5403(b)(6).

tacit understanding between HUD and the industry -- included one staff representative each from the industry's two collective national organizations, MHARR and the Manufactured Housing Institute (MHI) as voting members. This was particularly important to the smaller, independent industry businesses represented by MHARR that did not necessarily have the collective, institutional knowledge, know-how and experience of the broader Association, but continued to suffer disproportionately negative impacts from unduly burdensome and unduly costly regulation. And, indeed, during this initial period, the MHCC was able to develop and recommend to HUD significant proposals – including proposals for installation regulation and dispute resolution – which substantially benefitted consumers without imposing undue burdens on the affordability of mainstream manufactured housing.

Subsequently, however, MHI decided to refuse staff appointments to the MHCC. This has provided HUD with a convenient excuse to refuse the appointment of an MHARR staff representative to the MHCC following the term of former MHARR President Danny D. Ghorbani, and has left the MHCC without the knowledge and collective insight previously provided and has especially prejudiced the smaller, independent industry businesses represented by MHARR, which are justifiably wary of regulatory retribution and seek collective representation through MHARR staff. The exclusion of an MHARR staff representative from the MHCC for nearly a decade, therefore, effectively means that the concerns and interests of smaller, independent HUD Code manufacturers are not being fully heard, debated and considered while the program seeks to transform the MHCC back into the passive, ineffective Advisory Council of days past. By contrast, the MHCC has – and continues to – include voting members from collective, national consumer organizations.

Even worse, this exclusionary process is now being taken a step further with an edict that would virtually shut out any participation in the MHCC process by MHARR as a collective industry organization. Specifically, at the recent October 29-31, 2019 MHCC meeting, OMHP barred participation by MHARR and other collective industry organizations in key regulatory reform debates, in direct contravention of established MHCC practice and precedent, and sharply restricted supposed "public comment" to 15-minute windows at the beginning and end of each daily session, with individual commenters "limited to two minutes," allegedly to "ensure [that] pertinent MHCC business is completed."[51] (Emphasis added).

As MHARR has emphasized, though: (1) MHARR, as a collective, national industry organization, is not a mere member of the general "public." MHARR, rather, is a collective representative of smaller businesses directly regulated by HUD and directly impacted by HUD regulatory actions and decisions within the federal manufactured housing program. As such, MHARR members deserve to be represented collectively and heard collectively as part of the MHCC's proceedings and deliberations; however (2) by being relegated to speaking times that are either far removed from the consideration of specific proposals, or after votes have already been

[51] See, 84 Federal Register, No. 187 (September 26, 2019) at p. 50858. This was particularly disruptive and detrimental to full, complete and effective MHCC debate, insofar as it essentially precluded participation by MHARR in the consideration of proposals conceived, developed and submitted by MHARR (and similarly precluded participation by the proponents of other proposals). This led, in far too many instances to either misinformed, uninformed, or circular and needlessly extended debate to the detriment of the MHCC, the industry, consumers and the public at large.

taken on relevant matters and proposals, their collective participation is effectively nullified, thus denying them any meaningful participation at all.

Based on all the above, limitations on the participation rights of MHARR, its members and others similarly situated are unacceptable and are particularly repugnant in an Administration that is publicly committed to combatting bureaucratic assaults on the legitimate rights of regulated parties. MHARR, therefore, urges the White House Council to direct HUD to fully protect the rights of all interested parties and to ensure an even playing field within the MHCC process.

E. DISCRIMINATORY AND EXCESSIVE DOE MANUFACTURED HOUSING "ENERGY" STANDARDS SHOULD BE WITHDRAWN

On June 17, 2016 the U.S. Department of Energy (DOE) published a proposed rule in the Federal Register to establish "Energy Conservation Standards for Manufactured Housing"[52]pursuant to Section 413 of the Energy Independence and Security Act of 2007 (EISA). That proposed rule, which was strenuously opposed by MHARR on multiple grounds, was subsequently withdrawn by DOE, following the advent of the Trump Administration, in 2017.[53] Later, through a Notice of Data Availability and Request for Information (RFI) published by DOE on August 3, 2018, DOE announced that it would be: (1) "re-evaluat[ing] its approach in developing [energy] standards for manufactured housing;"[54] (2) "reconsidering the framework" for the standards previously proposed in 2016[55]; and (3) "examining if it must set a single mandatory level of [energy] efficiency" for federally-regulated manufactured homes.[56] As MHARR stated in its written comments in response to that RFI, however, it remains inalterably opposed to the imposition of any mandatory federal energy standard(s) by DOE or any other federal agency or entity on HUD Code manufactured homes, outside of the parameters, framework, purposes, procedures and provisions of the 1974 Act and subsequent amendments to that law. Consequently, MHARR urges the White House Council to reject the imposition of any mandatory DOE manufactured housing energy standards which would needlessly and substantially increase the cost of HUD Code manufactured homes as an "excessive energy mandate" within the meaning of EO 13878.

