(a) Is qualified for admission to the program of study;

(b) Maintains satisfactory progress in a course of study as provided in 34 CFR 668.16(e); and

(c)(1) Is a citizen or national of the United States;

(2) Provides evidence from the U.S. Immigration and Naturalization Service that he or she—

(i) Is a permanent resident of the United States; or

(ii) Is in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident; or

(3) Has a permanent or lasting, as distinguished from temporary, principal, actual dwelling place in fact, without regard to intent, in Palau or the Commonwealth of the Northern Mariana Islands.

(Authority: 20 U.S.C. 1091)

§ 319.32 May the grantee use funds if a financially assisted student withdraws or is dismissed?

Financial assistance awarded to a student that is unexpended because the student withdraws or is dismissed from the training program may be used for financial assistance to other eligible students during the grant period.

(Authority: 20 U.S.C. 1087*ll*)

§ 319.33 What are the reporting requirements under this program?

Recipients shall, if appropriate, prepare reports describing their procedures, findings, and other relevant information in a form that will maximize the dissemination and use of those procedures, findings, and information. The Secretary requires their delivery, as appropriate, to the Regional and Federal Resource Centers, the Clearinghouses, and the Technical Assistance to Parents Program (TAPP) assisted under Parts C and D of the Act, as well as the National Diffusion Network, the ERIC Clearinghouse on the Handicapped and Gifted, and the Child and Adolescent Service Systems Program (CASSP) under the National Institute of Mental Health, appropriate parent and professional organizations, organizations representing individuals with disabilities, and other networks the Secretary may determine to be appropriate.

(Authority: 20 U.S.C. 1409(g))

[FR Doc. 92-18485 Filed 8-4-92; 8:45 am]

BILLING CODE 4000-01-M

federal register

Wednesday
August 5, 1992

Part IV

Department of Housing and Urban Development

Office of the Secretary

24 CFR Part 92

Home Investment Partnerships Program; Proposed Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

24 CFR Part 92

[Docket No. R-92-1608; FR-3242-P-01]

RIN 2501-AB42

Home Investment Partnerships Program

AGENCY: Office of the Secretary, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule is intended to implement recent statutory amendments concerning insular areas participating in the HOME Investment Partnerships Program. The rule would provide the formula for determining allocations to insular areas (Guam, the Northern Mariana Islands, the United States Virgin Islands, and American Samoa). It would also provide other requirements for the insular area component of the Program.

DATES: Comments must be submitted on or before September 4, 1992.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Rules Docket Clerk, Office of General Counsel, room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500. Communications should refer to the above docket number and title. Facsimile (FAX) comments are *not* acceptable. A copy of each communication submitted will be available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the above address.

FOR FURTHER INFORMATION CONTACT: Mary Kolesar, Director, Program Policy Division, Office of Affordable Housing, 451 Seventh Street SW., Washington, DC 20410, telephone (202) 708-2470, TDD (202) 708-2565. (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:

I. Information Collections

The information collection requirements contained in this rule, for the most part, have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1980 and have been approved under OMB control number 2501-0013. The Department has revised or added information collection requirements in §§ 92.61 and 92.66, and has submitted a request for OMB approval of these requirements.

The annual public reporting burden of these requirements, including the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information, is stated in the chart below. Send comments regarding burden estimates or any other aspect of these collections of information, including suggestions for reducing the burden, to the Department of Housing and Urban Development Rules Docket Clerk, at the address stated above, and to the Office of Information and Regulatory Affairs, room 3001, Office of Management and Budget, Washington, DC 20503, Attention: Jennifer Main, Desk Officer for HUD. The Department may amend the information collection requirements set out in this rule to reflect public comments or OMB comments received concerning the information collections.

The following are the Paperwork requirements that apply to the new provisions contained in the HOME Insular Area Program at subpart B of 24 CFR part 92.

ANNUAL REPORTING AND RECORDKEEPING BURDEN

Reg section	Paperwork requirements	Record-keeping hours	Reporting hours	Number of jurisdiction	Total hours
92.61	Program description and housing strategy	0	10	4	40
92.66	Reallocation	0	3	4	12

Total Participant Costs:

Recordkeeping Hours 0×$15=$ 0
Reporting hours 52×$15=$780
Total: $780

II. Background

Sections 1 and 2 of Public Law 102-230, 105 Stat. 1720, approved December 12, 1991, amended the National Affordable Housing Act (NAHA) to provide for reserving a portion of HOME funds for grants to insular areas. Section 104 of NAHA, as amended, defines "insular area" to mean Guam, the Northern Mariana Islands, the United States Virgin Islands, and American Samoa.

