Manufactured Housing Association for Regulatory Reform

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THE MHCC SHOULD REJECT HUD'S PROPOSED FIRE SPRINKLER STANDARD FOR MANUFACTURED HOUSING

The MHCC should reject the federal fire sprinkler standard (and related enforcement) as proposed by HUD for the following reasons:

- HUD's proposed federal standard is completely unnecessary. A HUD "sprinkler" standard is not a prerequisite for federal preemption. The existing HUD "Fire Safety" standards address the same "aspect of manufactured home performance," i.e., fire safety, as state or local sprinkler standards and should, therefore, be preemptive. If HUD determines that its existing standards are preemptive, and advances that position, there is no further issue. If, however, HUD determines that the existing HUD fire safety standards are not-preemptive, then there is no federal-level issue and the matter should be addressed on a state-by-state and locality-by-locality basis in conjunction with all other segments of the housing industry (i.e., site-built, modular, multi-family, etc.) as the industry has been doing in the West for several years. If a particular jurisdiction ultimately requires sprinklers for all homes, the NFPA 13D standard will apply in order to account for the unique aspects of the manufactured homes shipped to such jurisdictions, as the industry has routinely done in various jurisdictions for years.

- A federal standard will ultimately be enforced against all manufactured homes. While couched as being triggered only by a manufacturer's "election" to install a sprinkler system or a state or local sprinkler mandate for all segments of the housing industry, there would be no bar to mandatory enforcement of this standard by HUD against all manufactured homes in the future -- either as a result of a policy decision by a future HUD administration, or by court order as a result of litigation by any party with an appropriate interest. As an aside, it goes without saying that any state or local sprinkler mandate adopted only for manufactured homes should be automatically rejected as discriminatory.

- Even a "voluntary" federal standard would be used by sprinkler proponents as a rationale and justification for the adoption of state and local sprinkler standards, either for all homes, or specifically for manufactured homes. A federal standard could thus have the effect of promoting and advancing the adoption of state and local sprinkler standards, thus reversing the current trend that has seen the model International Residential Code (IRC) sprinkler mandate either rejected or modified by most state and local jurisdictions.

- A federal standard would trigger all elements of HUD's design and production enforcement system, including DAPIA design and manual reviews, in-plant and home-site PIA inspections and related monitoring for all sprinkler systems installed in manufactured homes, and will result in the applicability of Subpart I to the performance of all such sprinkler systems for the life of the

home, with all relevant Subpart I investigation, documentation, notice and recall requirements.

- "Testing procedures" -- a critical element of the proposed HUD standard -- would become part of the federal installation standards which, as re-codified by HUD, are not preemptive. As a result, any jurisdiction could impose other, additional, or different testing procedures or requirements for a factory-installed sprinkler system. There would be no check or limit, through HUD, on the cost or substantive terms of those procedures. Such procedures could be used to restrict or exclude the placement of manufactured homes or to discriminate against lower and moderate-income purchasers.

- The existing HUD fire safety standards have been effective. The federal standards are already designed to achieve "fire safety" in manufactured homes without the necessity of costly sprinkler systems, and those federal standards have been effective, as shown by a Foremost Insurance Company study showing that the incidence of fires in HUD Code homes is some 50% lower than that other types of single-family homes.

- The Manufactured Housing Improvement Act of 2000 enhanced federal preemption by requiring that preemption be "broadly and liberally" construed. Accepting HUD's contention that a specific federal standard on the exact same point as a state or local standard or requirement is a pre-requisite for preemption, would undermine the preemption reform of the 2000 reform law and would establish a damaging precedent that would allow HUD to further limit and minimize the scope of preemption, or use an extremely narrow parsing of preemption as a pretext for other new federal standards.

- Lastly, with the industry in extremely fragile condition and with many consumers still unable to obtain or qualify for financing, the proposed HUD standard would significantly increase the purchase price of manufactured homes. Such a cost increase -- particularly given the demonstrated effectiveness of the current HUD fire safety standards -- would be a devastating blow for an industry that has sustained a nearly 90% decline in production and sales over the past decade, to an historic low of just 49,683 homes in 2009, and would further diminish the availability of affordable, non-subsidized manufactured housing for American consumers.

