

What is Negotiated Rulemaking?¹

Definition

Negotiated rulemaking is a consensus-based process through which an agency develops a proposed rule by using a neutral facilitator and a balanced negotiating committee composed of representatives of all interests that the rule will affect, including the rulemaking agency itself. This process gives everyone with a stake a chance to try to reach agreement about the main features of a rule before the agency proposes it in final form.

- The goal of the committee is to reach consensus understood to mean that each interest concurs in the result, unless all members of the committee agree at the outset to a different meaning.
- Each member agrees to negotiate in good faith.
- The agency sponsoring the negotiated rulemaking commits, consistent with its legal obligations, to use a consensus agreement from the committee as the basis for, if not the actual text of, a proposed rule.

Negotiated rulemaking generally follows these steps:

1. The agency evaluates the suitability of reg-neg and gives its go-ahead or a particular statute requires the agency to utilize the reg-neg process.
2. It convenes all the stakeholders and selects a facilitator
3. It organizes the negotiating committee, which
4. Negotiates the proposed rule in committee meetings, then
5. Compiles and submits a report to the rulemaking agency.

If the committee reaches consensus, the report will contained the proposed rule, which the agency may use to begin the normal rulemaking procedure required under the Administrative Procedure Act (APA). If the committee does not reach consensus on some or all issues, the agency may use any areas of agreement and all information gained to draft the proposed rule as it would any other rule. Negotiated rule making is basically a free-standing supplement to the APA's rulemaking provisions. The APA tells agencies what to do once it has proposed a rulemaking action. Negotiated rulemaking is a process for developing that proposal.

Role of the Public

The Negotiated Rulemaking Act was intended to clarify agency authority to use the process. The Act established basic public notice requirements, including providing for an

¹ This description is based in large part on the work of Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, American Bar Association, Section of Administrative Law & Regulation Practice, 2006 and *Texas Negotiated Rulemaking Deskbook*, University of Texas, School of Law, Public Resources Series Number One, October 1996.

opportunity for members of the public who believe they are inadequately represented on a negotiating committee to apply for membership or better representation. The Act also clarifies the applicability of the Federal Advisory Committee Act to reg-neg.²

History

In 1990, Congress endorsed use by federal agencies of an alternative procedure known as “negotiated rulemaking,”³ also called “regulatory negotiation,” or “reg-neg.” It has been used by agencies to bring interested parties into the rule-drafting process at an early stage, under circumstances that foster cooperative efforts to achieve solutions to regulatory problems.

Where successful, negotiated rulemaking can lead to better, more acceptable rules, based on a clearer understanding of the concerns of all those affected. Negotiated rules may be easier to enforce and less likely to be challenged in litigation. The results of reg-neg usage by the federal government, which began in the early 1980s, are impressive: large-scale regulators as the Environmental Protection Agency, Nuclear Regulatory Commission, Federal Aviation Administration, and the Occupational Safety and Health Administration used the process on many occasions. Building on these positive experiences, several states, including Massachusetts, New York, and California, have also begun using the procedure for a wide range of rules.

The very first negotiated rule-making was convened by the Federal Mediation and Conciliation Service (FMCS) working with the Department of Transportation, the Federal Aviation Administration, airline pilots and other interested groups to deal with regulations concerning flight and duty time for pilots. The negotiated rulemaking was a success and a draft rule was agreed upon that became the final rule. Since that first reg-neg, FMCS has assisted in both the convening and facilitating stages in many such procedures at the Departments of Labor, Health and Human Services (HRSA), Interior, Housing and Urban Development, and the EPA, as well as state-level processes, and other forms of consensus-based decision-making programs such as public policy dialogues, hearings, focus groups, and meetings.

How reg-neg differs from “traditional” notice-and-comment rulemaking

The “traditional” notice-and-comment rulemaking provided in the Administrative Procedure Act (APA) requires an agency planning to adopt a rule on a particular subject to publish a proposed rule (NPRM) in the *Federal Register* and to offer the public an opportunity to comment. The APA does not specify who is to draft the proposed rule nor any particular procedure to govern the drafting process. Ordinarily, agency staff performs this function, with discretion to determine how much opportunity is allowed for

² See 5 U.S.C. § 565; see also *supra* Part II, ch. 3(E)-(F). (Note the legislation creating this negotiated rulemaking specifically states that it is not subject to FACA).

³ Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified at 5 U.S.C. §§ 561-570). The Act was permanently reauthorized by the Administrative Dispute Resolution Act of 1006, Pub. L. No. 104-32, § 11.

public input. Typically, there is no opportunity for interchange of views among potentially affected parties, even where an agency chooses to conduct a hearing.

The “traditional” notice-and-comment rulemaking can be very adversarial. The dynamics encourage parties to take extreme positions in their written and oral statements – in both pre-proposal contacts as well as in comments on any published proposed rule as well as withholding of information that might be viewed as damaging. This adversarial atmosphere may contribute to the expense and delay associated with regulatory proceedings, as parties try to position themselves for the expected litigation. What is lacking is an opportunity for the parties to exchange views, share information, and focus on finding constructive, creative solutions to problems.

In negotiated rulemaking, the agency, with the assistance of one or more neutral advisors known as “convenors,” assembles a committee of representatives of all affected interests to negotiate a proposed rule. Sometimes the law itself will specify which interests are to be included on the committee.

