

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 3284

[Docket No. FR-4665-F-02]

RIN 2502-AH62

Manufactured Housing Program Fee

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Final rule.

SUMMARY: In accordance with recent statutory direction, the Department is publishing this rule to modify the amount of the fee that is collected from manufacturers of manufactured homes to fund HUD's responsibilities under the National Manufactured Housing Construction and Safety Standards Act of 1974. The rule also sets minimum payments to States participating in the program as State Administrative Agencies. This final rule follows publication of an April 15, 2002, proposed rule and takes into consideration public comments received on the proposed rule. This final rule adopts the proposed rule without substantive change.

DATES: *Effective Date:* September 12, 2002.

FOR FURTHER INFORMATION CONTACT: William W. Matchneer III, Administrator, Manufactured Housing Program, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-8000; telephone (202) 708-6401 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

On April 15, 2002, the Department published a proposed rule (67 FR 18398) to modify the amount of the fee to be collected from manufactured home manufacturers in accordance with section 620(d) (42 U.S.C. 5419(d)) of the National Manufactured Housing Construction and Safety Standards Act of 1974 (the Act). These fees are used to offset HUD's expenses for carrying out its responsibilities under the Act and have not been increased for over 12 years. Section 620(d) of the Act, added by the Manufactured Housing Improvement Act of 2000 (Pub. L. 106-569, 114 Stat. 2944, approved December 27, 2000) (the MHI Act), provides that the amount of any fee "may only be modified: (1) as specifically authorized

in advance in an annual appropriations Act; and (2) pursuant to rulemaking in accordance with section 553 of title 5, United States Code." (Section 553 of title 5, United States Code contains the "informal" rulemaking requirements of the Administrative Procedure Act.) Section 620(e) of the Act (unless otherwise noted in this preamble, references to a section of the Act include the amendments made to that section by the MHI Act) further provides that amounts from any fee shall be available for expenditure only to the extent approved in advance in an annual appropriations Act.

The fee that HUD collects under the Act is levied upon the transportable sections of each new manufactured housing unit, and the total amount of the fees that HUD collects annually is dependent upon the number of transportable sections produced per year. The amendments made by the MHI Act in section 620(d) of the Act, which make the modification of the amount of the fee subject to implementation only pursuant to rulemaking in accordance with section 553 of title 5, United States Code, prompt this rulemaking.

II. This Final Rule

This rule establishes a new part 3284, under which the amount of the fee is codified. This final rule adopts the proposed rule with only minor changes.

The amount established in this rule is unchanged from the final rule and has been determined by dividing \$13,566,000, the amount appropriated for Fiscal Year (FY) 2002, by 350,000, the number of manufactured housing transportable units projected to be produced in the FY. This calculation results in a revised fee of \$39. The explanation of this calculation of the amount of the fee has been removed from the final rule as unnecessary.

The final rule also clarifies in § 3284.5 that the manufacturer that must pay the fee of \$39 is the "manufacturer" as defined in § 3282.7.

In accordance with section 620(e)(3) of the Act, which was also added by the MHI Act, this rule also provides (as it did at the proposed rule stage) that HUD will continue to fund States that have approved State plans in amounts not less than the allocated amounts, based on the fee distribution system in effect on December 26, 2000. The yearly payment to a State would be set by this rule as not less than the amount paid to that State for the 12 months ending on December 26, 2000. As a conforming matter, this final rule adds a specific reference to States having approved plans to § 3284.1, Applicability.

III. Public Comments

HUD specifically invited comment on the projected number of transportable sections. None of the commenters suggested that a different production projection should be used in the final calculation of the amount of the fee. Therefore, the projected production level announced in the proposed rule has been used in the final calculation of the fee.

HUD received comments from 15 commenters on other aspects of the fee. These comments resulted in the issues set out in the numbered comments that follow, together with HUD's responses.

Comment 1: HUD's proposed fee modification was not specifically authorized in advance in an annual appropriations Act. Congress has not specifically authorized an increase in the amount of the label fee.