First, as MHARR established in its original August 8, 2016 comments,[57] HUD Code[58] manufactured homes, according to U.S. Census Bureau data, already offer energy performance

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[52] See, 81 Federal Register, No. 117 (June 17, 2016) at p. 39756, et seq.

[53] According to the DOE RFI, a "draft final rule" based on the June 17, 2016 DOE proposed rule, "did not clear" review by the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) and was subsequently "withdrawn" on January 31, 2017.

[54] See, 83 Federal Register, No. 150 (August 3, 2018) at p. 38075, et seq.

[55] Id. at p. 38075, col.1.

[56] Id.

[57] See, Attachment 8, hereto.

[58] The Federal Manufactured Housing Construction and Safety Standards (FMHCSS) established by HUD pursuant to the 1974 Act, as amended, and codified at 24 C.F.R. 3280, comprehensively regulate the construction and safety of manufactured homes produced for sale or lease in the United States. These standards (in Subparts F and H) include specific performance criteria for energy usage and utilization, and other energy-related aspects of HUD-regulated

that exceeds -- or is comparable to -- that of other types of homes, at a significantly lower acquisition cost that is inherently affordable for lower and moderate-income purchasers without costly taxpayer-funded government subsidies.[59] Given this fundamental, indisputable fact, there is no objectively-defensible combination of DOE energy standards or mandates that would significantly enhance the energy performance of HUD Code manufactured homes without simultaneously undermining the affordability of those homes contrary to the purposes and letter of existing law,[60] while needlessly excluding millions of Americans from the benefits of manufactured homeownership and homeownership altogether.[61] Further, the promulgation of any such standards by DOE would violate fundamental regulatory policies set forth in Executive Orders 13771 and 13777. Accordingly, MHARR continues to oppose the standards formulation set forth in DOE's initial June 17, 2016 Notice of Proposed Rulemaking and the alternative formulations proposed in the August 3, 2018 DOE-RFI which, as acknowledged by DOE, are based on cost calculations and other data derived from the same illegitimate, sham "negotiated rulemaking" process which led to the 2016 proposed rule.[62]

In relevant part, the DOE-RFI preamble acknowledges: (1) the extreme negative impact on the fundamental purchase price affordability of HUD Code manufactured housing (as set forth and demonstrated in MHARR's August 8, 2016 comments) that would have inevitably resulted from the June 17, 2016 proposed rule to establish manufactured housing energy standards pursuant to EISA; and (2) the net lifetime operating cost increases that the 2016 proposed rule (and associated methodology) would have imposed on significant numbers of manufactured homeowners and occupants. The RFI thus states: "Since the publication of DOE's proposals, the agency has re-examined its available data and re-evaluated its approach in developing standards for manufactured housing. In particular … DOE [is] aware of the adverse impacts on manufactured housing affordability that would likely follow if DOE were to adopt the approach laid out in its June 2016 proposal. *** Thus, DOE is examining if it must set a single, mandatory level of efficiency."[63]

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manufactured housing. The performance nature of the HUD FMHCSS standards, which is a crucial component of the inherent affordability of HUD Code manufactured homes, is addressed in greater detail infra.

[59] See, Attachment 9, hereto, Table C-10-AO, "Housing Costs – All Occupied Units (National), 2013 American Housing Survey.