Section 217(a)(3) of NAHA, as added by section 1 of Public Law 102-230, contains the following provision concerning the reservation of HOME funds for insular areas:

(3) Insular areas.—

(A) In general.—For each fiscal year, of any amount approved in an appropriations Act to carry out this title, the Secretary shall reserve for grants to the insular areas an amount that reflects—

(i) their share of the total population of eligible jurisdictions; and

(ii) any adjustments that the Secretary determines are reasonable in light of available data that are related to factors set forth in subsection (b)(1)(B). [The statutory factors for the basic formula allocation to States and to units of general local government that are metropolitan areas, urban counties, and consortia.]

(B) Specific Criteria.—The Secretary shall provide for the distribution of amounts reserved under this paragraph among the insular areas in accordance with specific criteria to be set forth in a regulation promulgated by the Secretary after notice and public comment.

(C) Transitional provisions.—For fiscal year 1992, the reservation for insular areas specified in subparagraph (A) shall be made from any funds which become available for reallocation in accordance with the provisions of section 216(6)(A). [That section provides for the reallocation of funds when a State does not become a participating jurisdiction.]

Section 217 of NAHA was also amended by Public Law 102-229, 105 Stat. 1701, 1709, approved December 12, 1991. This amendment also added a new section 217(a)(3). It provided for a reservation of HOME funds for insular areas in each fiscal year equal to the greater of $750,000 or 0.5 percent of the amounts appropriated for the HOME Program. This proposed rule would implement only Public Law 102-230 because it is the later enactment and implicitly repeals the earlier inconsistent provision.

The Department has decided to base the formula for determining the amount to be allocated for the insular areas both on the section 217(a)(3)(A)(i) insular areas share of total United States population and on the insular areas share of occupied rental units in the United States. The amount of HOME funds allocated for the insular areas is equal to the average of these two factors multiplied by the total HOME funds available for allocation after reserving HOME funds for Indian tribes and for education and organization support and coordinated federal support activities. In this average, share of population and share of occupied rental units are equally weighted.

The Department has used share of occupied rental housing as a measure of need based on rental occupancy data. Four of the six formula allocation factors used in determining relative need (see 24 CFR 92.50) are measures of subsets of occupied rental housing. The Department's experience indicates that there is a reasonably close correspondence between the relative need determined by using these factors, and the relative need determined by using share of occupied rental household.

The formula for determining the total insular areas allocation would be added to § 92.50. Section 92.60 sets forth the basis for determining the allocation amount for each insular area. The initial allocation is based on the insular area's population and occupied rental units. The HUD Field Office may reduce this amount based upon the insular area's performance and other criteria. No allocation may be made if the insular area has an outstanding audit finding or monetary obligation to HUD unless the HUD Field Office Manager finds that the insular area has made a good faith effort to clear the finding or has arranged for repayment to HUD. The allocation amount to an insular area may be increased (if funds are available due to decreases in allocations to other insular areas that have had funds reduced or recaptured) based on its HOME performance. While the Department may include the amounts of the insular area allocations in the formula allocation notice that is published in the **Federal Register** in accordance with § 92.52, insular areas will receive written notice of their allocation from HUD (see § 92.60).

The deadline for an insular area to submit a program description would be 60 days from when HUD transmits the written allocation notice. The program description has been revised to reflect the fact that insular areas are not participating jurisdictions and are not subject to certain statutory requirements directed at participating jurisdictions, including the matching contributions requirement and the prohibition against using HOME funds for administrative costs, and to require more specific information concerning projects and activities.

Section 92.64 states the applicability of the general HOME Program requirements to insular areas. Section 92.65 provides simpler procedural requirements when sanctions are applied. These proposed requirements are comparable to those that apply to the insular area component of the Community Development Block Grant Program. Finally, under proposed § 92.66, HOME funds that are reduced or recaptured from an insular area and are not used to increase the allocation amount for one or more of the remaining insular areas as provided in § 92.60 would be reallocated to the states as if they had been initially allocated to states.