Response: Section 620(d) of the Act states that the "amount of any fee . . . may only be modified" when two conditions are met: (1) in advance of HUD's modification, Congress specifically authorizes in an appropriations Act that the amount of the fee be modified; and (2) the modification is made through notice-and-comment rulemaking. In HUD's FY 2002 Appropriations Act (Pub. L. 107-73, 115 Stat. 651, 669, approved November 26, 2001), Congress appropriated \$13,566,000 for the manufactured housing program, and specifically directed that the fee established and collected pursuant to section 620 of the Act "shall be modified as necessary" to ensure that the general fund of the Treasury could be reimbursed by fee collections received up to the amount of the appropriation (emphasis added). Therefore, through this rule, HUD is modifying the amount of the fee as specifically authorized by Congress, *i.e.*, HUD is modifying the amount of the fee based on the amount necessary to collect \$13,566,000. HUD, therefore, both has satisfied the requirement in section 620(d)(1) and is complying with the subsequent congressional enactment in the FY 2002 Appropriations Act.

Comment 2: Establishment of a specific level of appropriation by Congress does not satisfy the requirement that a modification of the amount of the fee be specifically authorized. Rather, specific advance authorization in an annual appropriations Act is required for both program expenditures (section 620(e)) and fee changes (section 620(d)).

Response: Congress authorized HUD, in its FY 2002 Appropriations Act, to spend up to \$13,566,000 for the

manufactured housing program for the fiscal year. In addition, as discussed in the response to Comment 1, Congress mandated that fees be modified as necessary to ensure that the general fund of the Treasury could be reimbursed for that amount. Therefore, Congress has authorized program expenditures, as contemplated in section 620(e), and has authorized modification of the amount of the fee, as contemplated in section 620(d).

Comment 3: If specific authorization of a level of program expenditures, as required under section 620(e), also authorizes a fee increase, the provision in section 620(d) is surplusage.

Response: As discussed above, HUD does not base its authority to issue this rule on the fact that Congress established a level of program expenditures, as referenced in section 620(e), but on the fact that Congress mandated in the FY 2002 Appropriations Act that fees be modified to ensure a level of collections that is defined by the amount of the appropriations for the program. This mandate comports with the requirements in section 620(d).

Comment 4: The opportunity for HUD to receive and consider evidence of projected production levels through a proposed rule are limited at best, so HUD should ask Congress for a specific fee modification. Congress can thoroughly test and evaluate the relevant information.

Response: If Congress is to analyze such information and make a determination of a specific fee amount, there is little justification for the other statutory requirement that the amount be subject to notice-and-comment rulemaking. Congress does not ordinarily involve itself with this level of management of such regulatory programs, and the mandate in the FY 2002 Appropriations Act that HUD modify fees as necessary to ensure the level of appropriations reflects authorization by Congress for HUD to pursue a fee modification within certain limits. The requirement in the Act for notice-and-comment rulemaking in accordance with the Administrative Procedure Act satisfies the interest of Congress in establishing appropriate safeguards for HUD's modification of the amount of the fee.

Comment 5: The formula used by HUD to determine the fee level is appropriate, but should only be applied after HUD follows the processes and procedures in the Act.

Response: As discussed previously, HUD believes that it has followed the required procedures. HUD agrees with the commenter that the formula used to

establish the new level of the fee is appropriate, and notes that none of the commenters suggested changes to the production levels used by HUD to calculate the final fee.

Comment 6: One of the stated purposes of the Act is "to ensure that the public interest in, and need for, affordable manufactured housing is duly considered in all determinations relating to the Federal standards and their enforcement." This statement of purpose mandates a specific analysis of the impact of the increased fee on the affordability of manufactured housing. Further, the Conferees on the FY 2002 HUD Appropriations Act directed HUD "to identify the use of all program fees as part of the fiscal year 2003 HUD Budget Justification."