[60] See, 42 U.S.C. 5401(b)(1),(2) and (8): "The purposes of this title are – (1) to protect the quality, durability, safety and affordability of manufactured homes; (2) to facilitate the availability of affordable manufactured homes and to increase homeownership for all Americans…. [and] (8) to ensure that the public interest in, and need for, affordable manufactured housing is duly considered in all determinations relating to the federal standards and their enforcement." See also, 42 U.S.C. 5403(e)(4): "The [Manufactured Housing] Consensus Committee, in recommending standards, regulations, and interpretations, and the Secretary, in establishing standards or regulations or issuing interpretations … shall … (4) consider the probable effect of such standard on the cost of the manufactured home to the public." From these provisions, it is evident that the 1974 Act, as amended by Congress in 2000, is designed to ensure that manufactured housing standards and related regulations do not undermine or adversely impact the purchase price (i.e., initial acquisition cost) affordability of federally-regulated manufactured homes.

[61] See generally, The George Washington University Regulatory Studies Center, "Public Interest Comment on the Department of Energy's Proposed Rule [for] Energy Conservation Standards for Manufactured Housing" (August 16, 2016), Attachment 10, hereto.

[62] See, U.S. Department of Energy, "Manufactured Housing NODA Packages – Draft Results" (July 2018) at p. 2: "Incremental costs and savings calculations are based on methods and data presented in the 2016 NOPR."

[63] See, 83 Federal Register, supra at p. 38075, col. 1.

While a reexamination, reevaluation and reconsideration of DOE's 2016 proposed energy standards rule for manufactured homes is entirely warranted and, indeed, is required under the regulatory reform policies of the Trump Administration as enunciated in EOs 13771 and 13777, the entire basis, foundation and mandate of EISA section 413 is utterly incompatible with both the policy and letter of existing law as set forth by Congress in the National Manufactured Housing Construction and Safety Standards Act of 1974 and the Manufactured Housing Improvement Act of 2000. Instead, given the broad policy objectives of those laws -- including but not limited to their specific purpose and objective to ensure and maintain the purchase-price affordability of manufactured homes, and their comprehensive, integrated approach to the federal regulation of manufactured home construction and safety -- the purposes, objectives and language of EISA section 413 must be read, construed and understood in a manner that is consistent with those broader, pre-existing policy and regulatory mandates.

Accordingly, as is set forth in greater detail in MHARR's September 17, 2018 DOE-RFI comments[64] any manufactured housing energy standards implemented under EISA section 413 – if adopted at all, through any proceeding[65] -- must: (1) preserve the purchase-price affordability of manufactured housing based on current retail pricing levels; (2) be performance based, consistent with 24 C.F.R. 3280.1;[66] (3) preserve full and voluntary consumer choice in the selection of energy features and measures; (4) not result in the automatic imposition of different or more stringent future standards based on updates or amendments to any underlying code, including the International Energy Efficiency Code (IECC), or any similar code; (5) be cost-effective as defined in and required by both EISA section 413 and the 1974 Act, as amended; (6) any amendments or modifications to those standards, regardless of source or derivation, must be subject to review and recommendations by the statutory MHCC and full notice and comment rulemaking as required by 42 U.S.C. 5403; and (7) if DOE goes forward with such action, it must be pursuant to a completely new, proper and legitimate regulatory process in order to avoid potential litigation.

Put differently, objective data demonstrates that current-production manufactured homes achieve a level of energy performance under the existing federal FMHCSS standards that is comparable to other types of homes, at a significantly lower acquisition cost that makes manufactured homes inherently affordable for Americans at all income levels, including those who would otherwise be unable to afford any other type of home. With Congress having specifically recognized this fundamental attribute of manufactured housing, and having institutionalized the preservation and maintenance of that crucial attribute as a central policy objective of federal law in both the 1974 Act and the 2000 reform law, no action by DOE can – or should – be permitted to undermine the inherent affordability of HUD Code manufactured housing and thereby effectively exclude large numbers of mostly lower and moderate-income Americans from all of

[64] See, Attachment 11, hereto.

[65] Consistent with the comprehensive regulatory structure established by the 1974 Act and enhanced by the 2000 reform law, this entire matter should be under the jurisdiction of HUD, including all aspects of the 1974 Act and the 2000 reform law relating to the development and promulgation of FMHCSS standards and related regulations, including all MHCC review, notice and comment and publication requirements.

