Manufactured Housing Association for Regulatory Reform

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VIA FEDERAL EXPRESS AND ELECTRONIC SUBMISSION

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: Interpretative Bulletin for Model Manufactured Home Installation Standards-Foundation Requirements in Freezing Temperature Areas Under 24 C.F.R. 3285.312(b) – Docket Number FR-6023 – 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 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.) 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 June 21, 2017, the HUD Office of Manufactured Housing Programs (Program/OMHP) published, in the Federal Register, a proposed "Interpretative Bulletin for Model Home Installation Standards Foundation Requirements in Freezing Temperature Areas under 24 C.F.R. 3285.312(b)."[1] The proposed Interpretative Bulletin (IB), designated I-1-17 and issued pursuant to the purported authority of Genger Charles, HUD General Deputy Assistant Secretary for Housing,[2]

[1] See, 82 Federal Register, No. 118 at p. 28279, et seq.

[2] Genger Charles is an appointee of former President Barack Obama, who, at present, remains at HUD notwithstanding the transition to the administration of President Donald J. Trump on January 20, 2017. HUD has failed to respond to an inquiry by MHARR contained in June 29, 2017 correspondence to HUD Secretary Benjamin Carson asking that

maintains that its purpose "is to provide guidance for designing and installing manufactured home foundations in areas subject to freezing temperatures with seasonal ground freezing, in accordance with the [HUD] Model Manufactured Home Installation Standards wherever soil conditions are susceptible to frost heave."[3]

As is demonstrated below, however, the proposed IB is: (1) a de facto Obama Administration "midnight regulation" that should have been (and should remain) suspended under the Trump Administration's regulatory "freeze" order of January 20, 2017; (2) represents a blatant abuse of the manufactured housing program's regulatory authority – both substantively and procedurally; (3) rests on a false and deceitful premise; (4) would substantively and unlawfully change existing HUD standards without basis or justification; (5) has never been properly evaluated for its cost impact in violation of applicable law; and (6) would needlessly impose additional regulatory burdens on the American people and increase regulatory compliance costs ultimately paid by lower and moderate-income manufactured home-buyers, in direct violation of Executive Order 13777 and the express regulatory policies of President Trump.

Moreover, and even more fundamentally, the proposed IB fails the most basic test for an Interpretive Bulletin under applicable HUD regulations, in that it fails to "clarify"[4] anything under HUD's existing manufactured housing installation standards for states without state law installation standards and programs but, instead, renders the existing HUD standard ambiguous, vague, imprecise and uncertain in ways that will needlessly increase regulatory compliance costs for consumers, manufacturers, community owners, installers and other industry members, while creating an unnecessary and indefensible liability trap for design professionals. As a result, the proposed IB should be withdrawn in toto.

II. PROCEDURAL HISTORY AND BACKGROUND

The proposed "frost-free" foundation IB derives from and is based upon a 2016 report by HUD's manufactured housing program installation contractor, SEBA Professional Services, L.L.C. (SEBA), entitled "Manufactured Home Foundations in Freezing Climates – An Assessment of Design and Installation Practices for Manufactured Homes in Climates with Seasonally Frozen Ground."[5] (SEBA Report). The SEBA Report, in turn, appears to be substantially – if not

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HUD disclose, among other things, "whether the proposed IB was reviewed and approved by a Trump Administration official or designee appointed after Noon on January 20, 2017," as required by a regulatory "freeze" order issued by the White House Chief of Staff on January 20, 2017 and, if so, "which officials(s) or designee(s) reviewed and approved the proposed IB." See, Attachment 1, hereto.

[3] See, 82 Federal Register, No. 118, supra, at p. 28279.

[4] The preamble to the proposed IB states that it was "developed for the purpose of clarifying requirements ... for the manufactured housing industry when designing or setting foundations for manufactured homes in locations subject to freezing temperatures with seasonal ground freezing." (Emphasis added). Id. at p. 28280. See also, related discussion at pp. 10-13, infra.

[5] See, Attachment 2, hereto. The preamble to HUD's IB specifically states that the 2016 SEBA report "provides both a reference and technical basis for the guidance and recommendations included" in the IB. See, 82 Federal Register, No. 118 at p. 28281, col.2. See also, related discussion at pp. 11-13, infra.

exclusively – based on the opinions and conclusions of one individual, Mr. Jay H. Crandell, P.E. (Crandell), the principal of ARES Consulting, Inc. (ARES).[6]

MHARR, from the outset, has consistently and strenuously opposed the HUD program's creation and subsequent manipulation of both the SEBA Report and resulting proposed IB in an effort to illegitimately alter an existing federal installation standard and effectively divest states with HUD-approved state-law installation programs of their primary jurisdiction and authority over manufactured housing installation as provided by federal law.[7] In October 20, 2016 correspondence to administrator of the federal manufactured housing program,[8] MHARR stated:

> "[T]he SEBA Report ... would materially and significantly alter 24 C.F.R. 3285.312(b)(2) and (b)(3) in ways that extend well beyond a mere "interpretation" of that standard for purposes of enforcement. Specifically, the construction of those sections set forth in the report – based on the assertions and apparent conclusions of just one individual -- would effectively eliminate the disjunctive "or" in sections 3285.312(b)(2)(i) and 3285.312(b)(3)(i) which currently, and since the time of final adoption of Part 3285, nine years ago, in October 2007, has allowed HUD Code manufacturers to elect between monolithic slab systems and insulated foundations in "freezing climates" designed by a registered professional engineer or registered architect in accordance with either "acceptable engineering practice to prevent the effects of frost heave," or Structural Engineering Institute/American Society of Civil Engineers (SEI/ASCE) standard 32-01 (Design and Construction of Frost-