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THE MHCC SHOULD ACT TO RESTORE AND PRESERVE ITS ROLE, AUTHORITY AND FUNCTIONALITY

HUD's February 5, 2010 Interpretive Rule (IR) concerning "HUD Statements That Are Subject to Consensus Committee Processes" -- issued without opportunity for comment by either the MHCC, HUD program stakeholders, or any other interested party -- improperly and wrongly limits the role, authority and functionality of the Manufactured Housing Consensus Committee (MHCC). The IR, moreover, is just the latest in a series of actions by the previous management of the HUD program, over the past several years, to incrementally erode, diminish and undermine that role, authority and functionality. MHARR has opposed each of these actions, including, among other things, the "gag" rule proposed by HUD in 2009. Going forward, MHARR will continue to work with the Department and Congress (if need be) to reverse these actions and restore the MHCC to its full statutory role, authority and functionality. The MHCC and other program stakeholders should participate in these efforts.

In this regard, the IR is based on multiple fallacies, including the following:

- The IR essentially eliminates MHCC review and comment on a myriad of HUD policy and practice decisions directly relating to the federal standards and their enforcement, and the cost and availability of manufactured housing to consumers. It does this by effectively reading the crucial catchall section of the Manufactured Housing Improvement Act of 2000 -- section 604(b)(6) -- out of the law.

- The IR limits MHCC review and comment to matters that would constitute a "rule" under existing law (i.e., the Administrative Procedure Act) and would, therefore, be subject to public notice and comment rulemaking proceedings in any event. This significantly undermines the role of the MHCC as a consensus forum and as an independent, accountable and transparent check and balance within the program.

- The MHCC is not a run-of-the-mill federal advisory committee. The former dysfunctional National Manufactured Housing Advisory Council created by the original 1974 manufactured housing law was specifically created as an "advisory" committee. It was routinely bypassed by HUD for 24 years and when it was consulted, its recommendations were routinely ignored. If Congress had been satisfied with this arrangement, it could have left the Advisory Council intact when it passed the 2000 reform law. Instead, it created the MHCC, with a specific statutory mandate, specific statutory authority, a specific statutory funding mechanism, specific statutory subject matter jurisdiction and specific procedures. These specific statutory delegations of authority supersede any conflicting or more narrow or limiting provisions in more general laws like FACA. They also make the MHCC unique, with a uniquely defined role, authority and functions, and not a run-of-the- mill "advisory committee."

- Because the recommendations resulting from the MHCC consensus process are just that -- non-binding recommendations that the HUD Secretary may accept, modify, or reject, and that must be approved by the Secretary and subject to notice and comment rulemaking before they can ever become binding -- any contention that the role, authority and functionality of the MHCC must be restricted because it is a "private body" that is not "accountable" to the public, is simply misplaced and irrelevant.

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THE MHCC SHOULD REJECT HUD'S CHANGE TO THE MHCC BYLAWS ON THE COMPOSITION OF SUBCOMMITTEES

The Manufactured Housing Consensus Committee (MHCC) should reject HUD changes to the MHCC Bylaws that give veto power over the composition of MHCC subcommittees to the Designated Federal Official (DFO) appointed by HUD. This is yet another action by the previous management of the HUD program, over the past several years, to erode, diminish and undermine the role, authority and functionality of the MHCC.

- The prior MHCC Bylaws (July 2007), as approved by the Committee and HUD, provided that "the Chair of the MHCC shall appoint the chair and members of a subcommittee unless the Secretary appoints the HUD [DFO] to chair the meeting of any subcommittee." The new Bylaws, as unilaterally revised by HUD, however, now provide that "the Chair of the [MHCC] shall appoint the chair and members of a subcommittee in consultation with and with agreement of the DFO." This change effectively gives the DFO control over the composition of MHCC subcommittees.

- Neither the authorizing law for the MHCC -- the Manufactured Housing Improvement Act of 2000 -- nor the Federal Advisory Committee Act (FACA), require any such DFO or agency veto over the composition of MHCC subcommittees.

- There is no legitimate claim that veto power is warranted by the participation of non-MHCC members in such subcommittees. Subcommittee recommendations have no standing until they are approved by the full MHCC, which is comprised entirely of members appointed by the Secretary, and even recommendations of the full MHCC must be approved by the Secretary, subject to full notice and comment rulemaking proceedings. Consequently, there are myriad safeguards already against any possible "undue influence" by any interest, group, or individual, within an MHCC subcommittee.

- Nor has there has ever been any showing -- or claim -- by HUD, the General Services Administration (which generally oversees FACA committees), or any program stakeholder, that the existing subcommittees of the MHCC are somehow skewed, not representative of the balance of the full Committee, or in any way functioning in an improper manner.

- By contrast, veto power -- given the history of the program -- could be abused to limit the technical expertise or input available to a subcommittee, or to skew such input to a particular viewpoint. This concern is particularly serious in light of efforts, under the prior management of the program, to limit the role, authority and functionality of the MHCC, exclude the collective representation of the industry and limit member communications through a proposed gag rule that would have required MHCC-member communications to be approved, in advance, by the HUD DFO.