January 11, 2021

VIA FEDERAL EXPRESS AND ELECTRONIC SUBMISSION

Regulations Division
Office of Housing
U.S. Department of Housing and Urban Development
451 7th Street, S.W.
Washington, D.C. 20410-8000

Re: Manufactured Housing Program
Minimum Payments to the States
Docket No. FR-6234-A-01 – RIN 2502-AJ57

Dear Sir or Madam:

The following comments are submitted on behalf of the Manufactured Housing Association for Regulatory Reform (MHARR). MHARR is a Washington, D.C.-based national trade association representing the views and interests of producers of manufactured housing regulated by the U.S. Department of Housing and Urban Development (HUD) pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5401, et seq.) (1974 Act) as amended by the Manufactured Housing Improvement Act of 2000 (2000 reform law). MHARR was founded in 1985. Its members include independent manufactured housing producers from all regions of the United States.

I. INTRODUCTION

On November 12, 2020, HUD published an Advance Notice of Proposed Rulemaking (ANPR) in the Federal Register[1] seeking public comment on potential modifications to its regulations concerning minimum payments to states that participate in various aspects of HUD's regulatory program for manufactured housing.[2] The modifications, as detailed in the ANPR, would: (1) pay each State Administrative Agency (SAA)[3] "for its participation in … various [federal] program elements, including SAA roles, participation in joint monitoring, and

[1] See, 85 Federal Register, No. 219 (November 12, 2020) at p. 71856 ("Manufactured Housing Program: Minimum Payments to the States; Advance Notice of Proposed Rulemaking and Request for Public Comment").
[2] See, e.g., 24 C.F.R. 3282.307; 24 C.F.R. 3284.10.
[3] 24 C.F.R. 3282.7(ii) defines a "State Administrative Agency" as "an agency of a State which has been approved or conditionally approved to carry out the State plan for enforcement of the" federal manufactured housing construction and safety "standards pursuant to section 623 of the Act, 42 U.S. C. 5422, and Subpart G of this part."

administering installation and dispute resolution programs;" and (2) change the "annual funding" for such payments "from minimum end of Fiscal Year lump sum payments to payments for each operational element at the end of each Fiscal Year;" as well as (3) establish a "sunset provision for states to strategize and plan for" such changes.[4] As explained by HUD, state funding changes ultimately would be designed to "more appropriately reflect the responsibilit[ies] of [each] corresponding state and [to] better encourage states to participate to the maximum extent possible in the Federal-State manufactured housing partnership program."[5]

For the reasons set forth in greater detail below, MHARR supports increased payments and related incentives to the states to participate in all aspects the federal-state partnership envisioned by the 1974 Act as amended. MHARR strenuously objects however, to any "sunset" of the so-called (and misnamed) "supplemental" payments currently made by HUD to all SAAs, or the reduction of such amounts currently paid to *any* SAA, which are expressly protected from elimination or diminution by statute. To the contrary, increases in payments to the states should be funded in whole or in part by corresponding *reductions* in program payments to – and program dependence upon – private (i.e., non-state) contractors in general and the entrenched program monitoring contractor in particular, which wields unlawful de facto enforcement authority and discretion within the federal program which exceeds and is contrary to its statutorily-defined and expressly limited function. MHARR, accordingly, believes that certain modifications and clarifications of the payments system outlined in the ANPR are necessary and essential.

II. BACKGROUND

The federal manufactured housing program established by the 1974 Act was envisioned by Congress – and established by law – as a federal-state partnership, with participating states and HUD sharing responsibility for the enforcement of uniform, preemptive, federal standards enacted by HUD pursuant to notice and comment and, since 2000, in accordance with a statutorily-prescribed consensus-based standards development process. Based on this federal-state partnership and specific provisions of the 2000 reform law, increased funding for state SAAs (and corresponding reductions in the responsibilities of – and funding provided to – private, revenue-driven contractors) has been a consistent priority for MHARR. Unlike private contractors, which HUD has allowed to drastically expand their role and influence within the federal manufactured housing program, in direct violation of law, SAAs, as state entities, are broadly accountable to their respective governments and, ultimately, to the public in each such state. They, therefore, have a degree of credibility and *legitimacy* that private contractors -- with a monetary incentive to find fault with as many homes as possible and to simultaneously promote ever more burdensome regulatory requirements and related enforcement activity -- do *not* have, and will *never* have.