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[6] See, Manufactured Housing Consensus Committee (MHCC), October 25-27, 2016 meeting minutes, Appendix C at p. 2. See also: (1) Draft Minutes, MHCC Regulatory Subcommittee Meeting, November 28, 2016, at p. 4: "Jay Crandell said he ... provided the technical research used to support the recommendations contained in the SEBA report;" (2) Draft Minutes, MHCC Meeting, December 12, 2016 at p.8: "Jay Crandell, in answer to a question regarding the clarity of the SEBA Report, said it was clear to him because he wrote it...." (Emphasis added). The 2016 SEBA Report, however, does not contain any type of transparency disclosures regarding either Mr. Crandell or ARES, including, but not limited to: (1) whether the underlying report by Mr. Crandell was produced pursuant to a paid subcontract with SEBA, a paid contract with HUD, or on some other basis; (2) the amounts that were (and are being) paid to Mr. Crandell and/or ARES by SEBA and/or HUD for that report and related activity in support of the proposed IB; or (3) any information related to potential or actual conflicts of interest, including, but not limited to, other (past or present) clients of Mr. Crandell and/or ARES, past or present business associations of Mr. Crandell and/or ARES, and/or past or present contracts with HUD or parties associated with the HUD manufactured program, or other agencies with regulatory authority over manufactured housing. Such information is relevant, germane and material given Crandell's past contractual/financial relationships with, among others, HUD's manufactured housing "monitoring" contractor, the Institute for Building Technology and Safety (IBTS) (See, "An Assessment of Damage to Manufactured Homes Caused by Hurricane Charley," March 31, 2005 at p. ii, identifying "Jay Crandell, P.E." as a "subcontractor to IBTS"); the NAHB Research Center, Inc., the research arm of the national association representing competitors of manufactured housing producers (see, e.g., "Design Guide for Frost-Protected Shallow Foundations," June 1994, at p. iii, "The NAHB Research Center staff responsible for this document are Jay H. Crandell, P.E.;" "Review of Structural Materials and Methods for Home Building in the United States: 1900-2000 at p. ii. MHARR, accordingly, sought such information through an October 28, 2016 Freedom of Information Act (FOIA) request (see, Attachment 3, hereto). Ten months later, however, HUD has failed to respond to this request in any form -- claiming that it was not received by the Department. MHARR, however, by correspondence dated August 4, 2017, provided documentary proof to HUD of delivery of its October 28, 2016 FOIA request on November 1, 2016, and has demanded that HUD comply with all applicable FOIA production deadlines based on that delivery date. (See Attachment 4, hereto).

[7] See, 42 U.S.C. 5404.

[8] See, Attachment 5, hereto.

Protected Shallow Foundations). The SEBA Report accomplishes this by creating an apparently mandatory functional equivalence between "acceptable engineering practice" and the prescriptive requirements of SEI/ASCE 32-01that effectively eliminates any discretion or professional judgment on the part of the "registered professional engineer or registered architect" referenced in sections 3285.312(b)(2) and (3). ***

"[T]he SEBA Report, [however], fails to provide any evidence showing the alleged insufficiency of the current standard or current practice under that standard and whether its unilateral changes are "reasonable" for any given region. Nine years after the promulgation of the final installation standards rule, the SEBA Report fails to cite any evidence of either systemic failures resulting from the 3285.312(b) standards as originally stated and enforced, or an objective justification of any sort, showing the need for such material and significant alterations. [Further,] the SEBA Report fails to provide any evidence showing the cost of any such change, which would be substantial given the Report's apparent mandate for, among other things, a site-specific soil test "to determine frost susceptibility" in each instance, site-specific groundwater tests, and other related preparatory work and determinations.

"[M]ore significantly ... the "recommendations" and "guidance" of the SEBA Report appear to be a unilateral power-grab by HUD to supplant the primacy of state authority over installation in states with approved installation programs. In stating "recommendations" for "Local Regulatory Officials and Inspectors,"[9]the SEBA Report -- like HUD's April 11, 2016 "Interim Guidance" – does not distinguish between officials in HUD-approved and default states, and appears to impose affirmative mandates (either de jure or de facto) on state and/or local officials acting on the basis of approved state-law installation standards under color of state law. As MHARR stated in its April 14, 2016 communication to HUD, however, "while the Part 3285 standards, pursuant to 42 U.S.C. 5404, are model standards that provide a baseline for state standards to provide 'protection that equals or exceeds' the model federal provisions, the law provides no mechanism or basis for the imposition of unilateral HUD interpretations of the model federal standards on state officials enforcing state standards under color and authority of state law." Nor does that statute provide any mechanism or basis for HUD to impose a specific federal standard, modification of a specific federal standard, or interpretation of a specific federal standard on a state program that, in the aggregate, has been approved as providing a degree of protection that equals or exceeds the model federal program. Put differently, the applicability, interpretation and enforcement of state manufactured housing installation standards, following their adoption and approval by HUD, are a matter within the sole authority and discretion of state officials and not subject to unilateral dictates by HUD or by HUD contractors."[10]

[9] See, SEBA Report at p. 7, "Recommendations for Local Regulatory Officials and Inspectors."
[10] Id. at pp. 3-5.

(Emphasis in original). (Footnotes omitted).

The SEBA Report was subsequently presented to the Regulatory Enforcement Subcommittee of the statutory Manufactured Housing Consensus Committee (MHCC) at a meeting on November 28, 2016.[11] MHCC members, representing all manufactured housing program stakeholder categories delineated by the Manufactured Housing Improvement Act of 2000, posed pointed inquiries to HUD regarding the basis for the SEBA report. Among other things, members asked whether there have been "consumer complaints or problems in the field"[12] regarding manufactured housing foundations and "frost heave." No such information was offered or provided by HUD, while state officials serving on the MHCC and members of the public attending the meeting stated that they were "unaware of any issues that would prompt a change in regulation."[13] HUD was also asked whether it (or its contractor) had conducted "a cost analysis to see how [the changes mandated by the SEBA report would] affect the installation of the home" as is specifically required by law.[14] In response, SEBA stated that "a cost analysis had not been done because there is no change to the regulation." (Emphasis added).[15]This assertion, denying a "change to the regulation" in either the SEBA Report or the resulting HUD proposed IB, as is demonstrated below, is patently false, yet HUD, to date, has failed to undertake or provide – either to the MHCC, program stakeholders, or the public – the cost-impact information for the proposed IB plainly required by federal law.

