



# 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

**IN THIS REPORT:**

**SEPTEMBER 8, 2010**

- **AGENCIES RESIST CONSUMER FINANCING MANDATES**
- **NEW ACTIONS TO DOWNGRADE CONSENSUS COMMITTEE**
- **ACTIONS TO EXPAND IN-PLANT REGULATION**
- **HUD PROGRAM IN DIRE NEED OF NEW CONTRACTOR**
- **COSTLY ROOF TRUSS RULE -- ON-SITE RULE NEEDS CHANGES**
- **HUD PLANS FOR SEPTEMBER COSAA MEETING**
- **COSTLY ENERGY RULES SHOULD BE DEFERRED**
- **“FROST-FREE” DESIGN QUESTIONS**
- **FHA RAISES ELIGIBILITY STANDARDS FOR MOST MORTGAGES**

### CONSUMER FINANCE MANDATES BEING IGNORED BY REGULATORS

Newly released data indicates that industry production remains at historically low levels and has not significantly recovered. Industry-wide production in July 2010 was 4,265 homes, as compared with 4,410 homes in July 2009, bringing the industry's total production to date in 2010 to 29,899 homes, a mere 4% increase over production to the same point in 2009. This indicates that the total industry production in 2010 will be somewhere near the 49,683 total homes produced last year -- the lowest production level since 1949.

This sobering data underscores the importance of recent developments which demonstrate the resistance of federal entities to the full and proper implementation of the two key measures enacted by Congress to revive and expand the availability of financing for consumers of affordable manufactured homes -- the “duty to serve underserved markets” mandate and the Federal Housing Administration (FHA) Title I program

improvements enacted as part of the Housing and Economic Recovery Act of 2008 (HERA).

On the “duty to serve” (DTS), the Federal Housing Finance Agency (FHFA), as of August 23, 2010, had received 465 comments on its proposed DTS rule (not “over 1,000” as reported by some industry sources) that, based on “risk” concerns raised by Fannie Mae and Freddie Mac, would exclude chattel financing and other hybrid lending models. Although a number of retailers, communities, finance companies and state associations did submit comments, the response was not overwhelming for such a critical rulemaking and for an industry in its 12<sup>th</sup> consecutive year of decline because of the unavailability of consumer financing. And, while the industry’s post-production sector and some manufactured home owner associations did, to their credit, attempt to mobilize homeowners who had relied upon chattel financing to obtain their homes, that effort was hampered by the fact that many of these comments used the same form letter -- which typically is not as effective as individual comments based on personal experience.

As MHARR, however, made clear in its comprehensive comments filed on July 1, 2010, the performance of manufactured housing loans -- at less than one percent of the GSEs’ portfolios -- was not “the” reason or even “a” reason for the failure of the two Government Sponsored Enterprises (GSEs), and for FHFA to propose a DTS rule that excludes chattel financing on this basis, is unacceptable. Chattel financing has always been part of the manufactured housing industry and has been a key contributor to its growth, providing the most affordable financing vehicle for lower and moderate-income consumers seeking the most affordable homes that the industry produces -- the very people that the GSEs are supposed to serve.

To exclude chattel financing ignores the history of the industry and, without it, DTS cannot be implemented as Congress intended. The specific inclusion of chattel financing in the final DTS is thus crucial, particularly as sources continue to indicate that the GSEs will not change their current approach to manufactured housing unless their FHFA regulators tell them to do otherwise, which would leave the industry and its consumers in an effective “Catch-22.” To make matters worse for the industry, its competitors and usual detractors have submitted comments supporting FHFA’s vision of DTS and specifically its exclusion of chattel financing from DTS programs. It is noteworthy, moreover, that the harmful agenda of some of these special interest entities has secured a certain degree of influence within the manufactured housing industry in recent years.

Similarly, regarding the FHA Title I program, while HERA’s increased limits have been implemented through Mortgagee Letters and Ginnie Mae has nominally lifted its moratorium on the securitization of new manufactured housing loans, the strict conditions tied to renewed securitization (i.e., minimum \$10 million lender net worth plus 10% retainage of outstanding manufactured home mortgage-backed securities) -- corresponding with the resources of existing lenders -- make it unlikely that a significant number of new lenders will enter this market, leaving the market without adequate competition and consumers with inadequate access to financing for manufactured home

purchases. In fact, reports indicate that only an anemic few (perhaps one or two) financing providers have qualified -- or applied -- to date.