Nevertheless, budgeted HUD funding for state SAAs has declined by nearly 32% since 2005,[6] despite the fact that SAAs are tasked with providing consumer protection for the occupants

[4] See, 85 Federal Register, supra at p. 71857.

[5] Id.

[6] As is shown by HUD Congressional Justification documents, budgeted SAA payments in 2005 (with 146,881 HUD Code manufactured homes produced that year) were $6.6 million, while budgeted SAA payments in 2021 (with 94,615

of an ever-growing number of HUD Code manufactured homes produced since the inception of federal regulation in 1976. By contrast, HUD funding for its entrenched monitoring contractor[7] has increased by more than 91% since 2005, despite a 35.5% decline in per annum industry production over the same period.[8] Thus, SAA funding for a steadily growing number of homes and a steadily growing workload has substantially decreased over time, while funding for the monitoring contract over the same period has consistently increased, despite the fact that the contractor is responsible only for "monitoring" a significantly-smaller number of current-production homes.

This anomaly has had multiple negative impacts on the federal program, on American consumers of affordable housing and on the industry itself. These impacts include, but are not limited to: (1) needless suppression of state participation in the HUD program despite its structure and design as a federal-state partnership; (2) the withdrawal of certain states from participation in the HUD program either in toto[9] or with respect to specific program elements,[10] due to insufficient federal funding and related budgetary constraints; (3) needless regulatory burdens on manufacturers and corresponding regulatory cost burdens on consumers due to the revenue-driven pseudo-regulatory excesses of program contractors acting in lieu of HUD and/or state entities; and (4) significant continuing discrimination against federally-regulated manufactured homes and manufactured homeowners at the state and local level due to HUD's long-term failure to integrate as many state governments as possible into the federal-state partnership established by the 1974 Act, and thereby encourage broader acceptance of manufactured homes as an affordable housing resource, among others.

Given these negative consequences of existing program policies that have unlawfully diminished the role of the states within the HUD program while accentuating the illegitimate role and influence of entrenched program contractors, MHARR agrees with the stated concept and alleged objective of the proposals outlined in the ANPR – i.e., to "incentivize continued and new state partnerships." That objective, however, must be accomplished in a manner that: (1) fully complies with applicable law; and (2) properly re-balances the role and funding of SAAs versus the role and funding of private program contractors. MHARR, accordingly, offers the following comments with respect to the specific topics set forth in the November 12, 2020 ANPR.

HUD Code homes produced in 2019 – the last year for which full data is currently available -- were projected at just $4.5 million.

[7] The current monitoring contractor, the Institute for Building Technology and Safety (IBTS) has held the HUD manufactured housing monitoring contract continuously since the inception of federal regulation in 1976, albeit under different corporate names. While each successive monitoring contract has been advertised as a supposedly "competitive" procurement, those procurements – based on award criteria that appear to be tailored to the unique experience of the one and only actual program contractor – are, in effect, de facto sole-source procurements without compliance with the legal safeguards required by law for sole-source contracts.

[8] Corresponding payments to the entrenched HUD monitoring contractor were $3.14 million in 2005 while $6 million is budgeted for Fiscal Year 2021.

[9] E.g., the state of Michigan – formerly an SAA -- withdrew from the HUD program totally in 2015.

[10] E.g., the state of Pennsylvania, although still an SAA state, withdrew from the HUD manufactured housing installation program in 2020.

III. COMMENTS

A. HUD, BY STATUTE, MUST MAINTAIN A BASE FUNDING LEVEL FOR STATE SAAs

While certain language and phraseology used in the ANPR is unclear and, in some cases, facially or implicitly contradictory, it appears that HUD, through the incentive-based funding system described therein, wishes to terminate (i.e., "sunset"), within five to ten years, minimum base payments currently being paid to fully and conditionally-approved SAAs[11]and to ultimately transition to a funding system based completely on actual (i.e., current annual) floors produced and/or shipped, combined with additional payments based on participation in specifically-identified program elements, including joint "monitoring" activity, maintenance of a dispute resolution program, and "installation oversight." Consequently, at the end of the "sunset" period as ultimately determined by HUD, the minimum funding level(s) currently guaranteed to all state SAAs by the minimum base payment regime would end, and subsequent funding levels would be determined based strictly on: (1) the number of HUD Code floors produced in that state (if any); (2) the number of HUD Code floors shipped that state; and (3) participation in joint monitoring, dispute resolution and/or installation oversight activities. Funding levels for individual states, accordingly, would vary and would fluctuate each fiscal year, based on factors both outside and within the control of the state in question.

