

Legal Opinion: CLR-0001

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Subject: Innocently Late NOFA Applications

CLR-0001

October 3, 1994

MEMORANDUM FOR: Roberta Achtenberg, Assistant Secretary for  
Fair Housing and Equal Opportunity, E

FROM: Nelson A. Diaz, General Counsel, G

SUBJECT: Innocently Late NOFA Applications

You have requested an opinion on whether FY 1994 Fair Housing Initiatives Program (FHIP) NOFA applications that were received late through no fault of the applicants may still be considered in the competition for funding. It is my conclusion that there are no legal impediments to rating and ranking these innocently late NOFA applications as long as they are all treated equally.

Both section 102 of the Department of Housing and Urban Development Reform Act of 1989 (the Reform Act) (Pub. L. 101-235, approved December 15, 1989) and the implementing regulations at 24 CFR part 12 require the publication of "any deadlines relating to the award or allocation of the assistance." Apart from this reference, both statute and regulation are silent on the subject of deadlines, and the FHIP regulations at 24 CFR part 125, although requiring the publication of NOFAs, do not mention deadlines at all. However, reading within the context of the Purpose statement at 24 CFR 12.1 ("Section 102 contains a number of provisions designed to ensure greater accountability and integrity in the way in which the Department makes assistance available under certain of its programs."), one may reasonably conclude that the deadline requirement is present to assure the fairness of the competitive funding process. In general, all eligible applicants are to be given the same amount of time to prepare their applications.

In the FY 1994 FHIP NOFA (FR-3622), the deadline requirement included the provision that: "Applications will be accepted if they are received on or before the application due date, or are received within 7 days after the application due date, but with a U.S. postmark or receipt from a private commercial delivery service (such as, Federal Express or DHL) that is dated on or before the application due date." This provision served the fairness purpose of setting a time limit that applied to all of the applicants: no applicant would be permitted to work on the preparation of an application beyond the postmark or carrier receipt date. The "receipt within 7 days" portion of the provision is not related to the statutory and regulatory purpose of fairness, but rather, it served the administrative convenience of the Department: it provided a definite cutoff date that addressed the urgency and time pressures of administering the

funding process. Thus, an application could be considered late even though the competitive fairness concerns of the Reform Act were not violated.

In this situation, where an application meets the required fairness deadline with a timely postmark or carrier receipt, but, through no fault of its own, innocently misses the administrative convenience deadline, it is at your option, as a policy matter, to include for rating and ranking all applications with a timely postmark or carrier receipt. Because of the Reform Act requirement for the publication of "any deadlines relating to the award or allocation of the assistance," if you should decide to delete the "receipt within 7 days" provision, a Federal Register notice will be necessary.