All of this demonstrates that the main persisting bottleneck for the industry, which has led to more than a decade of decline, is the scarcity of both public and private financing over the past 12 years and the industry's inability to resolve this critical issue. This issue, added to other persistent difficulties after the home leaves the plant (e.g., placement, zoning and the re-codification of installation and dispute resolution, among others), points to a basic flaw in the representational structure of the industry in the nation's capital, which warrants much-needed in-depth scrutiny and examination, and remedial action by the post-production segment of the industry (i.e., retailers, communities, developers, financing and insurance providers and installers). Given its importance to the industry and its consumers, MHARR, as an independent national organization (i.e., an organization that does not receive representational funding from the post-production sector) has been carefully reviewing this issue in recent months. The Association's findings, in this regard, will be published soon.

In the interim, and for the present time, more new laws are not the answer. Instead, the industry -- and particularly its post-production sector -- and consumers should press the relevant agencies and entities through all available means, including, but not limited to, intervention by the new Congress after the November 2010 mid-term election, to change this course and ensure the full implementation of these crucial finance programs.

## **REGULATORS FURTHER DOWNGRADE MHCC**

In yet another unilateral revision of the bylaws of the Manufactured Housing Consensus Committee (MHCC) this year, HUD program regulators and attorneys have further degraded the independence, role, authority and functionality of that body that was intended by Congress to be a key reform of the manufactured Housing Improvement Act of 2000.

The initial bylaws revision, implemented by HUD in January 2010 without an MHCC vote -- unlike previous revisions which were prepared and approved by the MHCC itself -- was used at the April 2010 Tulsa, Oklahoma MHCC meeting to assert HUD control over the MHCC by dictating the content of the meeting agenda, the receipt, prioritization and subcommittee consideration of proposals, and to severely restrict public participation in MHCC meetings, among other things. At the time, HUD contended that the revisions were necessary to assure compliance with the Federal Advisory Committee Act (FACA). MHARR, however, in its report on the Tulsa meeting and elsewhere, has documented that none of these changes were mandated by FACA, the 2000 reform law or other applicable law, and that taken together, they would undermine the independence and role of the Committee, leaving it as little more than a rubber stamp akin to the

defunct National Manufactured Housing Advisory Committee that it was created to replace.

Significantly, these restrictions were imposed at the same time that HUD eliminated the collective representation of the industry from the MHCC -- which had been in place since its formation -- based on a "preference" noted in a White House internet "ethics" webpage, that registered federal lobbyists not be appointed to federal advisory committees -- a restriction that HUD has since sought to extend, without any supporting authority, to non-lobbyist employees of industry organizations, such as MHARR and MHI. This action would not only deprive the industry of nearly five decades of accumulated and institutionalized knowledge, know-how and expertise on these complex issues, but would also rob consumers of the ability to share and utilize the same while considering standards and regulatory issues at MHCC meetings.

Now, in a further unilateral revision of the MHCC bylaws, HUD has gone further, declaring that -- (1) of the seven "public interest" members of the MHCC, "three ... must be a representative of the public official category;" while (2) it has now eliminated any reference whatsoever to public participation in MHCC meetings, meaning that the "public," including representatives of the national industry organizations wrongfully barred from the MHCC, will now have no recognized procedural right to address the MHCC at any time.

To date, HUD has offered no basis, rationalization or excuse for these changes. As to the three "public officials," nothing in either the 2000 reform law or FACA requires this or provides even an arguable basis for such a set-aside. As to public participation, a review of the public bylaws of dozens of federal advisory committees shows that they consistently refer to and specifically permit public participation in committee meetings. The new MHCC bylaws are unique in excluding any reference to public participation.

This further downgrading of the MHCC, added to the other persistent difficulties affecting the federal program (Title VI), is yet another symptom of the bigger problem facing the industry -- the lack of full and proper implementation of the 2000 reform law -- arising from the exploitation by regulators of the same basic flaw in the representational structure of the industry in the nation's capital. Fortunately, manufacturers have already recognized this problem, and have begun taking steps to address and resolve this critical matter.

