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**VIA HAND DELIVERY &
ELECTRONIC and 1ST CLASS MAIL**

Pennsylvania Office of Attorney General
Antitrust Section
Strawberry Square
14th Floor
Harrisburg, PA 17120



**Re: *Submission of Written Comments
Proposed Regulations – Agency No. 59, ID No. 10
Unfair Market Trade Practices
New 37 Pa. Code Ch. 311
IRRC No. 3242***

Dear Sirs:

I represent the Pennsylvania Manufactured Homes Association (“PMHA”). The purpose of this letter is to provide comments to the above-referenced proposed regulations (herein, the “Proposed Regulations”) on behalf of PMHA, its members and the entire manufactured home community industry.

I. Introduction

On or about August 2, 2019, the Pennsylvania Office of Attorney General (“OAG”) adopted the Proposed Regulations and thereafter submitted them to the Independent Regulatory Review Commission. On August 31, 2019, the Proposed Regulations were published in the Pennsylvania Bulletin.

In the Proposed Regulations, the OAG proposes to amend Title 37 of the Pennsylvania Code to, among other things, “define and clarify certain terms under the Unfair Trade Practices Consumer Protection Law (“UTPCPL”) . . . [and to define] certain anticompetitive conduct as unfair methods of competition and unfair or deceptive acts or practices.” In its submission, the OAG stated that the Proposed Regulations are “in the public interest to expressly enumerate additional methods, acts or practices in violation of the UTPCPL which would serve to lower the hurdle for consumers to access justice which would otherwise require proving a violation of the so-called catch-all provision” of the UTPCPL.

The Proposed Regulations, as applied to certain activities undertaken by persons and entities in the manufactured home community industry, are confusing and contrary to a prior position taken by the OAG. PMHA submits this comment letter to express its comments to and concerns with the Proposed Regulations and to offer its suggestion on how to resolve its concerns.

II. Who is PMHA

PMHA has been the legislative, regulatory and educational voice of the factory built housing industry for over seventy years. Formed in 1946, and incorporated in 1949, PMHA maintains its headquarters in New Cumberland, Pennsylvania. PMHA's mission is "to help facilitate the growth and advancement of the factory built housing industry while promoting the highest professional standards." In addition to serving as the voice of the industry, PMHA provides its members assistance and educational opportunities regarding virtually all aspects of the industry, including such topics as landlord and tenant matters, fair housing, manufacturing and sales of homes, zoning, land development and building codes issues, transportation and tax issues, licensing requirements, community development and community management.

PMHA's community members are comprised of 228 manufactured home community owners, who, together, own and lease more than 27,000 rental sites in Pennsylvania. Throughout the Commonwealth, there are at least another 2,100 manufactured home communities that are not currently members of PMHA. In addition, PMHA's members include manufacturers, retailers/sellers¹, transporters and installers of homes, lenders, insurance companies and other professionals who service the manufactured home industry, such as accountants, lawyers, property management companies and home warranty companies. In total, PMHA has almost 500 members, each of whom is a resident of, and/or operates in, Pennsylvania.

On many occasions over the years, PMHA has worked closely with the OAG on legal and policy issues. In so doing, PMHA and the OAG have partnered to ensure that the manufactured home industry operates within the confines of the UTPCPL and the Manufactured Homes Community Rights Act ("MHCRA"), and its predecessor, and that the OAG's initiatives are consistent with best practices in the manufactured home industry. In addition, PMHA has assisted members of the Pennsylvania General Assembly during its consideration and passage of various pieces of legislation affecting the manufactured home industry.

III. Industry Past Practices

In many ways, the manufactured home industry is quite similar to the stick-built home industry. It provides housing to homeowners and renters, and development opportunities to investors. In some cases, the homes in a particular community are owned by their occupants, and in other cases, the occupants rent the homes from the community owners. And like its stick-built counterpart, the manufactured home industry has many developers who create communities

¹ During certain times relevant to this letter, retailer/sellers were referred to as "dealers".

and many manufacturers of the homes. About the only difference between owners in a stick-built home community and those in a manufactured home community is that the latter can relocate their homes to a different community if they desire to move.