The comment period for this proposed rule is limited to 30 days rather than the 60 day comment period usually afforded for public comment. The Department has determined, in accordance with 24 CFR 10.1, that it would be in the public interest to omit public comment on this rule because a formula allocation for insular areas must be in place by the time of the 1993 Fiscal Year (FY) appropriation for the HOME Program, since the amount allocated to insular areas would affect the total amount remaining available for other participating jurisdictions. However, it is not necessary to omit a comment period altogether in order to promulgate a final rule in time for FY 1993. To give interested parties an opportunity to comment before putting a final rule into effect, a comment period of 30 days is being afforded, rather than entirely omitting the comment period. In addition, those parties most affected by this rule, the four insular areas as defined in the rule, will be given individual notice of this rulemaking at the time of its transmittal for **Federal Register** publication to assure that they have adequate and timely notice and opportunity to comment.

III. Findings and Certifications

Environmental Review

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969. The Finding of No Significant Impact is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk at the above address.

Impact on the Economy

This rule does not constitute a "major rule" as that term is defined in section 1(b) of the Executive Order on Federal Regulations issued by the President on February 17, 1981. Analysis of the rule indicates that it would not: (1) Have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Impact on Small Entities

In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the undersigned hereby certifies that this rule does not have a significant economic impact on a substantial number of small entities, because only the four statutorily defined "insular areas" are affected by this rule.

Regulatory Agenda

This rule was not listed in the Department's Semiannual Agenda of Regulations published on April 27, 1992 (57 FR 16804) pursuant to Executive Order 12291 and the Regulatory Flexibility Act.

Federalism Impact

The General Counsel has determined, as the Designated Official for HUD under section 6(a) of Executive Order 12612, Federalism, that this proposed rule does not have federalism implications concerning the division of local, state, and federal responsibilities. The rule affects the four Federal territories included within the term "insular areas."

Impact on the Family

The General Counsel, as the designated official under Executive Order 12606, The Family, has determined that this rule would not have significant impact on family formation, maintenance, and general well-being. Assistance provided under the rule can be expected to support family values, by helping families achieve security and independence; by enabling them to live in decent, safe, and sanitary housing; and by giving them the means to live independently in mainstream American society. The rule would not, however, affect the institution of the family, which is requisite to coverage by the Order. Even if the rule had the necessary family impact, it would not be subject to further review under the Order, since the provision of assistance under the rule is required by statute, and is not subject to agency discretion.

List of Subjects in 24 CFR Part 92

Grant programs—housing and community development, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

Accordingly, the Department proposes to amend part 92 of title 24 of the Code of Federal Regulations as follows:

PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM

1. In part 92, the authority citation would continue to read as follows:

Authority: 42 U.S.C. 3535(d) and 12701–12839.

2. In § 92.2, the newly defined term *insular areas* would be added and the definition of *unit of general local government* would be revised, to read as follows:

§ 92.2 Definitions.

* * * * *

Insular areas means Guam, the Northern Mariana Islands, the United States Virgin Islands, and American Samoa.

* * * * *

Unit of general local government means a city, town, township, county, parish, village, or other general purpose political subdivision of a state; an insular area or a general purpose political subdivision thereof; a consortium of such political subdivisions recognized by HUD in accordance with § 92.101; and any agency or instrumentality thereof that is established pursuant to legislation and designated by the chief executive to act on behalf of the jurisdiction with regard to provisions of this part. When a county is an urban county, the urban county is the unit of general local government for purposes of the HOME Investment Partnerships Program.

* * * * *

3. The heading for subpart B would be revised and an undesignated heading would be added immediately after the heading for subpart B, to read as follows:

Subpart B—Allocation Formula and Insular Areas Program Allocation Formula

4. In § 92.50, paragraph (b) would be revised to read as follows:

§ 92.50 Formula allocation.

* * * * *

(b) *Amounts available for allocation; state and local share.* The amount of funds that are available for allocation by the formula under this section is equal to the balance of funds remaining after reserving:

(1) For grants to Indian tribes, one percent (or such other percentage or amount, as authorized by Congress) of the total funds appropriated;

(2) Up to such amounts as may be authorized by law for housing education and organization support and for coordinated federal support activities; and

(3) For allocations to insular areas, (after reserving the amounts described in paragraphs (b)(1) and (b)(2) of this section) an amount multiplied by a factor that is one half the sum of the insular areas' population divided by total United States population, including the insular areas, and the insular areas' occupied rental units divided by total United States occupied rental units, including the insular areas.

* * * * *

5. At the end of subpart B, an undesignated heading and new §§ 92.60 through 92.66 would be added, to read as follows:

Insular Areas Program

§ 92.60 Allocation amounts for insular areas.