[66] 24 C.F.R. 3280.1 states, in relevant part: "This standard seeks to the maximum extent possible to establish performance requirements." (Emphasis added).

the benefits of homeownership[67] in the name of unproven "junk" science and related political agendas.[68]

Accordingly, any consideration of alternative approaches under EISA section 413 must proceed from a specific recognition and express acknowledgement by DOE that its June 2016 proposed rule and "draft final rule" derived therefrom, and its previous construction of – and approach to – EISA section 413, was and is fatally defective and fundamentally erroneous in its premises, basis and approach, and that no part, aspect, element, or rationale relating to that proposed rule or "draft final rule" will be proposed, advanced or in any way incorporated by DOE in this matter going forward. That is not the case with the DOE-RFI, however, as the purported cost-benefit data relied upon by DOE to re-evaluate and re-cast its January 2016 proposed rule continues to be based upon the same irretrievably-flawed, inaccurate, unreliable and illegitimate data "developed" by DOE during – and incident to – its utterly discredited "negotiated" rulemaking on this matter. As was demonstrated by MHARR in its August 8, 2016 comments to DOE's 2016 proposed rule and its July 14, 2017 comments concerning the application of EOs 13771 and 13777 to this matter, both the June 17, 2016 proposed rule published by DOE and the 2016 "draft final rule" derived therefrom, are fatally flawed and unacceptable, and must not be rehabilitated or revived in any way.

That said, however, the best response to this entire matter would be for the White House Council to expressly disavow any DOE manufactured home energy standards as being in contravention of existing federal manufactured housing law and the regulatory reform policies enunciated in EOs 13771 and 13777, and instruct DOE to terminate any and all rulemaking proceedings with respect to such standards.

F. FEDERAL FINANCING DISCRIMINATION AGAINST HUD CODE CONSUMERS MUST BE ENDED

Among the federal regulations and policies which unnecessarily increase the acquisition cost of HUD Code manufactured homes and, as a result, needlessly exclude millions of Americans from the manufactured housing market and from homeownership altogether, are regulations (and related policies) enacted by the Federal Housing Finance Agency with respect to the statutory Duty to Serve Underserved Markets and by the Government National Mortgage Association (Ginnie

[67] As MHARR noted in its 2016 comments, the only evidence presented to the DOE "negotiated rulemaking" Manufactured Housing Working Group (MHWG) on the cost-impact of its proposed "Term Sheet" energy standards (by the National Association of Home Builders) demonstrated that "a $1,000 increase in the purchase price of a new manufactured home [would] exclude[e] 347,901 households from the market for a new single-section [manufactured] home, while the same $1,000 increase [would] exclude[e] 315,385 households from the market for a double-section home." See, Attachment 8, supra, at p. 25 and text related to note 78.

[68] This is particularly the case insofar as much of that alleged "science" and related political agendas have been expressly rejected and disavowed by the Trump Administration. See, Attachment 12, hereto, MHARR's July 14, 2017 written comments to DOE regarding "Reducing Regulation and Controlling Regulatory Costs Under Executive Orders 13771 and 13777" pursuant to a DOE Request for Information published May 30, 2017, noting the Trump Administration's rejection of both the Obama Administration's "Social Cost of Carbon" (SCC) construct and the so-called "Paris Climate Accord," which formed the policy basis for this matter.

Mae) with respect to the Federal Housing Administration's (FHA) Title I and Title II manufactured housing programs.

While a complete discussion of DTS – including its development, enactment and de facto non-implementation by FHFA, Fannie Mae and Freddie Mac -- is beyond the scope of this document, relevant information concerning all aspects of DTS is set forth in the March 15, 2016,[69] July 10, 2017[70] and November 12, 2019[71] MHARR written comments to FHFA attached hereto.

DTS is, in substantial part, Congress' response to – and remedy for -- the GSEs' longstanding failure to provide any type of meaningful consumer financing support for federally-regulated manufactured housing. At present (and historically since 2003) the GSEs have provided no securitization or secondary market support for manufactured home personal property loans and minimal or no support for manufactured home real estate loans.[72] As a result of this entrenched culture of institutional discrimination against manufactured homes and manufactured homebuyers, manufactured home loans in 2016 comprised less than 1% of the Enterprises' total portfolios, even though 22 million Americans live in manufactured homes and manufactured housing since 1989, has accounted for a significant proportion of all new single-family homes sold in the United States.

This deviation from the GSEs' core statutory mission, together with a corresponding expansion of their participation in the mortgage financing market for much higher-priced site-built homes, not only contributed to the GSEs' failure in 2008, but has sharply curtailed the availability of private-sector purchase financing for manufactured homes, severely impacting both American consumers of affordable housing and the industry with especially negative impacts on smaller, independent industry businesses.