Prior to 1993, it was not uncommon in the manufactured home industry for community owners to enter into agreements that required their residents to purchase homes from retailers/sellers designated by the community owners. In some cases, retailers/sellers of homes would rent spaces in a particular community and require their home buyers to rent those spaces. These arrangements were similar, if not identical, to the practice in stick-built communities where the developer had a list of approved builders (in some instances, there would be only one home builder) and required that any homeowner who wanted to live in that community use one of the approved builders, a practice that continues today.

These arrangements allowed for the development of more communities. Specifically, there are substantial costs involved in developing a manufactured home community, from zoning and land development costs to infrastructure costs, among others. By entering into agreements with retailer/sellers, community owners were able to recoup some of these costs when the rents charged to their residents were simply not sufficient.

The costs that manufactured home community developers incurred were the same kinds of costs that a developer in a stick-built home community would incur. However, because the stick-built home consumer was also purchasing the land on which the home would be built, these developers could more easily recoup their development costs from the sales of the lots. This is not the case in manufactured home communities, in which the owners are limited in the amounts they can charge for lot rents.

IV. Office of Attorney General Task Force on Manufactured Housing

In October 1992, Attorney General Ernest Preate established a Task Force on Manufactured Housing to identify and analyze problems facing manufactured housing communities and their residents and to attempt to develop responses to those problems. The Task Force reviewed and analyzed past complaints and received comments at public meetings from manufactured housing community residents, community owners and manufactured housing retailer/sellers.

After the Task Force completed its work, it issued its *Report of the Commonwealth of Pennsylvania Office of Attorney General Task Force on Manufactured Housing* in November 1993 (the Task Force's "Report"). The Task Force's Report summarized the Task Force's findings, and included enforcement policies of the OAG with respect to problems it determined existed in the industry. Four of the findings are relevant to the Proposed Regulations currently at issue: (1) consumers should have the opportunity to shop for the best price when they are purchasing a manufactured home; (2) homeowners, community owners and developers all make substantial investments in the purchase of manufactured homes and in the development of manufactured home communities; (3) homeowners should have a reasonable opportunity to recoup their investment in their homes when the market allows; and (4) community owners need

capital in order to develop communities and have a legitimate right to recover their costs and to have the opportunity to earn a reasonable return on their investments.

Against this backdrop, the Task Force focused on two practices in the manufactured home industry with which it had concerns. First, there were situations where the Task Force concluded that a consumer's ability to get the lowest possible price had been restricted or eliminated by agreements between community owners and retailers/sellers that required consumers to purchase their homes from retailers/sellers of the community owner's choosing. Second, in other situations, community owners rented vacant spaces to one or more retailers/sellers, with the result that there was some restriction of customer choice in where to place a newly purchased home. Each of these situations is included in what are generally referred to, and are referred to herein, as "tying arrangements."

Relevant to the Industry Past Practices described above in section III, the Task Force included in its Report the following findings:

- tying arrangements resulted in manufactured homes being sold for more than the competitive price for the same home in other areas;
- community owners benefitted from these arrangements through direct and indirect payments made to them by retailers/sellers; and
- these payments, which had the effect of raising the prices of homes, were not being disclosed to consumers.

The Task Force then concluded two important things:

- to the extent that legitimate business reasons promote economic partnerships between retailers/sellers and manufactured home community owners, they can be structured in ways that do not conceal or inflate the true prices of homes and the resultant consequences to consumers; and
- it is reasonable for a retailer/seller to rent spaces in a manufactured housing community in order to have spaces available that could be assigned to a consumer purchasing a home, so long as a prospective resident of that community were not compelled to purchase from any single retailer/seller.

Based on its findings and conclusions, and to address its concerns regarding tying arrangements while ensuring that manufactured home retailers/sellers and community owners can enjoy reasonable returns on their investments, the Task Force included in its Report the OAG's Enforcement Policy regarding tying arrangements (referred to herein as the "Tying Arrangement Enforcement Policy"). The Tying Arrangement Enforcement Policy states, in pertinent part:

The Attorney General will not challenge arrangements between [retailers/sellers²] and park owners to reserve vacant community spaces where in the case of community with 24 or fewer vacant spaces, only 25% of the vacant spaces have been leased to [retailers/sellers]. Where there are 25 or more vacant spaces, a community owner may lease up to 75% of vacant spaces to [retailers/sellers]. This Office will not challenge leases by [retailers/sellers] for homes they have acquired through purchase or trade or are selling pursuant to an agency relationship with the homeowner.