Not surprisingly, given the failure of HUD, SEBA and SEBA's contractor (Crandell) to provide this crucial, statutorily-required information to the MHCC, the Subcommittee rejected – by a 2-6-0 margin, a proposed motion that would have recommended that HUD "use the SEBA Report, 'Manufactured Home Foundations in Freezing Climates' including appendices, as the basis for an Interpretative Bulletin" on this matter.[16] The MHCC Regulatory and Enforcement Subcommittee, accordingly, could not and did not achieve a consensus, as defined by the 2000 reform law, in support of the mandates and rationale of the SEBA Report, or in support of using that Report as the basis for an IB on "frost-free" foundations. To the contrary, a subsequent motion, specifically omitting any reference to the SEBA Report as the "basis" for any subsequent IB and highlighting the questions, concerns and objections that the Subcommittee had raised regarding the justification, cost and impact of the standards changes mandated by the SEBA Report, called on HUD to "draft an interpretative bulletin before the December 12 MHCC teleconference taking

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[11] The MHCC, established by the Manufactured Housing Improvement Act of 2000, has express statutory authority to review, consider and submit recommendations to the HUD Secretary concerning proposed Interpretive Bulletins. See, 42 U.S.C. 5403(b)(3)(A). The same provision requires that if the "Secretary rejects any significant comment provided by the consensus committee ... the Secretary shall provide a written explanation of the reasons for the rejection to the consensus committee." No such written explanation was provided to the consensus committee in this case, in violation of 42 U.S.C. 5403(b)(3)(B).

[12] See, Draft Minutes, MHCC Regulatory Subcommittee Meeting, November 28, 2016, at p.2.

[13] Id.

[14] See, 42 U.S.C. 5403(e)(4): "The consensus committee, in recommending standards, regulations and interpretations, and the Secretary, in establishing standards or regulations or issuing interpretative bulletins ... shall *** (4) consider the probable effect ... on the cost of the manufactured home to the public." (Emphasis added).

[15] See, Draft Minutes, MHCC Regulatory Subcommittee Meeting, November 28, 2016, at p. 6. See also, Id. at p. 2 where the HUD program administrator stated to the MHCC Subcommittee that the mandates of the SEBA report are "an interpretation of a regulation and there is not anything new." See, further discussion at pp. 12-14, infra.

[16] See, Draft Minutes, MHCC Regulatory Subcommittee Meeting, November 28, 2016, at p. 3.

into consideration the comments from the November 28 MHCC Regulatory Subcommittee teleconference."[17] (Emphasis added)

A HUD-proposed "frost-free" IB was subsequently presented to the full MHCC on December 12, 2016. That proposed 25-page IB, however -- provided to MHCC members and program stakeholders less than two full business days prior to the scheduled meeting date -- expressly and deliberately ignored the outcome of the two resolutions addressed by the MHCC Regulatory and Enforcement Subcommittee at its November 28, 2016 meeting. Indeed, that proposed IB, consistent with an expanding pattern of the HUD program ignoring significant recommendations of the MHCC under its present administrator – an Obama Administration holdover, installed on a career basis instead of a non-career appointee as provided by the 2000 reform law – provided no indication whatsoever that HUD had considered, let alone addressed, the concerns raised by the Regulatory and Enforcement Subcommittee, which overlapped with the specific objections previously asserted by MHARR. Rather, the only evidence in the proposed IB submitted to the MHCC is that HUD did just the opposite – by ignoring the Subcommittee's rejection of the SEBA Report as the basis for any resulting IB.[18]

Again, therefore, not surprisingly, the full MHCC voted unanimously to submit recommendations to HUD on the proposed IB, calling on the Department to, among other things: (1) "ensure additional costs are not incurred due to the IB;" (2) "remove" references to "specific engineering language in the IB;" (3) "ensure [that the] IB doesn't exceed reasonable acceptable engineering practice as required in [24 C.F.R.] 3285.312(b)(2);" and (4) "remove reference[s] to the SEBA Report from the IB."[19] As HUD itself acknowledges in the preamble to its proposed IB published on June 21, 2016, the effect of the MHCC's comments regarding the proposed IB, was to recommend that HUD "delete the statement regarding the SEI/ASCE 32-01 Standard generally providing the bases for acceptable engineering practice" as that term is utilized in the existing HUD regulations concerning "frost-free" foundations.[20]HUD's preamble states, however, that it did "not agree with or accept" that MHCC recommendation, with no further explanation or rationale, thus violating at least two express provisions of the 2000 reform law (i.e., mandatory determination and consideration of cost-impact and mandatory explanation of rejections of MHCC recommendations) while siding – summarily – with its paid contractors, rather than the unanimous judgment of a cross-section of all stakeholders in the federal manufactured housing program, including consumers, state officials, industry members and others.

The entire record of this proceeding to date, accordingly, is one of the HUD manufactured housing program and its administrator: (1) ignoring and dismissing key recommendations of the MHCC; (2) acting without cost evidence or evidence of objective justification in violation of the Manufactured Housing Improvement Act of 2000; (3) ignoring and dismissing serious concerns and objections raised by all federal manufactured housing program stakeholders, including consumers, industry members and state officials; (4) seeking to curtail or eliminate legitimate state authority and/or state participation in the HUD manufactured housing program; (5) granting

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[17] Id. at p. 6.