(a) *Initial allocation amount for each insular area.* The initial allocation amount for each insular area is determined based upon the insular area's population and occupied rental units compared to all insular areas.

(b) *Threshold requirements.* The responsible HUD Field Office shall review each insular area's progress on outstanding allocations made under this section, based on the insular area's performance report, the timeliness of close-outs, and compliance with fund management requirements and pertinent regulations, taking into consideration the size of the allocation and the degree and complexity of the program. If HUD determines from this review that the insular area does not have the capacity to administer effectively a new allocation, or a portion of a new allocation, in addition to allocations currently under administration, HUD may reduce the insular area's initial allocation amount.

(c) *Previous audit findings and outstanding monetary obligations.* HUD shall not make an allocation to an insular area that has either an outstanding audit finding for any HUD program, or an outstanding monetary obligation to HUD that is in arrears, or for which a repayment schedule has not been established and agreed to. This restriction does not apply if the Field Office manager finds that the insular area has made a good faith effort to clear the audit and, when there is an outstanding monetary obligation to HUD, the insular area has made a satisfactory arrangement for repayment of the funds due HUD and payments are current.

(d) *Increases to the initial allocation amount.* If funds reserved for the insular areas are available because HUD has decreased the amount for one or more insular area in accordance with paragraphs (b) or (c) of this section, or for any other reason, HUD may increase the allocation amount for one or more of the remaining insular areas based upon the insular area's performance in committing HOME funds within the 24 month deadline, producing housing units described in its program description, and meeting HOME program requirements. Funds that become available but which are not used to increase the allocation amount for one or more of the remaining insular areas will be reallocated to the states as provided in accordance with the requirements in subpart J for reallocating funds initially allocated to a state.

(e) *Notice of allocation amounts.* HUD will notify each insular area, in writing, as to the amount of its HOME allocation that HUD has determined for the insular area in accordance with this section.

§ 92.61 Program description and housing strategy.

(a) *Submission requirement.* Not later than 60 days after HUD notifies the insular area of the amount of its allocation, the insular area must submit a program description to HUD containing the information described in paragraph (b) of this section.

(b) *Content of program description.* The program description must provide the following information:

(1) An executed Standard Form 424;

(2) The estimated use of HOME funds (consistent with needs identified in its approved housing strategy) and a description of projects and eligible activities, including number of units to be assisted, estimated costs, and tenure type (rental or owner occupied) and, for tenant assistance, households assisted;

(3) A timetable for the implementation of the projects or eligible activities;

(4) If the insular area intends to use HOME funds for first-time homebuyers, the guidelines for resale, as required in § 92.254(a)(4);

(5) If the insular area intends to use HOME funds for tenant-based rental assistance, a description of how the program will be administered consistent with the minimum guidelines described in § 92.211;

(6) If an insular area intends to use other forms of investment not described

in § 92.205(b), a description of the other forms of investment;

(7) A statement of the policy and procedures to be followed by the insular area to meet the requirements for affirmative marketing, and establishing and overseeing a minority and women business outreach program under §§ 92.350 and 92.351, respectively.

(c) The following certifications must accompany the program description:

(1) A certification that, before committing funds to a project, the insular area will evaluate the project in accordance with guidelines that it adopts for this purpose and will not invest any more HOME funds in combination with other federal assistance that is necessary to provide affordable housing;

(2) If the insular area intends to provide tenant-based assistance, the certification required by § 92.211;

(3) A certification that the submission of the program description is authorized under applicable law and the insular area possesses the legal authority to carry out the HOME Investment Partnerships Program, in accordance with the HOME regulations;

(4) A certification that it will comply with the acquisition and relocation requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, implementing regulations at 49 CFR part 24 and the requirements of § 92.353;

(5) A certification that the insular area will use HOME funds pursuant to the insular area's approved housing strategy and in compliance with all requirements of this part;

(6) The certification with regard to the drug-free workplace required by 24 CFR part 24, subpart F; and

(7) The certification required with regard to lobbying required by 24 CFR part 87, together with disclosure forms, if required by part 87.

(8) A certification that the insular area agrees to assist HUD to comply with 24 CFR part 50 and shall:

(i) Supply HUD with all available, relevant information necessary for HUD to perform for each property any environmental review required by part 50;

(ii) Carry out mitigating measures required by HUD or select alternate eligible property; and

(iii) Not acquire, rehabilitate, convert, lease, repair or construct property, or commit HUD or local funds to such program activities with respect to any eligible property, until HUD approval is received.