While MHARR, as noted above, supports a payment structure that would incentivize as many states as possible to participate in the federal manufactured housing program as SAAs, such incentivization *must* be achieved in a manner that is fully consistent with existing law. In that regard, when the original 1974 federal manufactured housing law was amended in 2000, one of Congress' principal objectives was to maintain and strengthen state participation in the federal-state partnership underlying the HUD manufactured housing program. As a result, Congress included a provision in the 2000 reform law designed to ensure that funding for state SAAs would not be reduced below levels extant at that time. Section 620(e)(3) of that law thus states: "On and after the effective date of the Manufactured Housing Improvement Act of 2000, the Secretary *shall* continue to fund the States having approved state plans in … amounts that are not less than … allocated amounts based on the fee distribution system in effect on the day before such effective date." (42 U.S.C. 5419(e)(3)). (Emphasis added). Insofar as the 2000 reform law was signed into law on December 27, 2000, this provision effectively requires that states continue to be compensated by HUD at allocated levels *no lower* than those paid (i.e., "allocated") on December 26, 2000.

Section 620(e)(3) thus establishes a mandatory *statutory* floor for state payments based on allocated amounts in effect at that time. While payments to the states in any given fiscal year may exceed that minimum statutory floor, they may not be lowered below that floor.[12] Moreover, since

[11] Minimum base funding has been provided for fully approved SAAs and now for conditionally approved SAAs pursuant to the minimum state payments final rule published by HUD contemporaneously with the ANPR herein. See, 85 Federal Register No. 219 (November 12, 2020) at p. 71831 ("Minimum Payments to the States").

[12] While the baseline for such payments was subsequently advanced to Fiscal Year 2014 by HUD regulation on the premise that such payments would be equal to or greater than the statutory minimum based on FY 2000 funding levels, HUD cannot by regulation either eliminate that statutory mandate or reduce payments to *any* SAA below that

this floor payment level is statutorily mandated, it may not simply be ignored or read out of the law by administrative fiat. As a result, HUD has no authority to unilaterally "sunset" the minimum base payment mandated by section 620(e)(3), or to reduce the payment to any state below that minimum floor. Put differently, if Congress had wanted this base payment floor to be temporary, it could have specifically provided so in the 2000 reform law. It did not. If it had wanted to "sunset" the base payment floor at any time, it could have specifically done so. It did not. If it had wanted to give HUD the authority to change or eliminate the base payment floor, it also could have done so. Again, it did not. As a result—and in the absence of any contrary action by Congress -- the statutory minimum payment is *permanent* and may not be unilaterally discarded *at any time* by HUD. Accordingly, there cannot be and should not be any "sunsetting" or elimination (either in whole or in part) of the statutory base payment to the states. Instead, any modified state payments should – and must – be in *addition to* the statutory base payment as provided by law.

Consequently, a state with production and/or shipment volume that would result in a calculated payment amount that exceeds the baseline FY 2000/2014 funding amount should receive a payment based on that calculated amount. By contrast, a state with production and/or shipment volume resulting in a calculated amount less than the FY 2000/2014 baseline in any given year, should continue to receive the baseline amount for that year. The statutory baseline would thus remain, as envisioned by the 2000 reform law, and as mandated by Congress, a continuing floor for all SAAs, but not a ceiling.

By contrast, there is no comparable statutory protection and no statutorily prescribed baseline funding level for program contractors. As a result, such funding, unlike state funding, *can* be unilaterally reduced by HUD, and, for two overriding and compelling reasons, *should* be substantially reduced, with the excess funds made available to support increased SAA funding.