## **EXPANSION OF DE FACTO IN-PLANT REGULATION**

HUD regulators, the program monitoring contractor and the Primary Inspection Agencies (PIAS) continue to press manufacturers to "voluntarily" accept and implement a de facto expansion of in-plant regulation as spelled out in "enhanced" regulatory checklists and an internal HUD "Standard Operating Procedure" (SOP). Manufacturers,

including those with no track record whatsoever of inadequate quality control, systemic home defects, or consumer complaints, have been subject to pressure to either accept this expanded regulation -- which failed to gain the consensus support of the Manufactured Housing Consensus Committee (MHCC) and has never been subjected to notice and comment rulemaking even though it changes the entire “focus“ of the in-plant regulatory process -- or face intensified and costly contractor audits and related enforcement action as retribution.

This expanded in-plant regulation, which HUD has alternately characterized as “voluntary” and “not optional,” is supposedly based on provisions of the federal standards requiring proper “engineering practice.” Neither HUD nor the monitoring contractor have ever explained, though, how existing engineering practices that have produced a track record of standards compliance are now so deficient as to require significant and costly revision.

Moreover, reports indicate that under this system, demands are being made on manufacturers that will unnecessarily increase both production and inspection costs. These include unnecessary training and other criteria for workers unrelated to the functions they perform, needless overlap of functions and skills, and criteria and paperwork that are unrelated to, unsuited for or simply unnecessary for a particular function. In practice, moreover, the process being followed by HUD is almost entirely subjective, meaning that an uneven regulatory field is being created among all HUD Code manufacturers, whether they “voluntarily” participate in the HUD process or not.

With industry sales and production at an all-time low and with consumers facing unprecedented difficulty in obtaining financing, these demands and, indeed, this entire system, seem to be more focused on creating billable time for private PIAs and HUD’s monitoring contractor than on improving an in-plant regulatory process that is already producing compliant, high-quality homes. By avoiding the MHCC and evading rulemaking, however, HUD has never had to justify these changes with specific facts, or respond to legitimate questions raised by manufacturers, consumers and the public at large.

### **NO PROGRESS WITHOUT A NEW CONTRACTOR**

A steady stream of problems within the HUD program, such as the costly de facto expansion of in-plant regulation, demonstrate the urgent need for the new blood and fresh thinking that a new monitoring contractor would bring to the program.

The federal program has had the same monitoring contractor (despite corporate name changes) since the inception of federal regulation in 1976. Although the contract is subject, officially, to competitive bidding, the contract is a de facto sole source procurement because award factors historically have been tied to the experience of the

incumbent contractor. This has effectively eliminated competition for the contract by virtually ensuring that only the incumbent contractor would qualify.

This has had a negative impact on the program, on the industry and on consumers of affordable manufactured housing by leaving the program and its approach to virtually every issue mired in the past. Without new ideas and thinking, the program has not evolved along with the industry and continues to view and treat manufactured homes as “trailers.”

The program is thus in dire need of a new contractor with a fresh approach to the implementation of the new regulatory provisions of the Manufactured housing Improvement Act of 2000. HUD should ensure that regardless of how it is accomplished, such a change is made at the first available opportunity.

### **MHARR COMMENTS OPPOSE TRUSS RULE -- CALL FOR IMPROVEMENTS TO ON-SITE RULE**

MHARR has filed comprehensive comments addressing both HUD’s proposed roof truss testing rule and its on-site construction completion rule. These are just the most recent examples of what MHARR expects to be a flood of proposed rules and regulations, with HUD attempting to undermine the independence of the MHCC in its effort to advance them.

On the proposed roof truss testing rule, there has never been any showing that the present standards are inadequate or have resulted in systemic roof failures. At the same time, the proposed rule would result in significant price increases to consumers by: (1) requiring more qualification testing for trusses; (2) requiring design changes to approximately 30-40% of the trusses currently utilized by manufactured housing producers; and (3) by requiring an increase in the material volume of trusses in all wind zones. Similarly, by effectively requiring re-qualification testing of all HUD Code trusses held in inventory the rule would result in a qualification backlog and period of reduced supplies of qualifying trusses that could last a year or more, causing higher demand for a smaller number of qualifying trusses and an artificial and unnecessary increase in prices ultimately paid by consumers.

Based on the lack of any demonstrated justification and the expected cost impact on consumers who are already struggling to obtain and qualify for the limited manufactured home financing that remains available, MHARR’s comments oppose this rule.

