



**ASSOCIATION OF
METROPOLITAN
PLANNING
ORGANIZATIONS**

Office of Management and Budget
Office of Information and Regulatory Affairs
725 17th St., N.W.
New Executive Office Building
Room 9013
Washington, DC 20503

December 21, 2005

RE: Proposed Bulletin for Good Guidance Practices

On behalf of the members of the Association of Metropolitan Planning Organizations ("AMPO"), we respectfully submit the following comments on the Office of Management and Budget's ("OMB") Proposed Bulletin for Good Guidance Practices.

AMPO is a nonprofit, membership organization established in 1994 to serve the needs and interests of metropolitan planning organizations ("MPOs") nationwide. Federal highway and transit statutes require, as a condition for spending federal highway or transit funds in urbanized areas with populations over 50,000, the designation of MPOs, which have responsibility for planning, programming and coordination of federal highway and transit investments. One of AMPO's many responsibilities is to work with its membership on implementation of recent landmark transportation legislation, including ISTEA, TEA-21, and SAFETEA-LU. These laws reflect an innovative type of federalism – one in which, for the first time, a significantly new federal transportation policy direction is being implemented through a state and local partnership arrangement.

As a result, MPOs frequently receive guidance from the key sub-agencies within the Department of Transportation, the Federal Highway Administration ("FHWA") and the Federal Transit Administration ("FTA"). Because MPOs also engage in air quality planning as it relates to transportation, they also are subject to Environmental Protection Agency regulations and guidance on certain air quality matters. SAFETEA-LU, the recently enacted long term transportation reauthorization bill, in particular, mandates a series of rulemakings and policy guidance that directly impact the day-to-day operations of MPOs around the country. AMPO is, therefore, acutely aware of and concerned with the federal government's guidance practices.

In recent years, AMPO has expressed uneasiness with the manner in which guidance documents have been disseminated from the FHWA and FTA. The agencies have been engaged in troublesome trends related to the issuance of guidance and how comments on that guidance are (or are not) solicited. AMPO's members do not advocate that every potential change to their essential planning processes go through formal rulemaking – flexibility is also important. When the agencies consider the issuance of substantive guidance that affects the core functions of our members, however, it is essential to permit adequate stakeholder outreach through meetings and notice through the *Federal Register*.

Our members are keenly aware of both the burdens and benefits of proactive public involvement. Transportation planning regulations require MPOs to conduct outreach that fosters public participation. Our planning efforts are improved markedly because the public comment and participation reflects community values. Similarly, the rulemaking practices of our federal partners can and do lead to better policies and better decisions. This same discipline should be applied to the FHWA's and FTA's guidance practices.

In general, AMPO strongly supports the Proposed Bulletin's intent and reliance on the guidance practices adopted by the Food & Drug Administration ("FDA") at 21 C.F.R. § 10.115. At least one central element of the Proposed Bulletin, however, requires clarification.

Specifically, AMPO questions why OMB has drawn a distinction between "significant" guidance documents and "economically significant" guidance documents for purposes of publication in the *Federal Register* and the solicitation of and response to public comments. The Proposed Bulletin in its current form requires agencies to clearly advertise the availability of "significant" guidance documents, but states that no formal response to those comments is required. See Proposed Bulletin, § III.2.b. By contrast, an agency must advertise "economically significant" guidance in the *Federal Register*, and it must invite and respond to public comments. *Id.* at § IV.1.

In its definitions, OMB proposes that "economically significant" relates only to those guidance documents that may "reasonably be anticipated to lead to an annual effect of \$100 million or more or adversely affect in a material way the economy or a sector of the economy." *Id.* at § I.3.i. By contrast, the FDA regulations apply no such measure in their definition of "Level 1 guidance documents." 21 C.F.R. § 10.115(c)(1). While OMB may more routinely engage in the sort of calculation that could measure an annual effect of \$100 million or a "material" adverse effect on the economy, AMPO respectfully submits that our members do not make such distinctions with respect to the guidance documents issued in the transportation arena.

Such distinctions are unnecessary because the work of MPOs, by definition, impacts all sectors of the American economy. More than 80 percent of our citizens live and work in these metropolitan areas, which drive the nation's economy and compete head-to-head with regional economies in other countries. Because the pricing of our goods and services in the international marketplace largely determines our ability to compete successfully, we must be able to transport these goods and services efficiently. The quality of metropolitan transportation infrastructure – highways, bridges, airports, transit systems, rail, and ports – is a primary factor in American economic competitiveness.