First, contractor funding, and especially "monitoring" contract funding, has substantially increased since 2000, even as annual industry production has fallen to levels far below those that were typical in the late 1990s and early 2000s. For example, HUD Code industry production peaked at more than 373,000 homes in 1998 and remained close to historical norms through 2005, when 146,881 manufactured homes were produced.[13] That year, budgeted contractor funding for the HUD program, according to the Department's annual Congressional Budget Justifications, was $3,140,000.[14]Conversely, for FY 2020, with 2019 annual HUD Code production at just 94,615 homes, HUD has budgeted $8,400,000 for contractor funding.[15] Thus, while <u>per</u> <u>annum</u> industry production since 2005 has declined by more than 35%, budgeted contractor funding through FY 2020 *increased* by 167.5%.[16] This baseless and anomalous disparity should and must be corrected by reducing contractor funding to amounts that legitimately reflect current production levels.

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statutorily mandated level. <u>See</u>, Attachment 1 hereto, MHARR February 14, 2017 comments to HUD ("Minimum Payments to States," Docket No. FR-5848-P-01, RIN 2502-AJ37).

[13] Calendar year production statistics are based on reports compiled on behalf of the HUD Office of Manufactured Housing Programs (OMHP).

[14] <u>See</u>, Attachment 2 hereto, FY 2005 HUD Congressional Budget Justifications.

[15] <u>See</u>, Attachment 3 hereto, FY 2020 HUD Congressional Budget Justifications.

[16] Put differently, in FY 2005, budgeted program contractor funding was 47.5% of the funding provided to state SAAs. By FY 2020, that ratio had totally reversed, with *state SAA* funding now standing at 42.8% of budgeted program contractor funding.

Second, contractor funding should and must be corrected – i.e., reduced – to properly reflect and correspond with the performance of *legitimate and lawful* contractor functions in accordance with the 2000 reform law. Specifically, the above-described "disconnect" between substantially higher funding to "monitor" significantly lower industry production since 2000, is a result of policy decisions made by HUD in connection with its unlawful post-2000 reform law sub-regulatory expansion of in-plant regulation, as well HUD's corresponding unlawful delegation of inherently governmental functions to the entrenched monitoring contractor in recent contracts. While MHARR has already described and analyzed these unlawful functions and delegations *in detail* in prior publications, comments, and correspondence to HUD,[17]their relevance in the context of the present ANPR lies in the fact that the 2000 reform law, for the first time, incorporates a specific definition of "monitoring." Under that express definition, the "monitoring" function is expressly limited and confined to the "periodic review of … primary inspection agencies … for the purpose of ensuring that the primary inspection agencies are discharging their duties under this title."[18]Insofar as the present duties and contractual responsibilities of the monitoring contractor extend *well beyond* any activities required to "ensure that the primary inspection agencies" are properly "discharging their duties," those contractual elements and HUD's corresponding over-dependence on the entrenched monitoring contractor are unlawful and should be eliminated, with the resulting savings being utilized for proper, legitimate and sufficient SAA funding (and/or a HUD label fee reduction if warranted).[19]

Accordingly, *no state*, under any modified payment system, should have its federal funding level reduced below current levels. State funding increases, moreover, should be facilitated by corresponding reductions in the activities and funding of program contractors and, most particularly the entrenched "monitoring" contractor.

B. PROGRAM "ELEMENT" PAYMENTS SHOULD BE BASED ON ACTUAL COSTS OF PERFORMANCE

In addition to increases in state baseline funding, MHARR agrees with HUD that it should provide further funding to the states to compensate for the performance of functions authorized by the 2000 reform law, principally installation regulation and dispute resolution. That additional funding, however, should be based on legitimate, *factual,* and accurate estimates of the actual costs of performing those functions, and *not* arbitrary assumptions, as appears to be the case at present.

Specifically, at a November 2020 MHCC subcommittee meeting, during an initial discussion of the program "element" payments detailed in the ANPR, MHARR inquired as to the factual basis for those program element amounts. The response from HUD, essentially, was that the payment ranges for those program elements were selected by HUD without specific factual

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[17] See, e.g., Attachment 4, hereto, October 2015 MHARR Viewpoint, "'Monitoring Contractor's Domination of Federal Program Must End."

[18] The lawful duties of primary inspection agencies are set forth in 24 C.F.R. 3282.351, et seq.