At the consumer level, the lack of GSE securitization and secondary market support for manufactured housing loans and the resulting highly-constricted availability of manufactured home consumer financing at market-competitive rates, directly and needlessly excluded – and continues to exclude -- millions of moderate and lower-income Americans from the only type of homeownership they can afford. Moreover, those who are not excluded from homeownership altogether are unnecessarily forced into higher-cost loans because of the lack of robust competition in a market distorted by the GSEs' discrimination against manufactured home loans and the resulting domination of that market by lenders with the ability to originate and maintain such loans in their own portfolios. For the industry, since 1998, manufactured home production has fallen significantly (from 373,143 homes to 96,555 homes in 2018), more than 62% of the industry's production facilities have closed, and the number of business entities producing manufactured homes has fallen by 48%. This has resulted in significant job losses with a devastating corresponding impact on job creation within the industry and allied businesses including product and component suppliers, retailers, transporters, installers, community owners and developers, insurers, financing providers and many more.

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[69] See, Attachment 13, hereto.
[70] See, Attachment 14, hereto.
[71] See, Attachment 15, hereto.
[72] Manufactured housing real estate loans since 2003 have been subject to significantly more restrictive criteria than site-built home mortgages, including punitive underwriting standards and discriminatory loan-level price adjustments, resulting in minimal support by the Enterprises.

Congress, accordingly, recognizing the GSEs' failure to fulfill their vital statutory mission with respect to manufactured housing and manufactured homebuyers, the resulting discrimination against consumers of affordable housing and the manufactured housing industry, and the need for an effective and robust remedy, included manufactured housing as an "underserved market" in the statutory DTS mandate incorporated in the Housing and Economic Recovery Act of 2008 (HERA). The DTS mandate thus represents both a congressional finding that Fannie Mae and Freddie Mac have not (and still do not) properly serve the manufactured housing market, despite their existing Charter obligations to support home ownership opportunities for very low, low and moderate-income Americans, as well as a remedy, designed to materially increase the participation of the GSEs in the manufactured housing market. DTS, then, is a mandatory directive to FHFA, Fannie Mae and Freddie Mac to, among other things: "develop loan products and flexible underwriting guidelines to facilitate a secondary market for mortgages on manufactured homes for very low, low and moderate-income families" (see, 12 U.S.C. 4565(a)). Moreover, to ensure that the term "mortgages" is not misconstrued to limit the scope of DTS to manufactured home real estate "mortgage" loans, the same section of HERA expressly provides that "in determining whether an Enterprise has complied" with DTS, FHFA -- as the Enterprises' regulator – "may consider loans secured by both real and personal property" (i.e., manufactured home-only "chattel loans") (see, 12 U.S.C. 4565(d)(3)).

Today, though, some eleven years after the enactment of the Duty to Serve, and two-thirds of the way through the initial three-year (2018-2020) DTS implementation plans filed by Fannie Mae and Freddie Mac, and approved by FHFA, the mainstream manufactured housing market – and mainstream manufactured housing consumers – remain, for all intents and purposes unserved by the GSEs, notwithstanding FHFA's claims and certification to Congress to the contrary. As was confirmed by Fannie Mae and Freddie Mac officials at an FHFA November 19, 2019 "Listening Session," neither entity has provided any support in either 2018 or 2019 for the personal property (or chattel) loans which comprise nearly 80% of the manufactured housing consumer financing market. These personal property loans are critical for lower and moderate-income manufactured homebuyers – and thus their popularity and prevalence within the manufactured housing financing market – because (despite higher-cost interest rates) they nevertheless offer consumers the least costly path to homeownership, insofar as the loan amount is based on the cost of the home alone, instead of the combined cost of the home and underlying real estate on which the home is situated. Thus, the vast bulk of manufactured home purchase loans and the vast bulk of manufactured home purchasers – in today's existing mainstream manufactured housing market – remain entirely unserved by Fannie Mae and Freddie Mac.

And while a supposed chattel loan "pilot program" has allegedly been submitted by the GSEs to FHFA for approval, there is no publicly-disclosed timeline for either the approval or implementation of those plans. Nor has there been any public disclosure of the scope and parameters of those programs, notwithstanding inquiries by MHARR. Virtually by definition, then, based on the overwhelming market share of personal property loans within the manufactured housing consumer financing market, the GSEs and FHFA have not met, are not meeting, and do not appear poised to meet -- at any time in the immediate or foreseeable future -- the mandate of DTS with respect to mainstream manufactured housing.