§ 92.62 Review of program description and certifications.

(a) *Review of program description.* The responsible HUD Field Office will review an insular area's program description and will approve the description unless it is not consistent with the insular area's approved housing strategy, or if the insular area has failed to submit information sufficient to allow HUD to make the necessary determinations required by § 92.61 (b)(4), (b)(6), and (b)(7), if applicable, or if the level of proposed projects or eligible activities is not within the management capability demonstrated by past performance in housing and community development programs. If the information submitted is not consistent with the approved housing strategy, or the insular area has not submitted information on § 92.61 (b)(4), (b)(6), and (b)(7), if applicable, or if the level of proposed projects or eligible activities is not within the management capability demonstrated by past performance in housing and community development programs, the insular area may be required to furnish such further information or assurances as HUD may consider necessary to find the program description and certifications satisfactory. The HUD Field Office shall work with the insular area to achieve a complete and satisfactory program description.

(b) *Review period.* The HUD Field Office will notify the insular area if its program description is not consistent with its approved housing strategy, or determinations cannot be made under § 92.61 (b)(4), (b)(6), or (b)(7), or if the proposed projects or activities are beyond currently demonstrated capability, within 30 days of receipt. The insular area will have a reasonable period of time, agreed upon mutually, to submit the necessary supporting information to show it is consistent or to revise the proposed projects or activities in its program description.

(c) *HOME Investment Partnership Agreement.* After Field Office approval under this section, a HOME funds allocation is made by HUD execution of the agreement, subject to execution by the insular area. The funds are obligated on the date HUD notifies the insular area of HUD's execution of the agreement in accordance with this section and § 92.501.

§ 92.63 Amendments to program description.

An insular area must submit to HUD for approval any substantial change in its HUD-approved program description that it makes during the fiscal year and must document any other changes in its file. A substantial change involves a change in the guidelines for resale (§ 92.61(b)(4)), other forms of investment (§ 92.61(b)(6)), minority and women business outreach program (§ 92.61(b)(7)), or a change in tenure type of the project or activities, or a funding increase to a project or activity of $100,000 or 50% (whichever is greater). The HUD Field Office will notify the insular area if its program description, as amended, is not consistent with its approved housing strategy, or determinations cannot be made under § 92.61 (b)(4), (b)(6), or (b)(7), or if the level of proposed projects or eligible activities is not within the management capability demonstrated by past performance in housing and community development programs, within 30 days of receipt. The insular area will have a reasonable period of time, agreed upon mutually, to submit the necessary supporting information to show it is consistent or to revise the proposed projects or activities in its program description.

§ 92.64 Applicability of requirements to insular areas.

(a) Insular areas are subject to the same requirements in subpart E (Program Requirements), subpart F (Project Requirements), subpart K (Program Administration), and subpart L (Performance Reviews and Sanctions) of this part as participating jurisdictions, except for the following:

(1) Subpart E (Program Requirements): Sections 92.208 through 210 do not apply. The prohibition, in § 92.214(a) against using HOME funds to defray administrative cost does not apply, and in addition to the costs listed in § 92.206, administrative costs of an insular area not to exceed 15 percent of the HOME funds provided to the insular area are eligible costs. The matching contribution requirements in §§ 92.218 through 92.221 do not apply.

(2) Subpart K (Program Administration):

(i) Section 92.500 (The HOME Investment Trust Fund) does not apply. HUD will establish a HOME account in the United States Treasury and the HOME funds must be used for approved activities. A local account must be established for repayment, interest and other return of investment of HOME funds. HUD will recapture HOME funds in the HOME Treasury account by the amount of:

(A) Any funds that are not committed within 24 months after the last day of the month in which the funds were deposited in the account;

(B) Any funds that are not expended within five years after the last day of the month in which the funds were deposited in the account; and

(C) Any penalties assessed by HUD under § 92.552.

(ii) Section 92.502 (Cash and Management Information System) applies, except that references to the HOME Investment Trust Fund mean HOME account and the reference to 24 CFR part 58 does not apply. In addition, § 92.502(c) does not apply, and compliance with Treasury Circular No. 1075 (31 CFR part 205) is required.

(iii) Section 92.503 (Repayment of investment) applies, except that repayments, interest and other return on investment of HOME funds may be retained provided the funds are used for eligible activities in accordance with the requirements of this section.

