Cornell University
School of Industrial and Labor Relations
Employment and Disability Institute

Work Incentives Support Center

October 2005

Just the Facts

Regulations and Tips for BPA&O and PABSS by Ray Cebula

Title: Administrative Procedures Act Rulemaking

What is required of an agency when promulgating rules and regulations?

The Administrative Procedure Act (APA), Title 5, U.S.C. Ch. 5, sections 511-599, requires that some 55 U.S. governmental agencies provide an opportunity for notice and comment when creating rules and regulations implementing major pieces of legislation. Agencies that act as "authorit(ies) of the Government of the United States,[1]" such as the FDA, EPA, DOE and SSA, are all covered by the APA.

The APA instructs agencies that are involved in "rulemaking" as to the notice and process requirements for obtaining public comment during the rulemaking process. A "rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.[2]" Rulemaking is, therefore, the agency process for formulating, amending, or repealing a rule.[3]

Rulemaking is discussed in detail in Section 553 of the APA. Any agency involved in rulemaking must comply with the provisions of Section 553 unless the rule involved affects a military or foreign affairs function of the United States or a matter related to agency management or personnel or to public property, loans, grants, benefits, or contracts.[4] Most of the substance with which we deal and that which impacts the lives of our client population involve rules that must, or have, been processed through the APA rulemaking procedures.

Whenever an agency, acting as an authority of the United States, promulgates rules and regulations implementing a piece of legislation, it must provide general notice through publication in the Federal Register. The notice must include a statement of the time, place and nature of the rulemaking proceedings, reference to the legal authority under which the rule is proposed, and either the terms or substance of the proposed rule.[5] A provision excerpting these requirements allows any agency to determine the "good cause" exists for not complying with this provision of the APA. When the agency finds that notice and public procedure is impracticable, unnecessary, or contrary to the pubic interest, the agency may dispense with the notice and comment process.[6]

After providing a Notice of Proposed Rulemaking, the agency must give interested persons an opportunity to participate in the rulemaking process. This participation will normally be through the submission of written data, views, or arguments with or with the opportunity for an oral presentation.[7] The agency must provid at least 30 days during which public participation will be allowed unless "good cause" is found for not meeting this requirement.[8] After consideration of the public comments collected during the

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comment period, the agency shall incorporate in the rules adaopted a concise general statement of their bais and purpose.[9] The promulgating agency will, most often than not, discuss the public comments and provide a rationale for accepting or rejecting each.

Why provide comment to a promulgating agency?

The APA sets forth a public process that must be used when an agency interprets its controlling statute and promulgates regulations controlling its various programs. It is during this consideration period that the agency formulates its final regulation(s) by considering the agency's expertise and the comments submitted by other interested parties.

Persons having interest and experience in working with individuals whose lives are impacted by the agency promulgating regulations are in a unique position to provide the agency with information and experience that "inside" agency personnel may not have. Advocates are in a unique position to provide the agency with information concerning the workings of eligibility and appeal processes. Social workers are well positioned to provide comment concerning the availability, or lack thereof, of services and/or public benefits of consequence to their client populations. Members of the public served by the agency are able to provide their own experiences in dealing with the agency.

Without this critical knowledge and experience the agency may well continue through the rulemaking process without altering its initial proposals.

How to provide comment to promulgating agency?

More often than not an agency promulgating regulations is equipped to accept comments in writing, via fax and/or via direct posting to the agency website. Each NPRM must provide the public with information as to how, where, and when the agency will accept comments. This information will be included directly in the NPRM.

Conclusion

Providing comments to agency proposals is an easy task. All of the information needed is contained with the NPRM itself. The power of the pen lies with the interested members of the public who will provide the agency promulgating regulations with information and guidance. It is a necessary task for those of us who act to protect the rights and benefits of the poor and disabled to provide agencies implementing critical programs with information needed to implement programs that are appropriate to the needs of our clientele. We each have unique experience gained from working directly with our target populations. This information and experience can make all the difference in an agency's programmatic development.

Endnotes

[1] APA, 5 U.S.C. § 551(1).
[2] APA, 5 U.S.C. § 551(4).
[3] APA, 5 U.S.C. § 551(4).
[4] APA, 5 U.S.C. § 553(a).
[5] APA, 5 U.S.C. § 553(b).
[6] APA, 5 U.S.C. § 553(b)(3)(B).
[7] APA, 5 U.S.C. § 553(c).
[8] APA, 5 U.S.C. § 553(d).
[9] APA, 5 U.S.C. § 553(c).