

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6515

Memorandum

To: Members, Subcommittee on Investigations, Oversight, and Regulations
From: Committee Staff
Date: October 30, 2017
Re: Hearing: “Operating or Rulemaking? A Review of SBA’s Opaque Standard Operating Procedure Process”

On Thursday, November 2, 2017 at 10:00 a.m., the Subcommittee on Investigations, Oversight, and Regulations will meet in Room 2360 of the Rayburn House Office Building for the purpose of examining the Small Business Administration’s (SBA) Standard Operating Procedures (SOP) process. Specifically, the Subcommittee seeks to understand how and when SOPs are developed and whether SOPs are a form of rulemaking that should go through the rulemaking process as set forth in the Administrative Procedure Act (APA).

I. Introduction

The Small Business Committee has had longstanding concerns that SBA imposes binding rules on regulated entities through its SOPs.¹ SBA’s SOPs are not promulgated according to APA’s procedures (see below). Based on its practice, SBA does not involve Congress, stakeholders, or regulated entities in the SOP process. Nevertheless, SOPs are often viewed as binding, similar to laws and regulations. Further, the SOP process’ and implementation’s opaqueness may lead to arbitrary and biased decision making by unelected agency officials.

II. Administrative Procedure Act

When an agency promulgates rules and regulations, it is subject to specific procedural requirements. The APA establishes basic steps the agency must take when proposing and finalizing federal regulations. The APA also establishes judicial review of agency rules by federal courts.² The APA states that an agency creates a rule whenever it is “designed to implement, interpret, or prescribe law or policy.”³

¹ See, i.e., Comment Letter from Chairman Steve Chabot, H. Comm. on Small Bus. to Mary Frias, Off. of Cap. Access, U.S. Small Bus. Admin. (March 27, 2015) (on file with the Committee).

² 5 U.S.C. § 701-06.

³ 5 U.S.C. § 551(4). The full definition of a rule under the APA is “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, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances,

The APA establishes two general types of rulemaking: formal rulemaking and information rulemaking.⁴ Formal rulemaking is only required in limited circumstances and requires a formal, courtroom-style hearing and presentation of evidence to support the rule.⁵ Informal rulemaking, also known as notice-and-comment rulemaking, is the more common process for creating agency rules. The agency must provide notice to the public of a proposed rule through a Notice of Proposed Rulemaking, and must accept public comment on the proposed rule.⁶ The notice is published in the Federal Register, and anyone from the public may comment on the proposed rule.⁷ Most comment periods last between 30 to 60 days, but there is no minimum period of time that the agency must accept comments. After receiving public comment on the proposed rule, the agency must then review all of the comments it receives before issuing a final rule.⁸ The final rule must be published at least 30 days before it becomes effective.⁹

The APA provides certain exemptions where the agency is not required to go through the notice-and-comment rulemaking process. Generally, when a rule involves a military or foreign affairs function of the United States, agency management or personnel, or to public property, loans, grants, benefits, or contracts, the agency is not required to go through notice-and-comment before promulgating the rule.¹⁰ Additionally, the notice-and-comment requirements do not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.¹¹ When an agency finds for “good cause” that notice and public procedure is “impracticable, unnecessary, or contrary to the public interest,” it can also be exempt from notice-and-comment requirements.¹²

III. SBA Standard Operating Procedures

According to SBA, its Standard Operating Procedures “are permanent directives that set forth the policies or procedures relating to [SBA] programs or activities.”¹³ SBA personnel “use SOPs to determine what their functions and responsibilities are and how to perform their jobs,” and program participants use them “to better understand their responsibilities under the program’s rules and interpretations.”¹⁴ SBA’s SOPs “also clarify or elaborate on laws and regulations.”¹⁵ SOPs do not go through the procedural requirements set forth under the APA. Therefore, SOPs should not be binding on regulated entities.

services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the forgoing.”
Id.

⁴ Agencies can also promulgate rules through hybrid rulemaking, direct final rules, and negotiated rulemaking.

⁵ 5 U.S.C. § 556. Formal rulemaking is appropriate where the rules are required by statute to be made on the record” at an agency hearing. *Id.* § 553(c).

⁶ 5 U.S.C. § 553(b).

⁷ *Id.* § 553(c).

⁸ *Id.*

⁹ *Id.* § 553(d).

¹⁰ *Id.* § 553(a).

¹¹ *Id.* § 553(b).

¹² *Id.*

¹³ SBA SOP 00 23 7 at 14 (Aug. 26, 2016).

¹⁴ *Id.*

¹⁵ *Id.*

The clearance process for SBA SOPs is internal. SBA’s General Counsel, Chief Operating Officer, Chief Financial Officer, Executive Secretariat, Congressional and Legislative Affairs, and Records Management clear SOPs.¹⁶ For all new SOPs or significant revisions to SOPs, the SBA Administrator must also clear and approve them before becoming effective.¹⁷ Courtesy copies are given only to the Inspector General and the Chief of Staff.¹⁸

IV. SBA SOP 50 10 5(J), Lender and Development Company Loan Programs

On October 13, 2017, SBA issued an “Information Notice” to SBA employees, 7(a) lenders, and certified development companies (CDCs) announcing its issuance of SOP 50 10 5(J). SBA provided the Information Notice to the Committee on October 16, 2017.¹⁹ According to SBA, this SOP “provides additional guidance and incorporates revisions to conform to changes in SBA regulations,”²⁰ specifically the Final Rule entitled “Miscellaneous Amendments to Business Loan Programs and Surety Bond Guarantee Program” published on August 21, 2017.²¹ This SOP will become effective January 1, 2018.²² This SOP did not go through any formal notice and comment process, but will directly affect 7(a) lenders and CDCs.

V. Conclusion

The Subcommittee remains concerned that SBA engages in rulemaking—making binding legislative rules—through SOPs. The SOP process is not transparent. Congressional and stakeholder engagement is not required or sought. Yet, regulated entities must often comply with SOPs or suffer consequences. This hearing will shed light on SBA’s SOP process to better understand its purpose and practice.

¹⁶ *Id.* at 33 (Appendix 2).

¹⁷ *Id.* at 20.

¹⁸ *Id.* at 23, 33 (Appendix 2).

¹⁹ Email from Mike Hershey, Cong. Affairs, U.S. Small Bus. Admin. to H. Comm. on Small Bus. staff (Oct. 16, 2017).

²⁰ SBA Information Notice to All SBA Employees, 7(a) Lenders and Certified Development Companies, “Issuance of SOP 50 10 5(J),” 5000-17008 (Oct. 13, 2017).

²¹ *Id.*

²² *Id.*