Response: HUD has always believed that it was required to consider the potential effect of its actions in the manufactured housing program on the cost of this affordable housing alternative. HUD has considered the potential effect on cost of raising the fee to \$39. It is HUD's position that the \$15 increase would have a negligible effect on the cost of manufactured housing. While the amount of the fee has been increased in comparison to the earlier fee, the \$39 fee still represents a very small proportion of the overall cost of a manufactured home. However, cost is not the only important consideration. The first purpose stated in the Act is "to protect the quality, durability, safety, and affordability of manufactured homes." The Conferees also directed HUD "to place a priority on monitoring safety inspection of homes and the issuance of inspection labels when determining the funding requirements for this program during fiscal year 2002." H.R. Conf. Rep. No. 107-272, p. 112 (2001). HUD has done everything required to meet the various mandates established by Congress in the authorizing statute for the manufactured housing program, the appropriations process, and other relevant legislation, as well as various Executive Branch issuances.

Comment 7: Before the final rule, HUD should publish specific information with line-by-line details about its proposed program expenditures.

Response: HUD is not required to publish such information. Choosing the most appropriate management of a Federal program is a governmental function. While the public has the right and a responsibility to observe government operations, the public is represented in the management of individual programs through elected officials and the structure of the powers

accorded to the branches of the Federal government. The Secretary has the statutory responsibility to administer an effective program that ensures the quality, durability, safety, and affordability of manufactured homes. In order to meet that responsibility efficiently, the Secretary has concomitant authority to manage the resources dedicated to the program, subject to the law and the direction of the President.

On the other hand, Congress has the authority and responsibility to establish appropriations levels for government operations, and HUD has provided, and will continue to provide, Congress with the information it needs to review HUD's operating budget for this program. Through this process, the public will be assured that their representatives have determined the level of Federal oversight that is appropriate in exchange for the benefit of Federal preemption of multiple State and local construction and safety requirements as applied to manufactured housing.

Comment 8: HUD has used program fees to engage in unauthorized activities.

Response: HUD strongly disagrees with this comment. In fact, although legal challenges to HUD's actions are rare, no court has ever found that HUD has acted outside of its authority or responsibility in this program. HUD has always been careful to ensure that its actions are legal and appropriate. In addition, HUD has tried to be responsive, in proportion to its program responsibilities, when consumers or industry participants present questions about the authority for, or effectiveness of, HUD's actions within the manufactured housing program.

Comment 9: It is unfair to manufacturers and consumers and a violation of the Act for HUD to increase the label fee by 62.5 percent. HUD should phase in the fee increase over several years to be more in line with inflation indices.

Response: As noted in the preamble of the proposed rule, the regulatory fee assessed for each section of manufactured housing to assure the public that such housing meets a minimum level of performance and safety has not been increased for over 12 years. In addition, Congress amended the statute in December 2000 to require the Secretary to exercise significant new responsibilities for nationwide programs for installation and dispute resolution and for a consensus rulemaking procedure, and to authorize the Secretary to use fee collections to fund a new program administrator. Although

the amount of increase of the fee appears large as a percentage change, the percent-increase statistic mostly reflects a very small initial fee and a substantial increase in the program responsibilities.

Further, in recent years fee revenue has not covered program expenses, even though HUD has significantly reduced "monitoring safety inspections" and other oversight activities performed by HUD staff with the assistance of HUD contractors. As discussed in the response to Comment #6, the Conferees on HUD's FY 2002 Appropriations Act had directed HUD to place a priority on monitoring safety inspections of homes when determining the funding requirements for the program during FY 2002. In addition, certain regulatory functions that do not depend on the level of production must continue to be performed, such as monitoring Design Approval Primary Inspection Agencies (DAPIA's), Production Inspection Primary Inspection Agencies (PIPA's), and State Administrative Agencies (SAA's) and training. These functions are necessary to protect consumers and the public, and to maintain confidence in the industry's product. Nevertheless, as fee revenues have fallen corresponding to diminished production levels, the program has reduced monitoring inspections and has exhausted reserve operating funds that had been available in the program account. Therefore, the \$15-per-section fee increase at this time is reasonable and necessary.

Comment 10: OMB has determined that the rule is a "significant regulatory action." As such, the proposed rule carries a significant risk of harming small manufacturing businesses, especially at a time when production levels are down.