[18] MHARR reiterated and expanded its objections to the proposed IB – and to the SEBA Report as the supposed basis for that IB – in written comments submitted to the MHCC on December 9, 2016. See, Attachment 6, hereto.

[19] See, Draft Minutes, MHCC Meeting, December 12, 2016, at p. 8.

[20] I.e., 24 C.F.R. 3285.312(b)(2), (3).

powers and authority to HUD contractors in excess of authorizing law; (6) seeking to create make-work activity for revenue-driven HUD contractors; (7) acting in violation of multiple Trump Administration Executive Orders (EOs); and (8) seeking to impose needless but extremely costly new regulations on lower and moderate-income Americans in direct violation of Trump Administration policy.

As is explained in detail below, HUD's proposed IB is a relic of the past Administration which would impose unnecessary regulatory costs with absolutely no basis in fact whatsoever and will disproportionately harm both the lower and moderate-income American families who rely on affordable manufactured housing the most, as well as the multitude of small businesses which comprise the core of the American manufactured housing industry. That proposal, accordingly, should be withdrawn.

I. COMMENTS

1. HUD's Proposed IB Should Be Suspended In Accordance With President Trump's Regulatory Freeze Order

The Trump Administration, upon assuming office on January 20, 2017, immediately issued a "Memorandum for the Heads of Executive Departments and Agencies," (Memorandum)[21] directing that action on all pending "regulations" and ""regulatory action" be suspended "in order to ensure that ... President [Trump's] appointees or designees have the opportunity to review any new or pending regulations." The Memorandum, accordingly, states, in relevant part: "Subject to any exceptions the Director or Acting Director of the Office of Management and Budget ... allows for emergency situations or other urgent circumstances relating to health, safety, financial or national security matters, or otherwise, send no regulation to the Office of the Federal Register ... until a department or agency head appointed or designated by the President after noon on January 20, 2017, reviews and approves the regulation." (Emphasis added). While the HUD proposed IB is not itself a "regulation," per se,[22] the January 20, 2017 Trump Administration Memorandum makes it abundantly and unequivocally clear that it applies to – and requires the suspension of activity on – such a proposed "interpretation" of an existing standard. The Memorandum thus states:

> "As used in this memorandum, 'regulation' has the meaning given to 'regulatory action' in section 3(e) of Executive Order 12866, and also includes any 'guidance document' as defined in section 3(g) thereof.... That is, the requirements of this memorandum apply to 'any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation

[21] See, Attachment 7, hereto.

[22] It should be noted, though, that federal manufactured housing law requires that proposed Interpretive Bulletins, following MHCC review, be published in the Federal Register for notice and comment pursuant to and in accordance with provisions of the Administrative Procedure Act (APA) applicable to agency rulemaking. (See, 42 U.S.C. 5403(b)(3)(C): "Following compliance with subparagraphs (A) and (B), the Secretary shall – (i) cause the proposed ... interpretative bulletin and the consensus committee's written comments, along with the Secretary's response thereto, to be published in the Federal Register; and (ii) provide an opportunity for public comment in accordance with section 553 of title 5, United States Code."

> of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking,' and also covers any agency statement of general applicability and future effect 'that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue.'"

(Emphasis added).

Based, therefore, on the plain text of this Memorandum, the proposed IB, entailing an "interpretation" of a "regulatory issue" (i.e., the purported meaning and requirements of the HUD manufactured housing installation standards for federally-administered installation states), should have been and should remain suspended, unless it was "reviewed and approved" by the "department or agency head" at HUD, "appointed or designated by ... President [Trump] after noon on January 20, 2017" (i.e., HUD Secretary, Dr. Benjamin Carson).

There is no evidence, however, that the IB was either reviewed or approved by the HUD Secretary appointed by the current Administration, or is anything other than Obama Administration "midnight regulation" orchestrated by Obama Administration holdovers at HUD, including the current HUD manufactured housing program Administrator. By correspondence to Secretary Carson dated June 29, 2017, MHARR specifically asked that HUD disclose, among other things: "(1) whether the proposed IB was reviewed and approved by a Trump Administration official or designee appointed after Noon on January 20, 2017, as required by the [Trump Administration] regulatory freeze order; [and] (2) if so, which official(s) or designee(s) reviewed and approved the proposed IB...." HUD, to date, has failed to respond to this inquiry. In the absence of a reply to this inquiry from HUD and evidence to support compliance with the January 20, 2017 Trump Administration Memorandum, and insofar as the IB was issued under the name of Ms. Genger Charles, an Obama Administration appointee still at HUD at the time the proposed IB was issued, MHARR asserts and maintains that the publication of the proposed IB violates that Memorandum, that the IB – as issued in violation of the January 20, 2017 Memorandum -- must be withdrawn, and that any further action related to the proposed IB must be suspended pending full review by Secretary Carson or his specific designee as required by the January 20, 2017 Memorandum.[23]

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[23] The contemptuous and dismissive treatment -- by the HUD manufactured housing program and program administrator -- of a closely-related November 15, 2016 congressional request to federal agencies, following the election of President Trump, to defer finalizing any pending regulatory actions, is illustrated by November 18, 2016 MHARR correspondence to HUD (see, Attachment 8, hereto) and the program administrator's December 7, 2016 response thereto (see, Attachment 9, hereto). MHARR's correspondence states, in relevant part: "Congress, in a letter dated November 15, 2016, called on the Secretaries, Administrators and Directors of all federal agencies to defer 'finalizing pending rules or regulations in the [Obama] Administration's last days,' noting that rushed regulations could entail 'unintended consequences' that could 'harm consumers and businesses.' The congressional communication further noted that 'such forbearance is necessary to afford the recently elected administration and Congress the opportunity to review and give direction concerning pending rulemakings....'" The December 7, 2016 response of the program administrator, however, totally disregards and essentially mocks these legitimate concerns, stating: "The OMHP [Office of Manufactured Housing Programs] notes your reference to recent communications from Congress concerning finalizing pending rules or regulations. It is important to note that this proposed interpretative bulletin has yet to be 'finalized' even within the broadest definition of that term in a regulatory context. The OMHP is committed to continuing to execute its program obligations consistent with the 2000 Amendments to the Act." The administrator's response thus rejects Congress' clear warning against taking steps to finalize pending