(3) Section 92.504 (Participating jurisdiction responsibilities; written agreements; monitoring) applies, except that the written agreement must ensure compliance with the requirements in this section.

(4) Section 92.508 (Recordkeeping) applies with respect to the records that relate to the requirements of this section.

(5) Section 92.509 (Performance reports) applies, except that a performance report is required only after completion of the approved projects.

(6) Subpart L (Performance Reviews and Sanctions): Section 92.522 does not apply. Instead, § 92.65 applies.

(b) The requirements in subpart H (Other Federal Requirements) of this part apply, except that insular areas must comply with affirmative marketing, flood insurance, labor and lead-based paint requirements applicable to participating jurisdictions. In addition, an insular area must advise HUD when it proposes specific properties to be utilized in its program, and HUD will perform an environmental review with respect to those properties in accordance with 24 CFR part 50. The insular area will supply HUD with available, relevant information necessary for that review, will carry out mitigating measures required by HUD or select alternate eligible property, and will not acquire, rehabilitate, convert, lease, repair or construct property, or commit HUD or local funds to these program activities with respect to any eligible property, until HUD approval is received.

(c) Subpart B (Allocation Formula), subpart C (Participating Jurisdiction: Designation and Revocation of Designation—Consortia), subpart D (Program Description), and subpart G (Community Housing Development Organizations) of this part do not apply.

§ 92.65 Funding sanctions.

Following notice and opportunity for informal consultation, HUD may withhold, reduce or terminate the assistance where any corrective or remedial actions taken under § 92.551 fail to remedy a recipient's performance deficiencies, and the deficiencies are sufficiently substantial, in the judgment of HUD, to warrant sanctions.

§ 92.66 Reallocation.

HUD will reallocate to the states any HOME funds reduced or recaptured from an insular area, and which are not used to increase the allocation amount for one or more of the remaining insular areas as provided in § 92.60 of this part, in accordance with the requirements in subpart J for reallocating funds initially allocated to a state.

Dated: June 22, 1992.

Jack Kemp,

Secretary.

[FR Doc. 92-18596 Filed 8-4-92; 8:45 am]

BILLING CODE 4210-32-M

federal register

Wednesday
August 5, 1992

Part V

Department of Education

34 CFR Part 8

Demands for Testimony or Records in Legal Proceedings; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 8

RIN: 1880-AA45

Demands for Testimony or Records in Legal Proceedings

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary of Education (Secretary) adds a new part 8 to title 34 of the Code of Federal Regulations establishing a procedure for departmental response to subpoenas or other demands for departmental employees to testify about, or produce records concerning, departmental matters in private litigation or other proceedings in which the United States is not a party. These regulations are intended to minimize the disruption of official duties caused by compliance with those demands, to maintain departmental control over the release of official information, and otherwise to protect the interests of the United States. They prohibit Department of Education employees from complying with those demands without the Secretary's permission.

EFFECTIVE DATE: These regulations take effect on August 5, 1992, with the exception of § 8.3(a). Section 8.3(a) will become effective after the information collection requirements contained in that section have been submitted by the Department of Education and approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980. If you want to know the effective date of § 8.3(a), call or write the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT: Rob Wexler, U.S. Department of Education, Office of the General Counsel, 400 Maryland Avenue, SW., room 4083, FOB-6, Washington, DC 20202-2243, (202) 401-3690. Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1-800-877-8339 (in the Washington, DC 202 area code, telephone 708-9300) between 8 a.m. and 7 p.m., Eastern time.

SUPPLEMENTARY INFORMATION: The regulations provide that, in response to subpoenas or other demands for testimony or records concerning departmental matters in private litigation or other proceedings in which the United States is not a party, Department of Education employees may testify or produce records only if the Secretary or the Secretary's delegate authorizes compliance with the demand. In making this determination, the Secretary or his or her delegate will consider whether compliance is in accordance with applicable laws, rules, and regulations and would not be contrary to the interests of the United States. The regulations provide for the handling of all other demands for records by treating them as requests for records under the Freedom of Information Act (5 U.S.C. 552).

The courts have recognized the authority of federal agencies to limit compliance with those demands in this manner. See *United States ex. rel. Touhy* v. *Ragan*, 340 U.S. 462 (1951). Moreover, subpoenas by State courts, legislatures, or legislative committees that attempt to assert jurisdiction over federal agencies are inconsistent with the Supremacy Clause of the U.S. Constitution, and a federal regulation regarding compliance with those subpoenas reinforces this principle. See *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *U.S.* v. *McLeod*, 385 F.2d 734 (5th Cir. 1967).