Response: The OMB designation is dictated by Executive Order 12866 and does not necessarily establish a risk of harm. Most rules that receive this designation are deemed significant because they either have an annual economic effect of at least \$100 million, or adversely affect in a material way a sector of the economy or public health or safety. The proposed rule noted that OMB did not determine that the proposal was economically significant. Rather, the designation resulted from another criterion: it "raise(s) novel legal or policy issues arising out of legal mandates." * * * The comments, as presented and responded to in this preamble, reflect such "novel" issues, and validate the OMB designation of the rule as a significant regulatory action. As noted in the response to Comment 6, HUD has undertaken all of the required

analyses and met all of its responsibilities in issuing this rule.

Comment 11: The State's cost to carry out the required functions of an SAA is much higher than the funding provided by HUD, and will increase as the State takes on additional responsibilities related to retailer alterations and inspections and installation. Proposed § 3284.10 should be modified to guarantee a State payment of at least \$50,000.

Response: The rule ensures that HUD's payments to the States will comply with the statutory minimum requirement. HUD appreciates that a higher payment may permit some States to participate more consistently in the manufactured housing program, and HUD would like to encourage such participation. In the past, HUD has considered whether establishment of a minimum payment such as \$50,000 would be feasible, and in the future, such payments may be possible. This rule merely establishes a minimum payment to the States; it does not prevent HUD from taking action in the future to seek higher payments to States, if such payments are found to be feasible, and it does not affect the per-section payments to be made to the States under current regulations. Because the demands on the program funds are so great at this time, however, HUD has not proposed the change suggested by the commenter.

Comment 12: Based on HUD's stated intent in the final rule that established the current fee distribution system (56 FR 65183, December 16, 1991), proposed § 3284.10 should be modified to provide that 38 percent of each label fee be paid to the State in which a new manufactured home is sited, and 8 percent of each label fee be paid to the State in which a new home is produced. This would help the States to meet the costs associated with the new requirements for dispute resolution and installation programs.

Response: HUD believes that § 3284.10 in today's final rule is a reasonable interpretation of the intent of Congress, especially in light of the December 1991 rule cited by the commenter (56 FR 65183). In the December 1991 rule, HUD changed the method of payments to States from a formula focused solely on the State of siting to a formula based on both the States of production and siting. HUD expressly rejected utilization of a fixed percentage to define the payments to States, stating that "a more equitable method of distribution of funds to SAAs is one based on a fixed fee dollar amount." (56 FR 65184-5) HUD noted that utilization of a percentage formula

could have the effect of requiring HUD to seek unnecessarily high fee increases in the future, in order to cover HUD's needs but maintain the percentages specified for distribution to the States. (See 56 FR 65184.)

However, HUD understands that the States may need funding beyond what is provided by HUD pursuant to new § 3284.10 and 24 CFR 3282.307(b) to implement optional new State programs for dispute resolution and installation. In the December 1991 rule, HUD also noted that States could assess their own fees to defray expenses in excess of funding received from HUD. (See 56 FR 65185) The law relating to this power of the States has not changed; nor has the requirement that a State participating as an SAA must provide satisfactory assurance that it will devote adequate funds to the administration and enforcement of the standards.

As discussed in the response to Comment 11, this rule merely establishes a minimum payment to the States that complies with the requirements of the Act and does not foreclose future actions regarding payments to the States. The provision is not intended to minimize the States' importance to the program, or to limit the amount of funding that could eventually be made available to the States from fee collections. HUD and the Consensus Committee can consider increasing the amounts available to the States for carrying out their approved State plans as part of future rulemaking.

Comment 13: HUD's FY 2002 appropriation request of \$13,566,000 did not consider the States' costs to implement the Act. However, this amount was intended to cover HUD's costs for services that are no longer necessary because of lower production levels, and the difference could be used for additional funding to the States.

