MHARR WASHINGTON UPDATE

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

REPORT AND ANALYSIS

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NAHB SUBSIDIARY NAMED MHCC ADMINISTERING ORGANIZATION (AO)

In a statement released on June 18, 2014, HUD has announced the selection of Home Innovation Research Labs, Inc. (HIRL) as the new Administering Organization (AO) for the Manufactured Housing Consensus Committee (MHCC). HIRL succeeds the MHCC's initial AO, the National Fire Protection Association (NFPA), which did not seek the AO contract after its last renewal expired in 2013. HIRL's selection as MHCC-AO follows a tortuous and needlessly extended contracting process which saw HUD reject a competing bid by the International Code Council (ICC) – the nation's leading independent residential code development organization -- for allegedly being submitted 38 minutes too late.

Although HIRL is certified as a standards developer by the American National Standards Institute (ANSI) and appears, at least initially, to meet the demanding AO criteria established by the Manufactured Housing Improvement Act of 2000, its status as a subsidiary of the National Association of Home Builders (NAHB) – an organization primarily comprised of site-builders in competition with the HUD Code manufactured housing industry, that has often taken positions hostile to the HUD Code industry (e.g., NAHB's July 21, 2010 comments to the Federal Housing Finance Agency opposing the inclusion of manufactured home chattel loans in the "duty to serve underserved markets" mandate) -- raises potentially serious issues.

HIRL, as acknowledged on its internet website, is the former NAHB-Research Center, which was awarded a number of manufactured housing research contracts by HUD's Office of Policy Development and Research (PD&R) in the 1980s and 1990s. Concern within the manufactured housing industry over competitors' potential access to proprietary technical and production information under those contracts led to litigation by industry members to put an end

to that practice. And, in the wake of that litigation, interaction between PD&R and NAHB-Research Center appeared to diminish. Now though, HUD, seemingly unconcerned with potential conflicts of interest between competing segments of the housing industry, has resumed its involvement with an NAHB entity in connection with manufactured housing regulatory matters.

While both HIRL and NAHB publicly acknowledge that HIRL is a wholly-owned subsidiary of NAHB, there is no readily accessible public information regarding the composition of HIRL's Board of Directors or other senior leadership positions, and thus no immediate way to evaluate or assess any operational overlap between the leadership of the two organizations.

Furthermore, while the role of the AO is largely procedural, the prior AO, NFPA, did make substantive presentations to the MHCC and often cited its substantive positions on fire safety and related issues. And, as the Secretariat for the National Green Building Standards, as indicated by HUD's announcement letter, HIRL could similarly seek to promote substantive standards that would impact the affordability of manufactured homes. Just as importantly, HUD has allowed the AO significant discretion regarding the operations of the MHCC, including matters that directly impact the proper representation of affected stakeholders.

MHARR, therefore, while welcoming the appointment of a new AO and the impending resumption of full MHCC activities, and is looking forward to working with HIRL to advance affordable HUD Code manufactured housing, will conduct in-depth research and analysis of this organization (and its predecessor, the NAHB-Research Center) and carefully monitor its activities to ensure that the MHCC continues to function as a legitimate forum for HUD program matters as intended by Congress.

NEW SUBPART I PROVIDES BASIS FOR CONTRACTOR ABUSE – IF ALLOWED

Ever since HUD's October 2013 publication of a final rule implementing Subpart I reforms developed and recommended by the Manufactured Housing Consensus Committee (MHCC), MHARR has noted two key defects that -- combined with other recent developments -- could provide fertile ground for program monitoring contractor abuse and a return to the type of arbitrary and needlessly costly regulatory practices that the Manufactured Housing Improvement Act of 2000 was designed to eliminate: (1) a requirement for monthly PIA inspections of manufacturer records that was not part of the final MHCC-recommended amendment package or the proposed Subpart I amendment rule published by HUD on February 11, 2011; and (2) the lack, thus far, of an open, methodical and definitive forum, by HUD to inform and educate all program stakeholders regarding the new Subpart I procedures and thereby ensure the proper and uniform interpretation of those provisions going forward.

Because the HUD manufactured housing program, in late 2013 and early 2014, did not have a permanent administrator, MHARR -- in addition to raising these issues in a January 27, 2014 communication to (and subsequent meeting with) the HUD Assistant Secretary for Housing – began an intensive study and analysis of all aspects of these issues, both to document them for industry members facing expanded and/or excessive regulation as a result, and also to address

them and their potentially grievous implications for manufacturers and consumers, with the new, manufactured housing program administrator, once appointed.

With the new program administrator now in place at HUD, and based on input from manufacturers in the field, MHARR has begun to inform and educate industry members on this matter, will publish a White Paper with its findings in August 2014, and will fully engage the new program administrator in order to head-off such extremely negative consequences for the industry and consumers down the road. While MHARR recognizes that the decisions which allowed these major issues to emerge and now begin to overlap and expand, occurred prior to the appointment and arrival of the current administrator at HUD, they nonetheless must be addressed – and addressed properly -- to avoid a return of the program to the regulatory abuses that the 2000 reform law was designed to end, and possibly even more serious consequences for both the industry and consumers.

The dangerous convergence to be detailed in MHARR's findings began with a unilateral HUD change to the recommendations of the MHCC in the final Subpart I modification rule. That final rule requires third-party PIAs to "review at least monthly … manufacture[r] service and inspection records." No such requirement was previously contained in Subpart I. Nor was this provision published for comment by program stakeholders as part of the proposed Subpart I amendment rule issued by HUD on February 15, 2011, which referred only to "periodic" PIA review of manufacturer records. When the final rule was published, however, that provision was deleted and replaced with a new, materially different section, that now specifies a minimum time period (monthly) for such reviews. The question now for the industry and consumers, therefore, is how this change was made, why it was made and who made it, given its potential for exploitation and abuse in a system featuring entrenched actors with a history of expansive, abuse and costly regulation.