These regulations do not apply to situations in which the United States is a party in a lawsuit. They also do not apply to instances in which an employee is requested to appear in adjudicative, legislative, or administrative proceedings unrelated to information concerning Federal activities or the employee's duties at the Department. Finally, the regulations do not apply to subpoenas or requests for information submitted by either House of Congress or by a congressional committee or subcommittee with jurisdiction over the matter for which the testimony or information is requested.

Executive Order 12600

These regulations would not supersede the procedures followed pursuant to Executive Order 12600 in responding to requests for information under the Freedom of Information Act (FOIA). Should a request for information under the FOIA involve "confidential commercial information," the provisions of Executive Order 12600 would apply.

Paperwork Reduction Act of 1980

Section 8.3(a) contains an information collection requirement. As required by the Paperwork Reduction Act of 1980, the Department of Education will submit a copy of this section to the Office of Management and Budget for its review. (44 U.S.C. 3504(h))

The collection requirement affects organizations and individuals submitting subpoenas or other demands to the Department in legislative or administrative proceedings or in litigation in which the United States is not a party. It requires summarizing the testimony or records being sought and is needed to determine whether to authorize an employee to comply with the demand.

It is estimated that there will be approximately 25 respondents each year, that a respondent will have to meet the collection requirement once annually, and that the responses will take an average of one hour to complete. Therefore, the estimated annual reporting burden of this collection requirement is 25 hours. It also is estimated that there will not be any recordkeeping burden.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, room 3002, New Executive Office Building, Washington, DC 20503; Attention: Daniel J. Chenok.

Waiver of Proposed Rulemaking

The Secretary has determined, under 5 U.S.C. 553(a)(2), that these regulations do not require public notice and comment because they are rules regarding a matter relating to agency management and personnel.

List of Subjects in 34 CFR Part 8

Administrative practice and procedure, Availability of information, Education Department, Freedom of Information Act.

(Catalog of Federal Domestic Assistance Number does not apply.)

Dated: July 31, 1992.

Lamar Alexander,

Secretary of Education.

The Secretary amends title 34 of the Code of Federal Regulations by adding a new part 8 to read as follows:

PART 8—DEMANDS FOR TESTIMONY OR RECORDS IN LEGAL PROCEEDINGS

Sec.

Authority: 5 U.S.C. 301; 5 U.S.C. 552; 20 U.S.C. 3474, unless otherwise noted.

§ 8.1 What is the scope and applicability of this part?

(a) Except as provided in paragraph (c) of this section, this part establishes the procedures to be followed if the Department or any departmental employee receives a demand for—

(1) Testimony by an employee concerning—

(i) Records contained in the files of the Department;

(ii) Information relating to records contained in the files of the Department; or

(iii) Information or records acquired or produced by the employee in the course of his or her official duties or because of the employee's official status; or

(2) The production or disclosure of any information or records referred to in paragraph (a)(1) of this section.

(b) This part does not create any right or benefit, substantive or procedural, enforceable by any person against the Department.

(c) This part does not apply to—

(1) Any proceeding in which the United States is a party before an adjudicative authority;

(2) A demand for testimony or records made by either House of Congress or, to the extent of matter within its jurisdiction, any committee or subcommittee of Congress; or

(3) An appearance by an employee in his or her private capacity in a legal proceeding in which the employee's testimony does not relate to the mission or functions of the Department.

(Authority: 5 U.S.C. 301; 20 U.S.C. 3474)

§ 8.2 What definitions apply?

The following definitions apply to this part:

Adjudicative authority includes, but is not limited to—

(1) A court of law or other judicial forums; and

(2) Mediation, arbitration, or other forums for dispute resolution.

Demand includes a subpoena, subpoena duces tecum, request, order, or other notice for testimony or records arising in a legal proceeding.

Department means the U.S. Department of Education.

Employee means a current employee or official of the Department or of an advisory committee of the Department, including a special government employee, unless specifically provided otherwise in this part.

Legal proceeding means—

(1) A proceeding before an adjudicative authority;

(2) A legislative proceeding, except for a proceeding before either House of Congress or before any committee or subcommittee of Congress, to the extent of matter within the committee's or subcommittee's jurisdiction; or

(3) An administrative proceeding.