Nor have the GSEs done any better with respect to an effort to shift the focus of DTS from mainstream, inherently affordable manufactured housing to a significantly more costly type of erstwhile manufactured home, titled as real estate, which the GSEs have touted as being more "like" site-built homes and have been variously referred to as a "new class" of manufactured homes, being produced and offered primarily by the industry's largest manufacturers. Indeed, even the name, in and of itself, is a pejorative, as is the entire concept of a distinct "new class" of manufactured housing, which implies ongoing discrimination against existing, mainstream, HUD Code manufactured housing. Despite all of the publicity and promotion given over to the MH Advantage and CHOICEHome programs established by Fannie Mae and Freddie Mac respectively in order to prioritize support for such higher-cost homes that are – with respect to both cost and placement – outside of the mainstream of the manufactured housing market, Freddie Mac originated zero such loans in 2018 and 2019, while Fannie Mae, for its part, originated zero such loans in 2018 and has originated, according to its officials at the November 19, 2019 meeting, approximately ten such loans in 2019. Based on total industry 2018 and 2019 production then, Fannie Mae and Freddie Mac, through these programs, provided consumer financing support for .006% of the manufactured homes produced and sold in the United States over that period. Again, by definition, this utterly fails to meet the mandate and directive of DTS as established by Congress.

The equally salient point however, is that these programs do not, cannot and will not fulfill the DTS mandate. DTS was established by Congress to compel the GSEs to serve defined markets, including the HUD Code manufactured housing finance market that had not been fully, properly, or effectively served by the GSEs in the past. DTS, therefore, is a statutory remedy, the objective of which is to compel the GSEs to change their practices and their policies and their perspective with respect to mainstream HUD Code manufactured homes. Instead, the MH Advantage and CHOICEHome programs seek to change the nature of the homes themselves to more closely resemble and mimic the characteristics of the site-built homes that Fannie Mae and Freddie Mac are used to dealing with and would continue to prefer to deal with. In doing so, those programs effectively prescribe much higher-cost features and much higher-cost homes that are unaffordable for the moderate and lower-income purchasers who have long constituted the bulk of manufactured homebuyers. As a result, they circumvent DTS rather than implement it, regardless of the number of loan originations.

Further, with regard to manufactured housing real estate loans, which constitute, at most 20% of the market, Fannie Mae, according to its November 19, 2019 presentation, purchased 12,600 such loans in 2018, up 26% from its average benchmark of loan purchases between 2014 and 2017 – i.e., a baseline of 10,000 such loans per year. Even assuming that the entirety of this increase – i.e., 2,600 loans over the pre-DTS per annum benchmark – was attributable to purchase loans on new HUD Code manufactured homes and included no refinancing loans (which it was not according to a DTS "dashboard" published by FHFA), an increase of 2,600 loan purchases, based on 2018 total production of 96,555 homes, would constitute an increase of 2.69% attributable, supposedly, to DTS.

Thus, it is evident that neither Fannie Mae nor Freddie Mac (nor FHFA) has embraced DTS with respect to the most affordable mainstream HUD Code manufactured homes, and that neither are fulfilling their DTS duties in a manner that is having – or will have – any appreciable,

let alone significant – market impact. Instead, much of the energy and effort that should have been – and should be now – devoted to DTS has instead been shifted outside of the mainstream manufactured housing finance market through the MH Advantage and CHOICEHome programs, which seek to change the essential nature and affordability of manufactured housing and serve a market segment that is more affluent than the moderate and lower-income Americans who rely on affordable mainstream manufactured housing.

All of this has had two major destructive impacts for both consumers and the mainstream manufactured housing industry. It has: (1) undermined any possibility of full-fledged financing competition for the nearly 80% of the manufactured housing market (and manufactured housing consumers) that rely on personal property loans; and (2) has forced moderate and lower-income manufactured housing consumers into higher-cost loans primarily originated by captive portfolio lenders. In no way does any of this constitute a valid, legitimate or market-significant implementation of DTS. Instead, it appears, on its face, to constitute an effort on the part of the GSEs – with the explicit blessing of FHFA – to continue with business as usual, in direct defiance of Congress.