AMPO maintains that virtually all of its members' efforts are "economically significant," as defined by the Proposed Bulletin. Federal guidance documents that place additional burdens on the

planning efforts of MPOs inevitably lead to a delay in the delivery of key transportation facilities, thereby directly affecting a metropolitan area's economic well-being. Many of these proposed highway and transit projects in and of themselves have an estimated value measured in billions of dollars. Yet, under the plain language of the Proposed Bulletin, unless a proposed guidance document can be traced to those costs, MPOs and the citizens they represent would not gain the benefit of a formal comment period.

The most recent federal highway legislation, SAFETEA-LU, brings these problems clearly into focus. The Act adds specific requirements to the planning process, ones that will likely be fleshed out by agency guidance documents. These measures clearly will impact the day-to-day operations of MPOs and will "[s]et forth initial interpretation of statutory or regulatory requirements. . . ." See Proposed Bulletin at § I.3(iii). It is less clear whether any future guidance will have a cumulative \$100 million annual impact. Yet it is virtually certain that, over time, the imposition of new planning procedures or requirements will affect the timing and approval of crucial transportation facilities in metropolitan areas nationwide. Because public participation is so central to the functioning of MPOs, and because the public already is integral in making decisions about the investment of dollars into transportation infrastructure, it is only appropriate that all "significant" guidance documents that affect the planning process be subject to formal publication, notice and comment. Such a change in the Proposed Bulletin would more faithfully honor OMB's stated purpose "to ensure that agency guidance documents are: developed with appropriate review and public participation, accessible and transparent to the public, [and] of high quality...."

AMPO's concern about too narrow a view of "significant" guidance documents is best demonstrated by recent experience. For example, several months ago, FTA issued a "Dear Colleague" letter that drastically altered the criteria to evaluate transit New Starts projects. At the time changes to the New Starts program were made, 22 transit projects were in the New Starts pipeline. Had the "Dear Colleague" changes to the New Starts criteria been in place prior to these projects moving forward, 15 of those projects would not have qualified for the program. Because changes to the New Starts criteria will have a major impact on the program, not only should FTA have issued guidance on the changes, but also that guidance should have gone through a formal notice and comment period.

In addition, FHWA recently issued guidance on the relationship between the process of evaluating environmental effects of federal actions under the National Environmental Policy Act ("NEPA") and Metropolitan Planning. AMPO is extremely concerned about the procedural issues associated with this guidance. The draft guidance was issued on the Monday before the Thanksgiving Holiday in 2004, with comments expected by Friday, the day after the holiday. Although AMPO and other partner organizations were given this curtailed opportunity to comment, the short time period made it extremely difficult to work effectively with our members to prepare comments on behalf of the Association. Rather than drafting a formal response, we were forced to comment by forwarding e-mails from our members, instead of assembling their concerns and developing a consistent response through usual internal procedures involving review by our Policy Committee and Board. As it turns out, the changes offered in the guidance were material. The new procedures described in the guidance were a significant departure from current practice in which MPOs engage in NEPA review in only limited situations. FHWA's narrow reading of the potential impact of this guidance effectively eliminated our members' opportunity to offer substantive comments on the proposals.

These few examples demonstrate our apprehensions about the guidance process and how federal agencies are handling guidance that we perceive to be "significant." This also emphasizes another one of our concerns with the Proposed Bulletin. While we recognize that a notice and comment process need not be undertaken for every guidance document published, there are no procedures available to resolve disputes if a disagreement arises about whether a piece of guidance is considered "significant" or "economically significant." In order to handle this issue, we respectfully offer two suggestions:

First, the definitions of "significant" should be made uniform (albeit with appropriate exemptions) in order to avoid these disputes in the first place. We believe that this would be the easiest way to handle this concern. Alternatively, we suggest the institution of some sort of dispute resolution process as incorporated into the FDA good guidance practices. At 21 C.F.R. § 10.115(o), the FDA permits a party who believes that the practices are not being followed (or if someone is treating a guidance document as a binding requirement) to contact supervisors in the office that issued the guidance. If the dispute cannot be resolved, a party may contact FDA's Office of the Chief Mediator and Ombudsman to get involved. (This regulation grows out of a requirement in Section 701(h)(4) of the Food and Drug Administration Modernization Act of 1997.) Federal agencies should be required to institute some similar dispute resolution mechanism that would enable outside groups to challenge an agency's interpretation of whether guidance is deemed significant or raise other related disputes.

On behalf of the MPO community, we appreciate the opportunity to submit these comments on OMB's Proposed Bulletin. Should you require additional information, please contact Debbie Singer, AMPO Legislative Counsel, at 1730 Rhode Island Ave., NW, Suite 608, Washington, D.C. 20036 or by telephone at (202) 296-7051.

Sincerely,



Rae Rupp Srch
President, AMPO Board of Directors



DeLania Hardy
Executive Director, AMPO