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MHARR Viewpoint

By Mark Weiss **FEBRUARY 2016** *As printed in The Journal*

"New Duty to Serve Proposed Rule Raises Serious Questions"

The latest Federal Housing Finance Agency (FHFA) proposed rule to implement – supposedly – the "duty to serve underserved markets" (DTS) mandate of the Housing and Economic Recovery Act of 2008 (HERA) raises a host of serious questions for the industry and its representation in Washington, D.C. That proposal, released to selected "stakeholders" on December 15, 2015, would maintain the blanket exclusion of manufactured home personal property (chattel) loans from DTS credit that first appeared in FHFA's disastrous 2010 proposed DTS "implementation" rule, a rule which MHARR, in written comments, called "grossly inadequate."

After high expectations – based, among other things, on the appointment of new FHFA Director Melvin Watt (a strong proponent of manufactured housing while in Congress) and promising meetings between MHARR and FHFA officials in 2014 – that an FHFA commitment to "re-visit" the initial 2010 proposed rule would result in DTS credit for manufactured housing chattel loans in any new or revised rule, the "new" proposed implementation rule, *continuing* the total exclusion of manufactured home chattel loans, landed with a thud around most of the industry. That is, with the exception of the Manufactured Housing Institute (MHI), which, following a series of closed-door meetings and contacts with FHFA in late 2015, inexplicably lauded FHFA's perfunctory invitation for "public comment" on the possible inclusion of chattel loan DTS credit in a final rule and a discretionary GSE chattel loan "pilot program," as a "significant victory."

Both points, though, are a distraction to divert the industry and consumers from deeper and more significant issues. First, an invitation for comments on a matter purposely *not* included in a proposed rule, and a "promise" to "consider" those comments, is little more than a legal truism, simply re-stating the obligation(s) of *any* agency conducting a rulemaking under the federal Administrative Procedure Act. Second, FHFA's mention of a possible chattel "pilot program" is not the same as "proposing a pilot program for chattel loans," as characterized by MHI. Indeed, FHFA has made it clear that *if, in fact,* any such program is authorized by FHFA in a final rule (and that is hardly a given with FHFA stating in the proposed rule that there would be "substantial difficulties ... to make chattel loans appropriate for Enterprise support"), it would be <u>discretionary</u>, with FHFA officials stating that the Enterprises "could" establish such a program as part of a DTS implementation plan *if* they "wanted to." Fannie Mae and Freddie Mac would thus have

veto power over whether such a program is ever established – and the Enterprises' hostility toward manufactured housing chattel loans (indeed manufactured home loans, period, as shown by Fannie Mae's unused "MH Select" program for HUD Code real estate loans) is well-documented.

Beyond these distractions, though, and with the content and substance of the 2015 MHI-FHFA closed-door meetings and contacts – acknowledged by FHFA officials – still shrouded in secrecy, serious questions exist about the nature, content and impact of those meetings on the development of the "new" (but not really "new") proposed DTS rule. The search for answers to those questions – in the face of wall-to-wall denial – must focus, then, at least initially, on information contained in the public record concerning these matters and the interests of those involved.

Most fundamentally, it is widely acknowledged – and MHARR has consistently maintained – that with HUD Code manufacturers continuing to produce their best homes ever, the lack of high-volume, lower-cost consumer financing, together with a toxic combination of other post-production roadblocks (e.g., placement restrictions and discriminatory exclusion, among others) that have never been adequately confronted or addressed, has kept manufactured housing production at artificially low levels for nearly 20 years, has driven numerous lenders out of the market and, most importantly, has frozen large numbers of homebuyers out of the manufactured housing market and, because of the unequalled affordability of HUD Code homes, the broader housing market altogether.

As prominent industry figures, a couple of large finance companies, MHI and others have explained, however, higher interest rates for manufactured home loans – and particularly chattel loans – are a function of existing market realities, including the absence of a secondary market and GSE support for such loans. Thus, in 2011 testimony before a House subcommittee, the President of Clayton Homes, Inc. stated: "... the lack of a secondary market means lenders are typically forced to hold manufactured home loans in their portfolios, which makes [the] cost of capital associated with originating manufactured home loans higher for these lenders versus those which are able to securitize real property mortgages through the GSEs...." Similarly, a 2011 MHI Issue Brief states: "... since our cost of capital is higher, manufactured home loan interest rates are typically higher. Since Fannie Mae and Freddie Mac do not purchase loans or create a secondary market where manufactured housing lenders can access capital at a discounted rate, lenders need to rely on other sources to make loans. These sources charge a higher interest."