2. The Proposed IB Violates Federal Law and HUD's Own Regulations

Existing HUD federal installation regulations addressing "frost-free" manufactured housing foundations, adopted in 2007 and implemented in 2008,[24] are clear and unequivocal. Under those regulations, design professionals (i.e., "registered professional engineers" or "registered architects"), consistent with the disjunctive term "or" set forth in the regulations, may elect between foundation designs which comply with the requirements of a prescriptive reference standard -- Structural Engineering Institute (SEI)/American Society of Civil Engineers standard 32-01 (SEI/ASCE 32-01) -- or "acceptable engineering practice" as determined by the licensed design professional responsible for preparing that specific design. The existing regulations at 24 C.F.R. 3285.312(b)(2), (3) thus provide, in relevant part:

> "(2) *Monolithic slab systems*... The monolithic slab system must be designed by a registered professional engineer or registered architect: (i) In accordance with acceptable engineering practice to prevent the effects of frost heave; or (ii) In accordance with SEI/ASCE 32-01 (incorporated by reference, see 3285.4).
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> (3) *Insulated foundations*. An insulated foundation is permitted above the frost-line when all relevant site-specific conditions ... are considered, and the foundation is designed by a registered professional engineer or registered architect: (i) In accordance with acceptable engineering practice to prevent the effects of frost heave; or (ii) In accordance with SEI/ASCE 32-01 ...."

(Emphasis added).

The existing HUD installation standards for federally-administered states thus allow state-licensed design professionals in the field to develop manufactured housing foundation designs for use in freezing climates based either on the SEI/ASCE 32-01 reference standard or their own professional judgment – i.e., "acceptable engineering practice" -- relying on education, experience and knowledge of relevant conditions.[25]The standard, moreover, as is, provides for full accountability for manufactured housing foundations in freezing climates either through compliance with the reference standard or "acceptable engineering practice" as determined and enforced through the professional licensing, professional responsibility and/or potential civil liability of the state-licensed professional responsible for that design. By providing such design

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regulatory actions (such as its proposed IB) and instead concocts a baseless "red herring" argument over the meaning of the word "finalized." Given this contrived, dismissive response to a clear request by Congress, it is not surprising that the program and program administrator would proceed with the proposed IB in violation of the January 20, 2017 Trump Administration Memorandum.

[24] See, 72 Federal Register, No. 202, October 19, 2007 at p. 59338, et seq.

[25] The HUD Manufactured Housing Construction and Safety Standards (24 C.F.R. 3280.1, et seq.) specifically *define* a "Registered Engineer or Architect" to be "a person licensed to practice engineering or architecture in a state and subject to all laws and limitations imposed by the state's Board of Engineering and Architectural Examiners and who is engaged in the professional practice of rendering service or creative work requiring education, training and experience in engineering sciences and the application of special knowledge of the mathematical, physical and engineering sciences in such professional or creative work...." See, 24 C.F.R. 3280.2. (Emphasis added). From this definition, it is evident that proper qualifications are already required by section 3285.312(b)(2) and (3) for the development of designs in full accordance with "acceptable engineering practice," and that those qualifications already ensure proper accountability and responsibility for the development of compliant and safe designs.

flexibility, the current standards are consistent with the mandate of federal manufactured housing law for the "establishment ... to the extent possible, [of] performance-based federal" standards for manufactured housing.[26] (Emphasis added). Such performance and outcome-based standards, which allow maximum flexibility for cost-saving technical and design innovation, combined with uniform standards, uniform federal/state enforcement and robust federal preemption, are directly responsible for the unparalleled affordability of manufactured housing,[27] one of the fundamental purposes of federal manufactured housing regulation, as directed by Congress in the 2000 reform law.[28]

For nearly a decade, these unambiguous regulations have ensured safe and cost–effective manufactured housing foundation designs for use in "freezing climates,"[29] with no evidence of a pattern of systemic or consistent failures presented by either HUD, SEBA, or SEBA's contractor. To the contrary, state participants in the MHCC meetings addressing this matter and commenters in this proceeding, have stressed the absence of any such evidence.[30]The HUD proposed IB, therefore – at a minimum – is an alleged "solution" in search of a problem. More significantly, though, its attempted promulgation violates multiple provisions of federal manufactured housing law and HUD's own manufactured housing Procedural and Enforcement Regulations (24 C.F.R. 3282).

At its core, the proposed IB would effectively eliminate the clear and definitive disjunctive "or" in sections 3285.312(b)(2) and (3), which allows design professionals to rely either on the SEI/ASCE 32-01 reference standard or "acceptable engineering practice." The IB does this -- in an ultimately vague and ambiguous way -- by generally equating "acceptable engineering practice" with compliance with the SEI/ASCE 32-01 reference standard. The IB thus states, among other things:

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[26] See, 42 U.S.C. 5401 (b)(3).

[27] See, U.S Department of Housing and Urban Development, Office of Policy Development and Research, "Is Manufactured Housing a Good Alternative for Low-Income Families? Evidence from the American Housing Survey," December 2004 at p. 6: "[T]he cost of manufactured housing, even for recent movers, is much lower than other alternatives, including renting."