As MHARR has already pointed out to HUD, there is no evidence that the monthly PIA review requirement was ever evaluated for its probable cost impact as required by the 2000 reform law. And that impact, as is now rapidly beginning to emerge, will be substantial. While HUD, in its final rule, seemingly acknowledged this concern, noting that: "commenters stated … the new requirement … would significantly add to the PIA's responsibilities` [and] increase costs" while doing "nothing to ensure that consumers are protected," and "agreed" with such comments, it nevertheless increased the frequency of such reviews from "periodic" to "at least monthly," contrary to applicable law. HUD, therefore, has never afforded regulated parties – or anyone else – an opportunity to comment on this provision of the final rule as actually adopted having never itself considered the cost implications of the modified final rule.

Based on that monthly inspection requirement, the scope of the changes made by the October 2013 amendments, the inherent complexity of Subpart I, and the overriding belief that all industry members, inspectors and monitoring personnel should be held to the same enforcement criteria, with an even playing field for all regulated parties, MHARR strongly urged HUD to conduct an open, transparent and detailed orientation program for all interested stakeholders. MHARR, in its January 27, 2014 communication with the HUD Assistant Secretary for Housing and in other communications, sought such an authoritative and methodical presentation -- as an authoritative presentation by HUD – to help avoid any misunderstandings,

enforcement or compliance inconsistencies, or subjective interpretations that could taint the new rules from the outset, if such interpretations and procedures were developed and/or offered by any other party.

Unfortunately, no such authoritative HUD presentation to ensure that the new Subpart I would start on the right track, however, has been held to date, and just as anticipated and predicted by MHARR, this has left a regulatory vacuum that is effectively allowing the monitoring contractor and others to move in, with a free hand in deciding how the new Subpart I will be interpreted and enforced, and results that are already alarming. In new "rump" meetings with selected and limited attendees, those parties have put forward a series of needlessly complex and costly "flow charts," protocols and procedures based on unilateral interpretations of the new Subpart I.

This new empowerment of the program monitoring contractor to put its own stamp on Subpart I is eerily reminiscent of the contractor's infamous "Acceptable Quality Level" (AQL) program of the 1980s and 1990s, that led to many of the reforms contained in the 2000 law. Worse yet, it will inevitably be compounded by the new $100.00 per section label fee that will likely go into effect before the end of 2014. And that, combined with gradually increasing industry production, will provide the program contractor with even more revenue and incentive to create and implement arcane new procedures and requirements that will substantially increase the cost of manufactured housing with no corresponding benefits for consumers. While MHARR has strongly urged HUD to utilize this new revenue to provide additional funding for cash-strapped State Administrative Agencies (SAAs), such funding adjustments require time-consuming rulemaking procedures, as contrasted with additional contractor funding, which will be immediate and fuel a spate of new make-work regulatory procedures.

MHARR will now address the convergence of these issues as a priority matter with HUD, and press the Department for a satisfactory resolution.

DOE SHIFTS TO "NEGOTIATED RULEMAKING" FOR MH ENERGY STANDARDS

In just the latest twist in a now seven-year saga, the Department of Energy (DOE) has formally announced that it will develop manufactured housing energy efficiency standards mandated by the Energy Independence and Security Act of 2007 (EISA) via a "negotiated rulemaking" with a new federal advisory committee being assembled for that purpose.

In a Federal Register "Notice of Intent" published on June 13, 2014, DOE requested nominations for members to serve on the new manufactured housing standards advisory committee that will operate under the auspices of an obscure DOE "Appliance Standards and

Rulemaking Advisory Committee" (ASRAC), which already has other "working group" offshoots engaged in developing standards for other types of products. Nominations for voting participation in the manufactured housing committee, in accordance with the Notice of Intent, are due by June 27, 2014. The deadline for the committee to "negotiate[e] a proposed rule and submit[t] it to ASRAC is September 30, 2014."

DOE's turn to a negotiated rulemaking is the latest oddity in a seven-year process which has already seen, among other things – (1) DOE develop a "draft" proposed manufactured home energy conservation rule; (2) DOE selectively leak that draft proposed rule to certain interested parties; (3) the utilization of that leaked "draft" proposed rule by those interested parties as the basis for a still undisclosed energy proposal that may be brought to the MHCC; (4) the DOE "draft" proposed rule being withdrawn after its submission to the Office of Management and Budget (and after objections and a request for an investigation by MHARR); and (5) now this shift, in midstream, from the "standard" DOE rulemaking process to a "negotiated" rulemaking.

In direct communications with DOE officials, MHARR has made it clear that any advisory committee or "working group" for a manufactured housing energy standards rulemaking that does not include full and proper representation for smaller HUD Code industry businesses and consumers would be unacceptable and that any DOE rulemaking process – "negotiated" or otherwise -- must include consultation with, and the full involvement of, both HUD and the MHCC, at a meaningful stage in the proceedings and not as a cosmetic afterthought.

MHARR will be meeting with DOE officials to sort out these issues and fully participate in this new DOE approach going forward, in order to protect the rights, interests and views of HUD Code industry small businesses and consumers of affordable housing. Toward that end, MHARR has already submitted a nomination for committee membership in order to ensure that smaller industry businesses have collective voting representation and real voice on that committee.

(***Editor's Note***: The last portion of the MHARR Washington Update has had its final bullet point was essentially an advertisement for something their office is obviously promoting. As MHARR is not an ***MHProNews*** client or advertiser, that section was edited out, in keeping with our publication's editorial policy.)