Given this long-standing economic reality and the well-documented, decades-long failure of both Fannie Mae and Freddie Mac to properly serve the manufactured housing market and manufactured homebuyers, the "Duty to Serve" was designed by Congress to *directly* address the underlying problem identified by the industry's finance sector and: (1) establish a high-volume secondary market and GSE support for all manufactured home consumer loans, that would help ease the pressures and risks that translate into higher interest rates and constrained credit availability for such loans; and (2) by alleviating those risks, which have largely limited today's manufactured housing finance

market to a small number of deep-pocket portfolio lenders (offering higher-cost products), help encourage more lenders to enter (or re-enter) the manufactured housing market and thereby expand competition, further reducing market pressures driving higher interest rates. In doing so – and cognizant of the fact that chattel loans account for more than 70% of all manufactured housing consumer loans and provide lower and moderate-income Americans with access to the industry's most affordable homes – Congress *specifically* authorized DTS program credit for manufactured home chattel loans.

And, in fact, nexus between the full implementation of a robust DTS-based secondary market for all manufactured home loans, including chattel loans, and expanded competition within the manufactured home consumer lending market (with corresponding downward pressure on interest rates), has been acknowledged by the parent company of the large lenders that currently dominate the market. Thus, 2012 testimony by the General Counsel of Clayton Homes, Inc. before another House subcommittee acknowledged that: "... [T]he lack of a secondary market means that lenders that want to participate in the manufactured housing market must hold these loans in their portfolios.... [S]ince only lenders that have the financial ability to hold the loans they originate on their balance sheets can participate in a meaningful way, this either eliminates or severely limits the ability of smaller lenders to enter the manufactured housing market." (Emphasis added).

An influx of competition, however, triggered by the full implementation of DTS, combined with a corresponding market-based softening of interest rates, could negatively impact the profitability of current higher-cost portfolio lenders according to published statements. Specifically, in an interview reported by media sources on April 3, 2015, the President of 21st Mortgage Company stated, regarding Clayton Homes and its financial subsidiaries, that: "The Company is profitable in all it does," but financial products are "where the money is made."

In the meantime, with DTS mired at FHFA, such "money-making" on financial products – and more importantly the availability of consumer credit in the manufactured housing market – have been hampered by the "high-cost" loan provisions of the Dodd-Frank finance reform law, which expose the large portfolio lenders, in particular, to significant risks and liabilities for charging the types of interest rates customarily associated with manufactured home consumer loans – and especially chattel loans. Consequently, the last five years have seen a highly-focused effort to enact legislation to adjust the Dodd-Frank interest rate caps to levels that would accommodate those customary and predominate interest rates. By contrast, over the same period, with the exception of MHARR, there has seemingly been little (or no) enthusiasm among the industry's largest businesses, and their representatives in Washington, D.C., for the *full* and expeditious implementation of DTS, including chattel loans, as expressly authorized by Congress.

All of this, however – particularly viewed in light of the failure of large industry lenders to provide crucial loan performance information to Ginnie Mae when that organization offered to revisit its onerous "10-10" rule for approval of Federal Housing Administration (FHA) Title I manufactured home chattel lenders, a rule that has resulted in the approval

of only the Clayton finance subsidiaries – just raises more troubling questions about closed-door meetings, late in the game, between FHFA, MHI and a self-advertised "consumer group," and the continuing blanket exclusion of chattel loans.

In MHARR's view, unless and until the full *content* of those secret meetings and all materials related to them – including documents, minutes and transcripts (if any) are fully and publicly exposed – this matter will be little more than a wild goose chase for the industry and consumers who desperately need greater access to chattel financing. While MHARR will submit strong comments to FHFA and aggressively pursue this matter through all available channels, there needs to be full and complete disclosure of all closed-door activities and inputs involving FHFA that could have impacted the substance of the "new" proposed rule.

MHARR is a Washington D.C.-based national trade association representing the views and interests of independent producers of federally-regulated manufactured housing.

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