Since November 1993, PMHA's members have relied on the Tying Arrangement Enforcement Policy and have operated in accordance with it. To PMHA's knowledge, there has not been a single complaint since 1993 against its members regarding tying arrangements. As set forth more fully below, PMHA is concerned that the Proposed Regulations, if promulgated as proposed, would require that its members cease operating in the manner they have been for the last 26 years or risk liability.

V. The Proposed Regulations³

The Proposed Regulations include the following in the definition of "unfair market trade practices":

- "A contract, combination or conspiracy between two or more persons to condition or to have the effect of conditioning the sale of one article of trade or commerce upon the purchase of another article of trade or commerce";
- "A contract, combination or conspiracy between two or more persons at the same or different level of market structure to persuade or to coerce suppliers or customers to refuse to deal with another person";
- "Attempted monopolization, in which a person not yet in possession of actual monopoly power, purposefully engages in competitively unreasonable practices that create a dangerous probability of monopoly power being achieved"; and
- "Incipient conspiracies to monopolize, in which two or more persons not yet in possession of monopoly power, conspire to seize monopoly control of a market but where monopoly power has not yet actually been achieved."

² The word "dealers" appears in the original.

³ PMHA does not assert a position regarding what authority the OAG has to promulgate the Proposed Regulations. However, PMHA does not, by not asserting any such position, concede that the OAG has such authority.

(collectively referred to herein as the “Relevant UMTPs”). See proposed Section 311.2. In accordance with the Proposed Regulations, each of the Relevant UMTPs is declared to be unlawful.

PMHA is concerned that the Proposed Regulations would make unlawful actions that were deemed in 1993 to be lawful by virtue of the Tying Arrangement Enforcement Policy. Specifically, the Relevant UMTPs could very easily be interpreted to include the very tying arrangements that the OAG approved in 1993 and included in its Tying Arrangement Enforcement Policy. If this were to occur, community owners and retailers/sellers could be at risk of liability for conducting themselves in a manner that the OAG has previously approved.

If this were to occur, the effect would be to stifle development and adversely impact competition in the industry – the exact opposite effect the Proposed Regulations are intended to have. Specifically, development costs for communities would rise, making it impractical or impossible for small community owners to develop and/or improve communities. This is because it would be harder for them to ensure a reasonable return on the capital investment needed to develop and improve communities. The result of this could be that smaller community owners will be driven out of the market place, which could result in there being fewer lots available for manufactured home owners to rent.

Furthermore, the application of the Relevant UMTPs to the previously-approved tying arrangements would require a change in how community owners operate without there being any established need. In the almost 26 years since the Task Force’s Report was issued, there has not been one complaint of which PMHA is aware regarding these tying arrangements. In short, nothing is broken that needs to be fixed. In contrast, however, the possible “fix” created by the Proposed Regulations would have a detrimental impact on the manufactured home industry and its residents.

Nothing has changed since 1993 that would indicate that the Tying Arrangement Enforcement Policy is no longer relevant or necessary. Tying arrangements, like in the stick-built homes industry, are still needed to ensure that community owners are able to obtain capital needed to develop communities, recover their costs and have the opportunity to earn a reasonable return on their investments. Like in 1993, community owners are still required to invest amounts for development that rents alone may not be able to pay. To ensure this happens, it is vital that tying arrangements, like those previously approved by the OAG, be allowed to continue. This is especially true since the Tying Arrangement Enforcement Policy has not resulted in any problems in the industry.

VI. Conclusion

To solve these concerns, and keep in place a system that was approved by the OAG, and has been working, PMHA suggests that the Proposed Regulations be revised to ensure that the industry’s current practices can continue without the risk that any of its members will be exposed to liability under the UTPCPL and/or MHCRA. In short, PMHA suggests that the tying arrangements that were approved by the OAG and included in its Tying Arrangement

Enforcement Policy be expressly excluded from the reach and effect of the Proposed Regulations.