The on-site construction completion rule presents more complex issues. While a proper on-site completion system would reduce the cost of manufactured housing and increase the affordable housing options of all Americans, the rule proposed by HUD

contains serious flaws that could totally undermine its value. MHARR's comments stress that these flaws must be remedied in any final rule, including: (1) clarification and enumeration of "close-up" and related routine installation work that is not subject to the on-site approval and inspection process; (2) modification of the on-site inspection structure to allow greater flexibility for on-site inspections; (3) modification of the on-site inspection structure to allow a manufacturer election for on-site inspection by a properly qualified, HUD-approved non-IPIA inspector; (4) no modification in a final rule which would provide for on-site inspections by state entities that are not HUD-approved IPIAs; and (5) retraction of the current provision which permits Design Approval Primary Inspection Agencies (DAPIAs) to establish qualifications for on-site inspectors.

In the absence of such clarifications and modifications, MHARR's comments make clear that the Association will oppose any further proposed or final on-site rule on behalf of HUD Code manufacturers.

### **HUD REVIVES COSAA**

For the first time in years, a HUD-COSAA meeting, including program regulators, the monitoring contractor, State Administrative Agencies (SAAs) and Primary Inspection Agencies (PIAs) has been scheduled for September 14-16, 2010. The draft agenda for the meeting, which HUD has provided to MHARR, includes the following topics:

"Agenda for the HUD-COSAA Meeting  
Hilton, Crystal City, Virginia  
September 14 – 16, 2010

Tuesday September 14<sup>th</sup>

Welcome and General Briefing  
Running SAAs with Today's Available Resources  
SAA Regional Meetings – PIA Meeting  
Sprinklers and Manufactured Housing –

Wednesday September 15<sup>th</sup>

Moving Forward with Quality Assurance  
FEMA and Temporary Housing Units  
SAA Regional Meetings – PIA Meeting  
Department of Energy's Role in Manufactured Housing

Thursday September 16<sup>th</sup>

General Session for SAAs  
Manufactured Housing and FHA's Title I and Title II Programs  
Implementation of State and Federal Installation and Dispute Resolution Programs  
Current Issues with Federal and State Funding.”

MHARR commends the revival of COSAA by the new management of the HUD program as a positive development. MHARR has consistently supported the original intent of Congress, that the HUD Title VI manufactured housing program operate as a federal-state partnership, and COSAA can advance that original congressional vision of the program. Unfortunately for the industry, consumers and the program, however, this partnership has eroded over the years as the program monitoring contractor and other private entities have assumed important functions and much of the role within the program that is properly the province of the states.

What must not be revived, however, is the past misuse of COSAA by program regulators and attorneys as a shortcut to implement costly new requirements on manufacturers without proper rulemaking. It is thus important that this meeting not be -- or become -- a throwback to past HUD-COSAA meetings which were often a forum for industry or manufacturer-bashing; an opportunity for the monitoring contractor to promote and advance elements of its longstanding extra-regulatory “wish list;” and/or an occasion for program regulators and attorneys to verbally promote the institutionalization of expanded de facto regulations without following the required processes. Indeed, many times, these meetings were used as a springboard to impose controversial and disputed interpretations of the law and regulations on manufacturers. These matters were then treated by HUD, PIAs and the contractor as being settled simply because they were discussed at such a meeting.

As this will be the first COSAA meeting under the new program leadership, MHARR believes that the past practices will be avoided, particularly given the fact that industry production remains at historically low levels and consumers of affordable housing face unprecedented challenges in obtaining and qualifying for either public or private financing of manufactured home purchases. MHARR representatives will attend the upcoming meeting in order to monitor its proceedings and to respond, as necessary, regarding issues that remain unsettled, or if improper past practices are revived.

### **MHARR URGES DOE TO DEFER COSTLY ENERGY REGULATIONS**

In a July 16, 2010 letter to the Secretary of the Department of Energy (DOE), MHARR asked DOE to refrain from imposing new “energy conservation” regulations for manufactured housing until the industry recovers from its dramatic economic decline.

Based on the latest information available, DOE, which was tasked with developing such regulations under the Energy Independence and Security Act of 2007 (EISA), expects to publish a proposed rule before the end of 2010.