Response: In its budget request, HUD considered the moneys that would need to be paid to the States for activities conducted under approved State plans, which the Act authorizes to be offset from the fee. Congress did not appropriate the full amount initially requested by HUD for the manufactured housing program in FY 2002. Even with lower production levels, HUD does not expect to be able to perform all of its program activities at optimal levels during the fiscal year. As discussed in the response to Comment 9, certain of HUD's regulatory functions must continue to be performed, regardless of the level of production. Therefore, HUD's regulatory responsibilities are not reduced in direct correlation to reduced production levels. HUD does not have any reserves available to fund

program activity, but if such reserves are available in the future, HUD agrees that increased funding for approved State activities should be given priority consideration.

IV. Findings and Certifications

Paperwork Reduction Act Statement

Although there are no information collection requirements in this rule, which establishes the fee to be collected from manufacturers of manufactured homes to fund HUD's responsibilities under the National Manufactured Housing Construction and Safety Standards Act of 1974, the collection of the fee is related to a form that has been reviewed and approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). The form has been assigned OMB control number 2502-0233. However, the form will be modified to reflect the cost data as modified by this rule, and a modification has been submitted to OMB with a request for approval. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This rule does not impose any Federal mandates on any State, local, or tribal governments or the private sector within the meaning of the UMRA.

Environmental Impact

In accordance with 24 CFR 50.19(c)(6) of the HUD regulations, this rule sets forth fiscal requirements which do not constitute a development decision that affects the physical condition of specific project areas or building sites, and therefore is categorically excluded from the requirements of the National Environmental Policy Act and related Federal laws and authorities.

Impact on Small Entities

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this rule and in so doing certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule will have a total economic impact this Federal Fiscal Year of no more than \$13,566,000, the amount approved by Congress in HUD's FY 2002 Appropriations Act. Congress further requires HUD to collect this amount in fees from manufacturers of manufactured housing. The rule will implement this mandate by establishing a per unit fee on transportable sections of manufactured housing that is proportional in its impact, with a greater impact on larger manufacturers and a lesser impact on smaller manufacturers.

Federalism Impact

Executive Order 13132 (entitled "Federalism") prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on State and local governments and is not required by statute, or preempts State law, unless the relevant requirements of section 6 of the Executive Order are met. This rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive Order.

Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866 (entitled "Regulatory Planning and Review"). OMB determined that this rule is a "significant regulatory action," as defined in section 3(f) of the Order (although not economically significant, as provided in section 3(f)(1) of the Order). Any changes made to the rule subsequent to its submission to OMB are identified in the docket file, which is available for public inspection in the office of the Rules Docket Clerk, Office of General Counsel, Room 10276, U.S. Department of Housing and Urban

Development, 451 Seventh Street, SW., Washington, DC 20410-0500.

List of Subjects in 24 CFR Part 3284

Consumer protection, Manufactured homes.

Accordingly, for the reasons discussed in this preamble, HUD adds 24 CFR part 3284, as follows:

PART 3284—MANUFACTURED HOUSING PROGRAM FEE

Sec.

3284.1 Applicability.

3284.5 Amount of fee.

3284.10 Payments to States.

Authority: 42 U.S.C. 3535(d), 5419 and 5424.

§ 3284.1 Applicability.

This part applies to manufacturers that are subject to the requirements of the National Manufactured Housing Construction and Safety Standards Act of 1974 (the Act), and to States having State plans approved in accordance with the Act. The amounts established under this part for any fee collected from manufacturers will be used, to the extent approved in advance in an annual appropriations Act, to offset the expenses incurred by HUD in connection with the manufactured housing program authorized by the Act.

§ 3284.5 Amount of fee.

Each manufacturer, as defined in § 3282.7 of this chapter, must pay a fee of \$39 per transportable section of each manufactured housing unit that it manufactures under the requirements of part 3280 of this chapter.

§ 3284.10 Payments to States.

Each calendar year HUD will pay each State that, on December 27, 2000, had a State plan approved pursuant to subpart G of part 3282 of this chapter a total amount that is not less than the amount paid to that State for the 12 months ending at the close of business on December 26, 2000.

Dated: August 6, 2002.

John C. Weicher,

Assistant Secretary for Housing—Federal Housing Commissioner.

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