



1900 L Street, NW, #300, Washington, DC 20036
202/785-8888 fax 202/785-2008

December 22, 2005

Ms. Lisa Jones
The Office of Management and Budget
Office of Information and Regulatory Affairs
725 17th Street, NW
New Executive Office Building
Room 9013
Washington, DC 20503

RE: Proposed Bulletin for Good Guidance Practices

Dear Ms. Jones:

The National Leased Housing Association is pleased to be able to provide comments to the Office of Management and Budget on its "Proposed Bulletin for Good Guidance Practices".

NLHA is a membership organization that has, for the past thirty years, represented the interests of housing agencies, developers, lenders, housing managers and others in providing federally assisted rental housing. NLHA members are primarily involved in the Section 8 housing programs, and are involved with the operation of rental housing for over three million families. The Association works with a number of federal agencies in working to achieve its goals, but has by far the most contact with the Department of Housing and Urban Development (HUD). Because HUD's programs require it to operate in a rather unique manner, we thought that comments to the proposed Bulletin from our perspective would be helpful.

HUD administers the Section 8 and its FHA mortgage insurance and subsidy programs both as a regulator and as a contractual party. Because the lines between the two are not easily drawn, HUD tends to fall back on the role most favorable to it in any given circumstance. And, with regard to its implementing policy determinations, HUD acts similarly, whether they are interpreting a clause in a Section 8 contract, or a published regulation.

In addition, in order to avoid the requirements of the Administrative Procedures Act involving published regulations, HUD has tended to rely increasingly on other forms of pronouncements, which can be promulgated more simply, in the operation of its housing programs.

HUD does this in a number of ways, including:

- a. The issuance (and from time to time updating) of a complex system of “handbooks”. Handbook changes go through a form (often time consuming) of internal clearance and, from time to time, are now published in draft form on the HUD website for public comment.
- b. The issuance of a series of “notices”. These are less formally issued, but are dated and numbered and have a stated expiration date, which is sometimes formally extended, but even when it is not, is often ignored with regard to continued implementation and effectiveness. These tend to be issued without any opportunity for outside comment.
- c. The issuance of a series of “mortgagee letters”, the equivalent of “notices.” Theoretically, such issuances are directed towards FHA insured lenders, although their reach often goes beyond the lending community.
- d. The issuance of “memoranda” on an irregular but far from uncommon basis. These typically contain interpretations of policy, and are sometimes issued internally, and sometimes issued also to outside program participants, although the distribution of these memoranda can be very incomplete. These are typically dated, but not numbered, and do not have a stated expiration date and are rarely posted on HUD’s web site.
- e. The issuance of instructions to the field by email or similar electronic means. These “emails” are then forwarded on an ad hoc basis and cited as policy positions.
- f. The issuance of special books, outside of the numbered handbook series. An example would be as the “Section 8 Renewal Guide” and the various books issued to implement HUD’s Mark to Market program (affecting a wide array of Section 8 properties), which are then updated infrequently with website announcements, but are again typically not cataloged or numbered, making it very difficult to know if one is looking at the current complete edition, and even more difficult to determine what the standards were at a date in the past, when an event occurred that has later come into question.
- g. Implementation of “unwritten policies.” As hard as it may seem to believe, our constituents when approaching HUD about an action that is seemingly permitted under a statute and often under HUD’s guidance have been told that such action will not be permitted. When asked where such a prohibition is to be found, the answer from career staff has been that HUD has an “unwritten policy” on the matter or the existing guidance is “incorrect” even though HUD has not chosen to issue corrections for months and often years.

From the perspective of HUD administrators, none of the issuances listed above are “guidance documents”. They are all proscriptive, setting forth inalienable rules that can only be modified at the highest levels (exactly where the authority for modification exists it always hard to say), where modification is rare because of fear of “precedent”.

The effect of this informal method of governance can be devastating on the participants in the HUD programs, like those who belong to NLHA, and equally devastating to the residents whom HUD and the participants are pledged to serve.

Having set forth this as background (and of course, if requested, NLHA could provide many specific examples), we commend OMB for its efforts.

NLHA Recommendations

NLHA requests that as part of the attempt to regularize and set standards for guidance documents issued by federal agencies, that OMB pay attention to the definition of what constitutes a “guidance” document.

We would submit that each of the types of issuances described above is a guidance document, and that this needs to be made clear.

We would suggest that a mechanism be developed to determine precisely what constitutes a “significant” guidance document; we could see HUD maintaining that none of its issuance would meet this standard and, short of litigation, do not see how one could challenge this assertion. (Litigation is not an option to most affordable housing providers in any event because of its cost, the time it takes for decisions on matters that generally need immediate resolution, and the realistic fear of providers that taking an antagonistic position vis-a-vis HUD could threaten their entire business.)

We would suggest that there needs to be something that sets forth the effect of an agency not following the process set forth in this Bulletin, once issued. Will this diminish the effectiveness of an issuance? Without adverse consequences of non-compliance, this Bulletin may simply be ignored.

We would also suggest that each agency (and each major office with the agency) needs to establish a mechanism, including designating sufficient personnel with sufficient authority) to implement the Bulletin and, during implementation, to provide OMB with a plan and schedule for implementation. We believe that the plan and schedule should be itself a public document.

While we agree on the importance of Internet access, as provided in the draft Bulletin, access only exists if the agency’s website is sufficiently user friendly to permit a viewer to be able to see what guidance documents exists, without finding himself or herself in a maze or on a scavenger hunt. Today’s HUD website, which contains both too much and too little information, would not meet this test. HUD should publish a notice in the *Federal Register* when guidance is being issued or revised with information relating to where it can be located on the web and how readers may obtain a hard copy of the document.

We expect OMB will get a significant number of comments on this proposal. We know that many will be very detailed and contain technical and legalistic interpretations of the effect of what you are proposing. We hope that the receipt of a large number of such comments will not

deter OMB from completing this task and issuing a Bulletin of this nature on as timely a basis as possible.

The operation of HUD's housing programs has become increasingly subject to abrupt policy and procedural changes brought about by in part by the lack of exactly the type of standardization this Bulletin is designed to bring to guidance documents. We in the affordable housing industry are committed to working with the government in order to continue to be able to provide affordable housing in a time of increasing need and limited governmental financial support. Because of the lack of standardization of this nature, our task has become much more difficult. We welcome your initiative and your help.

Sincerely,

Denise B. Muha

Denise B. Muha
Executive Director