[28] See, 42 U.S.C. 5401(b)(2): "The purposes of this title are – (2) to facilitate the availability of affordable manufactured homes and to increase homeownership for all Americans."

[29] "Freezing climates," not the variants utilized by HUD in its proposed IB, is the regulatory predicate set forth in 24 C.F.R. 3285.312(b) for the applicability of subsequent provisions, including 3285.312(b)(2) and (3).

[30] See, e.g., Draft Minutes, MHCC Meeting, December 12, 2016: MHCC member and Colorado State Administrative Agency (SAA) director "Rick Hanger said he was trying to understand what problems we are trying to solve. In Colorado, there are about 30,000 installations and there has been no feedback from HUD about any concerns regarding the installation practices." Id. at p. 5. MHCC member and North Carolina SAA Joseph Sadler stated that "in North Carolina ... most foundations are on piers that go below the frost line, and he has not seen any issues with frost heave." Id. at p. 3. See, e.g., Draft Minutes, MHCC Regulatory Subcommittee Meeting, November 28, 2016: MHCC member and Arizona SAA director Debra Blake stated "she is unaware of any issues that would prompt a change in regulation." See also, August 14, 2017 comments filed in the instant docket by Wisconsin Housing Alliance Executive Director Amy Bliss: "Just recently, I requested a list of all installation related home failures over the past several years from our State Administrative Agency. The answer came back that there were zero."

- "HUD did not agree with or accept the MHCC recommendation to delete the statement regarding the SEI/ASCE 32-01 standard *generally* providing the bases for acceptable engineering practice;"[31]

- "*In general,* the basis and design principals for acceptable engineering practice *should* be consistent with the provisions of the ASCE standard;"[32]

- "One of the reviewed FFF [frost free foundation] designs demonstrated an appropriate application of the HUD Code *and* ASCE 32 standard's technical requirement for frost protection of foundations. Thus it is possible to develop a compliant FFF design in accordance with acceptable engineering practice *or* ASCE 32;"[33]and

- "[M]ost of the reviewed alternative foundation designs including FFF designs were found to be not in conformance with the HUD Code *and* the ASCE 32 reference standard for frost-protection of shallow foundations;"[34]

(Emphasis added).

Similarly, the SEBA Report which, according to the proposed IB, "provides both a reference and technical basis for the guidance" contained in the IB,[35] broadly equates "acceptable engineering practice" with compliance with SEI/ASCE 32-01 and effectively conflates those terms, contrary to the clear and unequivocal disjunctive election provided by the existing regulation. That Report states, in relevant part:

- "For manufacturers, this includes ensuring designs comply fully with 24 Code of Federal Regulations (CFR) 3285, Model Manufactured Home Installation Standards (HUD Code) *and* applicable provisions of SEI/ASCE 32-01 (ASCE 32);"[36]

- "Thus a need exists to clarify requirements and provide guidance for proper and compliant application of FFF designs as an alternative to a conventional (frost depth) footing or a conventional FPSF [Frost Protected Shallow Foundation] design using insulation to protect against ground freezing *per the ASCE 32 standard*;"[37]
- "Manufacturers should require that design professionals … develop foundation frost-protected installation methods that comply with applicable provisions of the HUD Code *and* ASCE 32;"[38]

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[31] See, 82 Federal Register, No. 118, supra at p. 28280, col. 3.
[32] Id. at pp. 28281-28282.
[33] Id. at p. 28281, col. 2.
[34] Id. at p. 28281, col. 3.
[35] Id. at p. 28282, col. 2.
[36] See, Attachment 2, hereto at p. 2.
[37] Id. at p. 4.
[38] Id. at p. 5.

- "Foundation frost-protection methods used for installation designs must comply with the HUD Code *and* the ASCE 32 standard;"[39] *and, most importantly*

- "The above items define important design considerations in ASCE 32 and also establish a standard of care that other alternative methods *must meet*...."[40]

(Emphasis added).

From these statements, set forth in the IB itself and in the SEBA Report, as the "reference and technical basis" for the IB:

(1) It is evident that the IB (notwithstanding the contrary self-serving assertions of the program administrator and program installation contractor),[41] rather than enunciating an "interpretation" of the existing standards, in fact changes their substance and meaning by replacing the current disjunctive "or" with a functional equivalence between the term "acceptable engineering practice" and SEI/ASCE 32-01, even to the point of pronouncing that the design "considerations" contained in SEI/ASCE 32-01 establish the relevant standard of care for designs professional preparing manufactured housing foundation designs of the type authorized by 24 C.F.R. 3285.312(b)(2) and (3). As such, the IB represents an abuse of the statutory and regulatory processes for the promulgation of interpretative bulletins and should be withdrawn.

In relevant part, section 3282.113 of HUD's manufactured housing Procedural and Enforcement Regulations authorizes the Secretary to "issue interpretative bulletins interpreting the standards under the authority of section 3280.9 of this chapter or interpreting the provisions of this part." To the extent that the proposed IB fails to "interpret" the existing standard but, instead, substantively modifies that standard, it violates the authority provided by this section.

(2) The IB, by conflating the regulatory term "acceptable engineering practice" with SEI/ASCE 32-01 -- *in particular*, stating that SEI/ASCE 32-01 "generally provid[es] the bases for acceptable engineering practice" -- violates the fundamental regulatory predicate for an IB, in that, rather than "clarifying" the meaning and requirements of 24 C.F.R. 3285.312(b)(2) and (3) – which were already clear to begin with – the proposed IB instead renders the current disjunctive election vague, ambiguous, indefinite and uncertain, while federal law provides for the imposition of civil and potentially criminal penalties on any regulated party that happens to guess incorrectly what this purported "guidance" is actually supposed to mean or require.

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[39] Id. at p. 6.

[40] Id. at p. 19.