Secretary means the Secretary of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

Testimony means statements made in connection with a legal proceeding, including but not limited to statements in court or other forums, depositions, declarations, affidavits, or responses to interrogatories.

United States means the Federal Government of the United States and any of its agencies or instrumentalities.

(Authority: 5 U.S.C. 301; 20 U.S.C. 3474)

§ 8.3 What are the requirements for submitting a demand for testimony or records?

(a) A demand for testimony of an employee or former employee, or a demand for records issued pursuant to the rules governing the legal proceeding in which the demand arises—

(1) Must be in writing; and

(2) Must state the nature of the requested testimony or records and why the information sought is unavailable by any other means.

(b) Service of a demand for testimony of an employee or former employee must be made on the employee or former employee whose testimony is demanded, with a copy simultaneously delivered to the General Counsel, U.S. Department of Education, Office of the General Counsel, 400 Maryland Avenue, SW., room 4083, FOB–6, Washington, DC 20202–2100.

(c) Service of a demand for records, as described in § 8.5(a)(1), must be made on an employee or former employee who has custody of the records, with a copy simultaneously delivered to the General Counsel at the address listed in paragraph (b) of this section. For assistance in identifying the custodian of the specific records demanded, contact the Records Management Branch Chief, Office of Information Resources Management, U.S. Department of Education, 7th and D Streets, SW., ROB–3, Washington, DC 20202–4753.

(Authority: 5 U.S.C. 301; 20 U.S.C. 3474)

§ 8.4 What procedures are followed in response to a demand for testimony?

(a) After an employee receives a demand for testimony, the employee shall immediately notify the Secretary and request instructions.

(b) An employee may not give testimony without the prior written authorization of the Secretary.

(c)(1) The Secretary may allow an employee to testify if the Secretary determines that the demand satisfies the requirements of § 8.3 and that granting permission—

(i) Would be appropriate under the rules of procedure governing the matter in which the demand arises and other applicable laws, rules, and regulations; and

(ii) Would not be contrary to an interest of the United States, which includes furthering a public interest of the Department and protecting the human and financial resources of the United States.

(2) The Secretary may establish conditions under which the employee may testify.

(d) If a response to a demand for testimony is required before the Secretary determines whether to allow an employee to testify, the employee or counsel for the employee shall—

(1) Inform the court or other authority of the regulations in this part; and

(2) Request that the demand be stayed pending the employee's receipt of the Secretary's instructions.

(e) If the court or other authority declines the request for a stay, or rules that the employee must comply with the demand regardless of the Secretary's instructions, the employee or counsel for the employee shall respectfully decline to comply with the demand, citing *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951), and the regulations in this part.

(Authority: 5 U.S.C. 301; 20 U.S.C. 3474)

§ 8.5 What procedures are followed in response to a demand for records?

(a)(1) After an employee receives a demand for records issued pursuant to the rules governing the legal proceeding in which the demand arises, the employee shall immediately notify the Secretary and request instructions.

(2) If an employee receives any other demand for records, the Department—

(i) Considers the demand to be a request for records under the Freedom of Information Act; and

(ii) Handles the demand under rules governing public disclosure, as established in 34 CFR part 5.

(b) An employee may not produce records in response to a demand as described in paragraph (a)(1) of this section without the prior written authorization of the Secretary.

(c) The Secretary may make these records available if the Secretary determines that the demand satisfies the requirements of § 8.3 and that disclosure—

(1) Would be appropriate under the rules of procedure governing the matter in which the demand arises and other applicable laws, rules, and regulations; and

(2) Would not be contrary to an interest of the United States, which includes furthering a public interest of the Department and protecting the human and financial resources of the United States.

(d) If a response to a demand for records as described in paragraph (a)(1) of this section is required before the Secretary determines whether to allow an employee to produce those records, the employee or counsel for the employee shall—

(1) Inform the court or other authority of the regulations in this part; and

(2) Request that the demand be stayed pending the employee's receipt of the Secretary's instructions.

(e) If the court or other authority declines the request for a stay, or rules that the employee must comply with the demand regardless of the Secretary's instructions, the employee or counsel for the employee shall respectfully decline to comply with the demand, citing *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951), and the regulations in this part.

(Authority: 5 U.S.C. 301; 5 U.S.C. 552; 20 U.S.C. 3474)

[FR Doc. 92-18620 Filed 8-4-92; 8:45 am]

BILLING CODE 4000-01-M