Once assembled, the next goal is for members to receive training in interest-based problem-solving and consensus-decision making. They then must make sure that all views are heard and that each committee member agrees to a set of ground rules for the negotiated rulemaking process. The ultimate goal is to reach consensus on a text that all parties can accept. The agency is represented at the table by an official who is sufficiently senior to be able to speak authoritatively on its behalf. Negotiating sessions are chaired by a neutral mediator or facilitator skilled in assisting in the resolution of multiparty disputes.

The Checklist—Advantages as well as Misperceptions

The advantages of negotiated rulemaking include:

- Producing greater information sharing and better communication;
- Enhancing public awareness and involvement;
- Providing a “reality check” to agencies and other interests;
- Encouraging discovery of more creative options for rulemaking;
- Increasing compliance with rules;
- Saving time, money and effort in the long run;
- Allowing earlier implementation dates;
- Building cooperative relationships among key parties;
- Increasing the certainty of the outcome for all and thus enabling better planning;
- Producing superior rules on technically complex topics because of the input of all parties;
- Giving rise to fewer legislative “end runs” against the rule; and
- Reducing post-issuance contentiousness and litigation.

What negotiating rulemaking does not do:

- It does not cause the agency to delegate its ultimate obligation to determine the content of the proposed and final regulations;
- It does not exempt the agency from any statutory or other requirements;
- It does not eliminate the agency’s obligation to produce any economic analysis; paperwork or other regulatory analysis requirements imposed by law or agency policy;
- It does not require parties or non-parties to set aside their legal or political rights as a condition of participating; and
- It is not compulsory, participation is voluntary, for the agency and for others.

Reg-neg works well when:

- The regulation will affect multiple constituencies;
- The subject matter is complex and controversial;
- The issues are generally known and there are enough issues for all parties to negotiate;
- All parties are willing and able to commit the effort needed to participate;
- The agency lacks complete information on the subject matter; and
- The agency is willing to be guided by consensus

When is Reg-neg Appropriate?

Negotiated rulemaking is clearly not suitable for all agency rulemaking. The Negotiated Rulemaking Act sets forth several criteria to be considered when an agency determines whether to use reg-neg:⁴

1. Whether there are a limited number of identifiable interests—usually not more than 25, including any relevant government agencies – that will be significantly affected by the rule;
2. Whether a balanced committee can be convened that can adequately represent the various interests and negotiate in good faith to reach consensus on a proposed rule;
3. Whether the negotiation process will not unreasonably delay issuance of the rule;
4. Whether the agency has adequate resources to support the negotiating committee; and
5. Whether the agency – to the maximum extent consistent with its legal obligations—will use a committee consensus as the basis for a proposed rule.

If consensus is achieved by the committee, the agency ordinarily would publish the draft rule based on that consensus in a notice of proposed rulemaking—and the agency would have committed itself in advance to doing so. Such a commitment is not an abdication of the agency’s statutory responsibility, for there would not be consensus without the

⁴ See 5 U.S.C. § 563.

agency's concurrence in the committee's proposed rule.⁵ Even negotiations that result in less than full consensus on a draft rule can still be very useful to the agency by narrowing the issues in dispute, identifying information necessary to resolve issues, ranking priorities, and finding potentially acceptable solutions.⁶

The Importance of Training

Negotiated rulemaking uses interest-based negotiation techniques widely taught in management and other training programs. Through these techniques, all the participants can identify and articulate their own interests side by side with the other major competing concerns, moving past less productive "positional" confrontations to areas of potential agreement. This process may also help an agency forge consensus about new rules, defuse controversy, and ward off legal challenges. It may also increase compliance with rules, on the theory that a regulated industry that has helped develop a rule from the drafting stage onward will probably end up with regulations it finds workable and with which its members may more readily comply.

How a Facilitator Works

- A facilitator works with all the parties to make sure that issues are discussed and that agreement can be reached after full and robust debate, understanding of issues and interests and information sharing.
- A facilitator helps the negotiators try to reach consensus through a process of evaluating their own priorities and making trade-offs to achieve an acceptable outcome on issues of greatest importance to them.
- The existence of a deadline for completing negotiations, whether imposed by the state, the agency, or other circumstances, imparts urgency that can aid the negotiators in reaching consensus.
- A facilitator helps the parties develop the draft rule that can be approved by consensus and supported by all interests and constituencies.
- A facilitator helps the participants look at a number of diverse issues that they can rank according to their priorities, so that each of the participants may be able to find room for compromise on some of the issues as an agreement is sought.
- A facilitator as well as the committee members and their adopted ground rules recognize that it is essential that the issues to be negotiated not require compromise of principles so fundamental to the parties that meaningful negotiations are impossible. Parties must indicate a willingness to negotiate in good faith, and no single interest should be able to dominate the negotiations.

⁵ Nor would such an agreement undercut the agency's authority to make changes at the final rule stage. *See Nat. Res. Def. Council v. EPA*, 859 F.2d 156, 194-95 (D.C. Cir. 1988).

⁶ There is a lively debate on the pros and cons of negotiated rulemaking, with several critics arguing that negotiated rulemaking allows agencies to transfer too much control to private parties; others have argued that regulatory negotiation has not produced faster and less litigated rules while others have found that participants felt negotiated rules were superior and more likely to be implemented than conventional rules.