[19] It should also be emphasized, as was already made clear by the MHCC at its January 7, 2021 special meeting, that increased state payments should not be financed by and should not result in *any* certification label fee increase. Such fees are ultimately paid by consumers and any further increase would disproportionately impact and harm lower and moderate-income manufactured homebuyers.

underpinning relating to the actual state costs of performing those functions. The stated amounts, or "ranges" in the ANPR, therefore, are inherently arbitrary and capricious, and should not be the basis for state program element payments under any proposed or final rule. Instead, HUD, based on factual and specific input from the states, should set program element payment levels based on the actual (and reasonable) costs of performing those functions.

C. RESPONSES TO SPECIFIC ANPR INQUIRIES

The November 12, 2020 ANPR sets forth six specific inquiries with respect to aspects of a modified state payments system. MHARR responds to those inquiries as follows:

1. Should HUD change from a minimum annual payment structure to a payment structure that is based on an eligible state's participation in the federal program?

MHARR Response: Conditionally, yes. As is stated above, however, HUD should and must maintain the minimum base state payments mandated by the 2000 reform law, as augmented by program element payments based on the actual and reasonable cost of performing those functions.

2. Should HUD provide a uniform annual funding amount associated with each partnership element? Is the range of funding proposed by HUD for each partnership element appropriate?

MHARR Response: Yes, HUD should provide program element payments to states performing such functions. The current payment ranges, however, appear to have no basis in relevant fact and are, therefore arbitrary and capricious. Instead, HUD should calculate program element payments based on actual and accurate cost information for each state.

3. Can a state determine its budgeting needs and establish and implement additional partnership elements to retain maximum compensation within a 5 or 10-year sunset period?

MHARR Response: Unknown, pending further ANPR responses from the states. This inquiry, however, is fundamentally irrelevant and improper, as a "sunset" of the base payment mandated by the 2000 reform law, as explained above, would be unlawful.

4. Will states that are not currently SAAs be incentivized to become SAAs?

MHARR Response: Yes, but only if SAA status is a required condition for such payments <u>and</u> if such payments reflect the actual and reasonable costs of performing those functions. Just as importantly, however, if HUD truly wants to incentivize states to become SAAs, the number of manufactured homes in every state must be increased. In order to facilitate and advance that objective, HUD must utilize its statutory authority -- via enhanced federal preemption as mandated by the 2000 reform law -- to increase the areas and number of jurisdictions in each state where manufactured homes can be sited without discriminatory zoning exclusions or restrictions. States, accordingly, should be incentivized to report such discrimination to HUD and HUD should undertake a program to invalidate such exclusions and restrictions.

5. Should HUD consider payments to states that are not SAAs?

MHARR Response: See response to Question 4, above. Put simply, and as MHARR noted during the January 7, 2021 MHCC discussion of this matter, such states will not be incentivized to become SAAs if they are subsidized by HUD to perform program elements without submitting a state plan pursuant to section 623 of the 2000 reform law (42 U.S.C. 5422) and becoming an SAA.

6. Should HUD augment the per-unit formula to account for each transportable section with a manufacturer-reported first destination in a state that administers a HUD-approved installation program?

MHARR Response: See responses to Questions 4 and 5, above.

IV. CONCLUSION

For all of the foregoing reasons, MHARR supports the ostensible objectives of the ANPR – (1) to encourage continued and additional state participation in as many aspects of the federal manufactured housing program as possible; and (2) to properly and equitably compensate states for such participation based upon the actual duties that approved state entities perform. With respect to specific amounts for such compensation and procedural aspects of the calculation and distribution of such funds including, but limited to, the time and nature of payments (e.g., lump sum or progressive) MHARR would refer HUD to the comments received individual states and from the Manufactured Housing Consensus Committee (MHCC), which considered this matter on January 7, 2021. Regardless of such procedural input, however, HUD should act expeditiously – and in any event more quickly than the four years which passed between its 2016 proposed minimum payments rule and its November 2020 final state payments rule – to publish a proposed rule on this matter that will be consistent with the 2000 reform law, will help to achieve the purposes and goals of the 2000 reform law, and will fully and properly implement the 2000 reform law as enacted by Congress.

Sincerely,

Mark Weiss
President & CEO

cc: Hon. Dana Wade