[41] See, e.g., Draft Minutes, MHCC Regulatory Subcommittee Meeting, November 28, 2016: "DFO Danner said this is an interpretation of a regulation and there is not anything new;" "Michael Henretty said a cost analysis has not been done because there is no change to the regulation." Id. at p. 2, 6.

In relevant part, 24 C.F.R. 3280.9 (referenced in section 3282.113) states that: "Interpretative Bulletins may be issued for the following purposes: (a) to clarify the meaning of the standard; and (2) to assist in the enforcement of the standard." (Emphasis added). To the extent that the proposed IB fails in any way to "clarify" the relevant standard-- the essential and fundamental predicate of this provision -- instead rendering the clear disjunctive election of the current standard vague and ambiguous, the IB violates the express terms and purpose of 24 C.F.R. 3280.9 and should be withdrawn.

It should be noted, moreover, that HUD, in fact, lacks the legal authority to issue an Interpretive Bulletin with regard to any federal installation standard promulgated under 24 C.F.R. 3285. Section 604 of the Manufactured Housing Improvement Act of 2000 states that "the Secretary may issue interpretative bulletins to clarify the meaning of any Federal manufactured home construction and safety standard [24 C.F.R. 3280] or Procedural and Enforcement Regulation [24 C.F.R. 3282]." Insofar as HUD chose to codify its federal installation standards as a separate Part 3285, outside of the Part 3280 Federal Manufactured Home Construction and Safety Standards, federal law provides no basis or authority for the promulgation of any such IB purporting to construe a Part 3285 standard. Accordingly, this entire proceeding is ultra vires based on this ground alone.

(3) The IB, by "generally" equating "acceptable engineering practice" with compliance with SEI/ASCE 32-01 and simultaneously stating in the SEBA Report that "design considerations in ASCE 32 ... establish a standard of care that other alternative methods must meet," not only renders definitive disjunctive election of the current standard vague and ambiguous, but creates a de facto liability trap for design professionals which will effectively ensure that manufactured housing foundation designs developed by those professionals will not deviate from the significantly more costly prescriptive mandates of the SEI/ASCE 32-01 standard.

By equating the regulatory term "acceptable engineering practice" with SEI/ASCE 32-01, and asserting that SEI/ASCE 32-01 establishes the "standard of care" for "other alternative [foundation] methods" – i.e., designs based on "acceptable engineering practice," and setting forth that equivalence in a regulatory statement carrying the force of law, any design professional deviating from SEI/ASCE 32-01 (or approving of such a deviation, including the employer of any such person) would inevitably face a claim of negligence per se in any litigation arising from the alleged failure of any such design. "Negligence per se" is defined as: "negligence due to the violation of a law meant to protect the public, such as a speed limit or building code. Unlike ordinary negligence, a plaintiff alleging negligence per se need not prove that a reasonable person should have acted differently -- the conduct is automatically considered negligent, and the focus of the suit will be over whether it

proximately caused damage to the plaintiff."[42](Emphasis added). The ultimate predictable result of the proposed IB, therefore, will be to shift all manufactured home "frost-free" foundation designs and installation practices to those mandated by SEI/ASCE 32-01, thereby substantially increasing regulatory compliance costs for both industry members and consumers, ignoring relevant objections from the MHCC and program stakeholders, and promulgating a de facto amendment to the relevant standards based on a false predicate.

Beyond these issues, and as noted above, herein, the HUD program has offered no specific evidence of manufactured home foundation failures as a result of frost heave as an objective basis and showing of need for this de facto regulation, nor has HUD, SEBA or SEBA's contractor provided any information indicating, analyzing or demonstrating the cost and cost-effectiveness of this de facto regulation, in violation of the specific requirements of the Manufactured Housing Improvement Act of 2000.[43]

Furthermore, as MHARR has previously asserted, the proposed IB is part of a HUD program power grab – in violation of the Manufactured Housing Improvement Act of 2000 – to dictate installation standards in all 50 states.

Specifically, the installation provisions of the 2000 reform law, together with mandatory dispute resolution mechanisms, were adopted to close significant gaps in the original National Manufactured Housing Construction and Safety Standards Act of 1974, as construed by HUD. Although the manufactured housing industry has always supported sound consumer protection and the safe and proper installation of manufactured homes (which had been at the root of the overwhelming majority of consumer complaints prior to the 2000 law), HUD determined, early-on that it would not address the installation of manufactured homes under the 1974 law, because the law did not include express authorization for such standards. Recognizing, however, that proper installation is crucial: (1) to the proper performance of a manufactured home; (2) to the value of that home to its owner and consumer finance providers; and (3) to public and government acceptance of manufactured homes as legitimate "housing," rather than "trailers," the industry and consumers worked for nearly 12 years, together with other stakeholders, to develop the installation provisions ultimately included in the 2000 reform law.

The result was a statutory structure, based on the 1994 recommendations of the National Commission on Manufactured Housing, which authorized any state that wished to do so (i.e., a "complying" state), to establish (or continue) a state-law installation program and state-law installation standards, so long as those requirements provided protection that met or exceeded the "protection" provided by baseline federal standards to be developed by the MHCC. HUD, by contrast, was authorized to regulate installation only in non-complying (i.e., "default") states that failed to adopt a state-law installation program within five years of enactment of the 2000 law.

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[42] See, Cornell University Law School on-line legal dictionary.

[43] See, 42 U.S.C. 5403(e)(4) and (5): "[T]he Secretary, in ... issuing interpretations under this section, shall -- *** (4) consider the probable effect of such standard on the cost of the manufactured home to the public; and (5) consider the extent to which any such standard will contribute to carrying out the purposes of this title."

This structure was consistent with the nearly-universal view of program stakeholders that varying soils and other installation-related conditions in different geographical areas made states the best and most appropriate party to regulate the siting of manufactured homes. The 2000 reform law, consequently, allows states to take the lead role in the regulation of installation, with HUD assuming that duty only in default states that fail to adopt and implement a conforming state-law program.