Given the destructive impact of this blatant failure on the HUD Code manufactured housing market, the HUD Code manufactured housing finance market and American consumers of affordable housing, the White House Council should initiate immediate steps within the Executive Branch to compel FHFA to fully implement DTS in a market-significant manner, which would necessarily include full-fledged support for manufactured housing personal property loans. For every day that DTS remains unimplemented on a market-significant basis, both the industry's core of smaller, independent businesses and otherwise qualified moderate and lower-income homebuyers are being seriously and, potentially, irreparably harmed.

In addition to DTS, the White House Council (and HUD) should also investigate and take action to eliminate (or substantially modify) the Ginnie Mae "10-10" rule,[73] which has severely constrained the availability of manufactured home consumer financing under the Federal Housing Administration's Title I manufactured housing program. Currently – and since 2010 – this rule has severely restricted lender participation in those programs, limiting approved lenders (based on previous MHARR inquiries) to two portfolio lenders (both under the control of Clayton Homes, Inc. and its corporate parent, Berkshire Hathaway, Inc.) which currently dominate – and have dominated for nearly two decades – the large bulk of manufactured home consumer lending. This has resulted in the program's emasculation and virtual irrelevance, today, as a source of financing support for manufactured housing consumer loans after having been a significant source of such support in prior decades.

[73] The "10-10" rule, which became effective on October 1, 2010, states that "All approved [manufactured home loan] issuers must meet and maintain a minimum adjusted net worth valuation (as calculated in accordance with the HUD audit guide), plus $10 million, as calculated in accordance with the HUD audit guide, plus funds equal to 10% of each of the following: (1) all [manufactured home mortgage-backed securities] outstanding; (2) the issuer's outstanding Commitment Line balance; and (3) the issuer's outstanding pool balances for all other single-family and multi-family pools. See, Chapter 30, Ginnie Mae MBS Guide, Part 2, Section C ("Adjusted Net Worth Requirements"), Ginnie Mae 5500.3, Rev. 1.

III. CONCLUSION

While the HUD Code manufactured housing industry and consumers of affordable HUD Code manufactured housing face significant federal regulatory burdens and related challenges, both the White House Council and HUD have available to them, already, all of the statutory tools that are needed – and are necessary – to achieve parity between HUD Code manufactured housing and other types of housing, and remedy these burdens which have needlessly suppressed the industry and its ability to meet the affordable housing and homeownership needs of millions of Americans. As detailed and explained herein, these ill-conceived, unnecessary and, in certain instances, unlawful burdens include:

- Measures and actions that discriminate against moderate and lower-income American consumers by imposing regulatory mandates that are unnecessary and unnecessarily costly;
- Measures and actions that discriminate against smaller industry businesses (and in favor of the largest industry conglomerates) by imposing regulatory mandates that are unnecessary and unnecessarily costly;
- Measures and actions that discriminate against smaller industry businesses (and in favor of the largest industry conglomerates) by imposing excessive or unlawful procedural mandates within the HUD regulatory program;
- A lack of parity in placement opportunities and zoning in large areas of the country and resulting discrimination against both manufactured housing consumers and businesses, due to non-implementation and non-enforcement of the enhanced preemption of the 2000 reform law;
- The failure to implement DTS which leaves in place FHFA and GSE policies which discriminate against manufactured homebuyers by discriminatorily limiting full-fair market competition and sustaining unnecessarily higher-cost interest rates, particularly on manufactured housing personal property loans, which constitute the vast bulk of the manufactured housing consumer finance market; and
- The failure to properly implement DTS which discriminatorily impacts smaller industry producers by needlessly limiting the size of the manufactured housing market and leaving in place a market largely dominated by captive portfolio lenders subject to the control of the industry's largest corporate conglomerates; among other things.

As MHARR has repeatedly stressed, the means and methods needed to address and remedy each of the needless burdens detailed above, already exist. What is still needed, however, is the will, focus, leadership and tenacity to deploy those remedies in order to benefit American consumers of affordable housing. The White House Council established by President Trump can and must provide that type of leadership on behalf of those millions of Americans.

Sincerely,

Mark Weiss
President and CEO

cc: Hon. Ben Carson
Hon. Dan Brouillette
Hon. Mark Calabria
Hon. Mick Mulvaney
HUD Code Industry Members