To accomplish this, PMHA recommends that proposed Section 311.3 of the Proposed Regulations be revised to include one of the following statements:

Furthermore, the provisions of this chapter shall not be deemed to, and shall not, invalidate, change, amend, modify or otherwise affect the Office of Attorney General Enforcement Policy regarding tying arrangements set forth in the November 1993 *Report of the Commonwealth of Pennsylvania Office of Attorney General Task Force on Manufactured Housing*, which remains in full force and effect.

or

Furthermore, the provisions of this chapter shall not apply to: (1) arrangements between manufactured home retailers/sellers and manufactured home community owners to reserve vacant community spaces where in the case of community with 24 or fewer vacant spaces, 25% or less of the vacant spaces have been leased to retailers/sellers, or in the case of a community with 25 or more vacant spaces, only 75% or less of vacant spaces are leased to retailers/sellers, or (2) manufactured home retailers/sellers who have leased spaces for homes they have acquired through purchase or trade or are selling pursuant to an agency relationship with the homeowner.

PMHA believes that either of these additions to the Proposed Regulations will resolve its concerns and allow its members to continue operating as they have since 1993 without the legal risks that the Proposed Regulations would otherwise threaten.

In addition, various criteria required by the Regulatory Review Act (“RRA”) to be considered in determining whether regulations are in the public interest support PMHA’s suggested revisions to the Proposed Regulations:

- Economic impacts of the regulation: The RRA requires that direct and indirect costs to the private sector and adverse effects on the prices of goods or services and competition must be considered. As mentioned above, if the Proposed Regulation were enacted as written, community owners might not be able to develop new communities or improve current ones. This could cause some of them to leave the market, which would reduce the number of lots available for rental. Clearly, this would have an adverse impact on rental rates and competition throughout the State, and thus on manufactured home consumers.
- Clarity, feasibility and reasonableness of the regulation: Under the RRA, consideration of a proposed regulation must take into account any possible

conflicts with existing laws, the need for the regulation and whether acceptable data supports the regulation. As discussed above, the Relevant UMTPs, as applied to the manufactured housing industry, are in conflict with the Tying Arrangement Enforcement Policy issued by the OAG. While enforcement policies do not constitute laws, they are based on the OAG's interpretation of the law. Thus, it is appropriate to consider the Tying Arrangement Enforcement Policy in this analysis. In so doing, it becomes clear that the Relevant UMTPs, as applied to the manufactured housing industry, are in conflict with current law.

There is also a question of whether the Proposed Regulations, specifically the Relevant UMTPs, as applied to the manufactured home industry, is necessary. There is simply no data to suggest that there are any problems with tying arrangements that are within the confines of the Tying Arrangement Enforcement Policy. In fact, as set forth above, there have been no complaints against manufactured home community owners or retailers/sellers since the Tying Arrangement Enforcement Policy was issued.

- Less costly or intrusive alternatives: The RRA requires a consideration of whether there are less costly or intrusive alternatives methods for achieving the goal of a regulation. Relevant to PMHA's members, a less costly and less intrusive alternative method already exists: the Tying Arrangement Enforcement Policy. That is, leaving the Tying Arrangement Enforcement Policy intact and keeping the status quo will cost manufactured homes community owners and retailers/sellers nothing and will not cause any intrusion into how they do business, and have been since 1993. Enacting the Proposed Regulations without PMHA's suggested revision, however, would substantially change how owners and retailers/sellers operate and could have significant financial impacts to the manufactured home industry and its residents.

For all of the reasons set forth above, PMHA believes that one of its suggested additions to the Proposed Regulations is appropriate and will allow the manufactured home industry to continue operations as it has for years without imposing any adverse costs, impacts or risks upon it. PMHA is available to answer any questions that you may have regarding this comment letter.

Very truly yours,



Steven M. Williams

SMW

cc: Pennsylvania Manufactured Housing Association
Independent Regulatory Review Commission (via email)