What the 2000 reform law does not do, however -- again recognizing, as it does, the unique competence and ability of the states and state authorities to determine proper installation systems and techniques within their own borders – is authorize or direct HUD to substitute its judgment for that of state authorities regarding the specific details and elements of any given state installation standard. Put differently, the 2000 law allows HUD to determine whether a state-law installation program and state-law installation standards as an integrated "whole" provide consumers with a level of protection equal-to-or-greater-than the HUD standards, but does not provide back-door authority for HUD to micro-manage state-law programs and/or standards or over-ride state judgments regarding the need for -- or content of -- any specific installation requirement or standard.

Nevertheless, at the October 26, 2016 MHCC meeting, the HUD program administrator, under direct questioning by MHARR as to what exactly the SEBA Report constituted and whether the unilateral changes to the 3285.312(b) "Footings" standard contained in that Report would be applicable in all states, stated that the mandates contained in the SEBA Report, effectively changing the 3285.312(b) federal standard – and now incorporated within the HUD proposed IB, would be applied to – and required to be enforced – in all states, including current HUD-approved states with state-law installation standards and programs.

This action, if permitted to go forward by the Trump Administration, would establish a destructive precedent – in violation of the 2000 reform law and the federal-state partnership created by the original National Manufactured Housing Construction and Safety Standards Act of 1974 – that would empower HUD dictate the specific content and specific requirements of state-law installation standards and programs, thereby over-riding state law and decisions made by state authorities acting under state law, by the simple expedient of unilaterally changing its "interpretation" of the federal "model" installation standards. HUD would thus have the power to unilaterally impose new and additional mandates on the states that ultimately would either bankrupt state programs or force state programs out of the installation regulation structure through financial and budget pressures that state governments would simply be unwilling to accept. And for every state that drops a state-law installation program, more power, authority, and revenue would be diverted to unaccountable HUD program contractors.

This HUD attack on the primacy of state-based installation regulation, would – if allowed to go forward – not only undermine the federal-state partnership mandated by Congress, but would impose high-cost, prescriptive, one-size-fits all installation mandates with no showing of need, necessity or cost-effectiveness, in violation of the 2000 reform law. Given such destructive and predictable consequences – particularly in the absence of any showing of objective need for the proposed IB -- there is no legitimate basis for the proposed IB's promulgation and it should be withdrawn.

3. HUD's Proposed IB Violates EO 13777 and Should be Withdrawn

On February 24, 2017, President Trump issued Executive Order (EO) 13777 ("Enforcing the Regulatory Reform Agenda"). In relevant part, EO 13777 provides:

> "Section 1. Policy. It is the policy of the United States to alleviate unnecessary regulatory burdens placed on the American people.
>
> ***
>
> Section 3 Regulatory Reform Task Forces *** (d) Each Regulatory Reform Task Force shall evaluate existing regulations ... and make recommendations to the agency head regarding their repeal replacement or modification, consistent with applicable law. At a minimum, each Regulatory Reform Task Force shall attempt to identify regulations that: (i) eliminate jobs or inhibit job creation; (ii) are outdated, unnecessary or ineffective; (iii) impose burdens that exceed benefits; [or] (iv) create a serious inconsistency, or otherwise interfere with regulatory reform initiatives and policies.

(Emphasis added).

In June 7, 2017 written comments submitted to HUD pursuant to a May 15, 2017 HUD "Notice and Request for Comment" concerning the implementation of EO 13777 by and within the Department, MHARR called, among other things, called for the proposed IB (I-1-17) to be "terminated pursuant to EO 13777." In relevant part, MHARR stated that "HUD's intentional distortion and misapplication of the installation mandate of the 2000 reform law – seeking to undermine, restrict and ultimately abolish the legitimate role and authority of the states as established by Congress, will result in significant harm for the industry and consumers, and impose needless and excessive regulatory compliance costs."[44] In order to "alleviate unnecessary regulatory burdens" that would be "placed on the American people" under the proposed IB, with no evidence of need or justification whatsoever, the proposed IB, again, for this sufficient and necessary reason, should be withdrawn in its entirety.

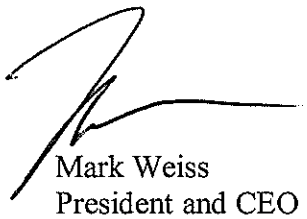
II. CONCLUSION

For the reasons set forth above, MHARR strenuously opposes the HUD proposed IB as a blatant abuse of the manufactured housing program's regulatory authority and the specific procedures of the 2000 reform law relating to the development and use of Interpretive Bulletins. The proposed IB, with its needless imposition of substantial additional costs on smaller industry businesses and lower and moderate-income manufactured homebuyers, constitutes a direct violation of the express terms and policies enunciated in President Trump's Executive Orders concerning government-wide regulatory reform and the imposition of unnecessary regulatory costs on American consumers and American businesses. Furthermore, the proposed IB is part of a pattern of unnecessary and unnecessarily costly regulatory expansion and intensification during

[44] See, Attachment 10, hereto at pp. 16-17.

the nearly four-year tenure of the current program administrator, which has consistently imposed baseless new regulatory burdens on lower and moderate-income manufactured housing consumers and smaller industry businesses, while benefiting only HUD program contractors and industry competitors. Accordingly, and as explained herein, the proposed IB should be withdrawn in toto.

Sincerely,



Mark Weiss
President and CEO

cc: Hon. Benjamin Carson
Hon. Paul Compton, Esq.
Hon. Tim Scott
Hon. Sean Duffy
Hon. Mick Mulvaney (OMB)
Ms. Neomi Rao (OMB/OIRA)
HUD Code Industry Members