With lower and moderate-income manufactured housing consumers unable to obtain or qualify for financing now, matters would be that much worse if the purchase price of manufactured homes were unnecessarily increased by thousands of dollars due to DOE energy regulations which the industry should have prevented -- but did not when EISA was being debated by Congress. A further economic shock to the industry and its consumers at a time of record low production would compound the present steep decline and further stress many of the industry's remaining businesses, with dire consequences for the broader economy and for consumers of affordable housing. As a result, MHARR's letter urges DOE to refrain from issuing any new manufactured housing energy regulations until industry production has recovered to historically sustainable levels in excess of 100,000 homes per year.

This would help both the industry and consumers of affordable housing without allowing any lapse in the regulation, as HUD already regulates energy efficiency in manufactured homes and manufacturers already offer multi-level energy efficiency option packages that provide consumers with maximum freedom of choice to tailor the energy profile of their home to climate conditions where they live, as well as their financial resources. A one-size-fits-all DOE regulatory approach, by contrast, would represent overkill for consumers in certain regions and would effectively price many more consumers -- who may be marginally qualified from the start -- out of the housing market altogether. This point is crucial, because advocates of such regulation contend that such purchase price increases can be offset over the long-term by reduced "life-cycle" operating costs. But for a consumer priced out of the market by enhanced energy regulation, who cannot afford to buy a home to begin with, there is no "life-cycle," no "long-term," and no offsetting savings.

With rulemaking on this issue already in its initial phase, and given the above concerns, the industry and consumers should support and join in MHARR's effort to slow down this proceeding. If, however, administrative approaches and remedies fail, the industry and consumers could be left with no alternative but to seek congressional intervention.

### **GENERIC "FROST FREE" DESIGN QUESTIONS**

Although it was not involved in the development of the recently-circulated generic "frost-free" foundation design, MHARR has been the recipient of numerous inquiries regarding the design and its status in relation to the federal construction and safety standards, the federal installation standards and the HUD manufactured housing program.

While MHARR, to date, has taken no position on either the merits of the design or its position in relation to the federal standards and regulatory program, a number of questions and concerns have been voiced within the industry regarding this design and its use that manufacturers should be aware of.

Specifically, some have noted that the design allows footers to be placed directly on soil but does not define or quantify what qualifies as “compact or undisturbed non-frost susceptible soil,” which is essential to successful use of the design.

In addition, the use of the generic foundation design by manufacturers, or a retailer arguably acting on behalf of a manufacturer, could potentially expose manufacturers to legal liability for failure of the foundation, the home, or both, that they generally do not face under the current practice of having foundation designs developed and/or approved by local Registered Professional Engineers or registered architect/engineers hired either by the retailer or the home purchaser as recommend by the MHCC in its installation proposal to HUD. The use of a generic design by multiple manufacturers, moreover, increases the risk of class action suits based on allegations of similar failures in multiple instances.

Given these potential issues, and reports that the design has been rejected by certain building officials, manufacturers may wish to carefully consider their use or endorsement of any generic design.

MHARR, for its part will monitor any further HUD or MHCC action on this matter very closely, particularly since HUD, while it has raised points (and questions) of its own, has not taken a definitive position on the “frost-free” design.

### **FHA RAISES REQUIREMENTS FOR MANY TITLE II LOANS**

In a final rule published in the Federal Register on September 3, 2010, the Federal Housing Administration (FHA) has raised the eligibility criteria for most FHA-insured mortgages, including many insured through the FHA Title II manufactured housing program. According to FHA, however, the FHA Title I manufactured housing program is exempt from these changes and is not affected.

Under the new rule, a minimum FICO score of 500 would be required to be eligible for an FHA-insured mortgage. For those with FICO scores between 500 and 579, the maximum loan-to-value ratio (LTV) would be 90% (*i.e.*, a minimum 10% down payment would be required) while for those with FICO scores at or above 580, the maximum LTV for purchase loans would go to 96.5% and the maximum LTV for re-financing would go to 97.5%. In accordance with the rule, these new criteria will go into effect on October 4, 2010. Other possible changes, including stricter limits on seller

concessions and/or revised underwriting requirements, are still under consideration by FHA, but are not part of this final rule.

FHA sources have confirmed for MHARR that only Title II mortgages insured under the Mutual Mortgage Insurance Fund (MMIF) will be affected by this rule, which was specifically adopted in order to shore-up the liquidity and solvency of the MMIF capital reserve account. By contrast, FHA Title II manufactured home loans that are insured through funds other than the MMIF, will not be subject to these new requirements.

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