



## **Recommendation 85-5**

### **Procedures for Negotiating Proposed Regulations**

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(Adopted December 13, 1985)

Negotiations among persons representing diverse interests have proven to be effective in some cases in developing proposals for agency rules. In 1982, the Administrative Conference of the United States adopted Recommendation 82-4, 1 CFR § 305.82-4, encouraging the use of negotiated rulemaking by federal agencies in appropriate situations.<sup>1</sup> The concept of negotiated rulemaking arose from dissatisfaction with the rulemaking process, which since the 1960's, in many agencies, had become increasingly adversarial and formalized—unlike the brief, expeditious notice and comment procedure envisioned in section 553 of the Administrative Procedure Act. Experience has now shown that negotiated rulemaking can be a practical technique in appropriate instances.

Since Recommendation 82-4 was adopted, its recommended procedures have been followed four times by federal agencies. The Federal Aviation Administration used negotiated rulemaking to develop a new flight and duty time regulation for pilots. The Environmental Protection Agency used negotiated rulemaking to develop proposed rules on nonconformance penalties for vehicle emissions and on emergency exemptions from pesticide regulations. The Occupational Safety and Health Administration encouraged labor, public interest, and industry representatives to negotiate a standard for occupational exposure to benzene. The benzene negotiations did not result in agreement among the parties on a proposed rule, but the other three negotiations did lead to substantial agreement resulting in two final rules (which have thus far not been challenged) and one draft rule which, after public comment, is pending before the agency.

The experience of these four cases has shown that the original recommendation was basically sound, and has provided a basis for the Administrative Conference to use in supplementing Recommendation 82- 4.

It is important to view Recommendation 82-4 and the present recommendation, taken together, as a guide to issues to be considered rather than a formula to be followed.

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<sup>1</sup> Recommendation 82-4 used the term "regulatory negotiation" to refer to this process. The present recommendation substitutes "negotiated rulemaking" to emphasize that it is addressing negotiation of rules, and not other uses of negotiations in the regulatory process.



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Negotiation is intrinsically a fluid process that cannot be delineated in advance. Accordingly, what will "work" in a particular case depends on the substantive issues, the perception of the agency's position by interested parties, past and current relationships among the parties, the authority of party representatives in the negotiations, the negotiating style of the representatives, the number and divergence of views within each constituency represented, and the skill of the participants and mediators. These factors are mostly dynamic and their character is likely to change during the negotiating process. Proponents of negotiated rulemaking must recognize the unavailability of neat formal solutions to questions of who should participate, how the negotiations should be conducted, or even the definition of "successful" negotiations.

Agencies undertaking negotiated rulemaking must be prepared to deal with these real-world uncertainties by pursuing a thoughtfully flexible approach. Elements of Recommendation 82-4 and the present recommendation provide a conceptual framework within which to plan and conduct negotiations in a particular proceeding, but should not be taken as a formal model. An agency cannot merely transplant a pattern followed successfully by another agency, or even by itself on another occasion. Nevertheless, agencies that are considering negotiated rulemaking for the first time should find it helpful to discuss their plans with other agencies and persons experienced with the process.

Some agencies have indicated a concern about the effect of the Federal Advisory Committee Act on negotiated rulemaking proceedings. The four agency experiences reviewed by the Administrative Conference have not shown that the Act, as interpreted by the sponsoring agencies and participants, impeded effective negotiations. Under current judicial and agency interpretations of the Act, it appears that caucuses and other working group meetings may be held in private, where this is necessary to promote an effective exchange of views.

Another concern expressed by some agencies has been the potential costs associated with negotiated rulemaking. While aspects of the recommended process may entail some short-term additional costs, the Conference believes that potential long-range savings will more than offset the costs. Moreover, agencies should be aware of opportunities for assistance from within the government, for example, training provided by the Legal Education Institute of the Department of Justice, and mediation assistance by the Federal Mediation and Conciliation Service and the Community, Relations Service.



### Recommendation

1. An agency sponsoring a negotiated rulemaking proceeding should take part in the negotiations. Agency participation can occur in various ways. The range of possibilities extends from full participation as a negotiator to acting as an observer and commenting on possible agency reactions and concerns. Agency representatives participating in negotiations should be sufficiently senior in rank to be able to express agency views with credibility.

2. Negotiations are unlikely to succeed unless all participants (including the agency) are motivated throughout the process by the view that a negotiated agreement will provide a better alternative than a rule developed under traditional processes. The agency, accordingly, should be sensitive to each participant's need to have a reasonably clear expectation of the consequences of not reaching a consensus. Agencies must be mindful, from the beginning to the end of negotiations, of the impact that agency conduct and statements have on party expectations. The agency, and others involved in the negotiations, may need to communicate with other participants—perhaps with the assistance of a mediator or facilitator—to ensure that each one has realistic expectations about the outcome of agency action in the absence of a negotiated agreement. Communications of this character always should consist of an honest expression of agency actions that are realistically possible.

3. The agency should recognize that negotiations can be useful at several stages of rulemaking proceedings. For example, negotiating the terms of a final rule could be a useful procedure even after publication of a proposed rule. Usually, however, negotiations should be used to help develop a notice of proposed rulemaking, with negotiations to be resumed after comments on the notice are received, as contemplated by paragraphs 13 and 14 of Recommendation 82-4.

4. The agency should consider providing the parties with an opportunity to participate in a training session in negotiation skills just prior to the beginning of the negotiations.

5. The agency should select a person skilled in techniques of dispute resolution to assist the negotiating group in reaching an agreement. In some cases, that person may need to have prior knowledge of the subject matter of the negotiations. The person chosen may be styled "mediator" or "facilitator," and may be, but need not be, the same person as the "convenor" identified in Recommendation 82-4. There may be specific proceedings, however, where party



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incentives to reach voluntary agreement are so strong that a mediator or facilitator is not necessary.

6. In some circumstances, federal agencies such as the Federal Mediation and Conciliation Service or the Community Relations Service of the Department of Justice may be appropriate sources of mediators or facilitators. These agencies should consider making available a small number of staff members with mediation experience to assist in the conduct of negotiated rulemaking proceedings.

7. The agency, the mediator or facilitator, and, where appropriate, other participants in negotiated rulemaking should be prepared to address internal disagreements within a particular constituency. In some cases, it may be helpful to retain a special mediator or facilitator to assist in mediating issues internal to a constituency. The agency should consider the potential for internal constituency disagreements in choosing representatives, in planning for successful negotiations, and in selecting persons as mediators or facilitators. The agency should also recognize the possibility that a group viewed as a single constituency at the outset of negotiations may later become so divided as to suggest modification of the membership of the negotiating group.

8. Where appropriate, the agency, the mediator or facilitator, or the negotiating group should consider appointing a neutral outside individual who could receive confidential data, evaluate it, and report to the negotiators. The parties would need to agree upon the protection to be given confidential data. A similar procedure may also be desirable in order to permit neutral technical advice to be given in connection with complex data.

9. Use of a "resource pool" may be desirable, to support travel, training, or other appropriate costs, either incurred by participants or expended on behalf of the negotiating group. The feasibility of creating such a pool from contributions by private sources and the agency should be considered in the pre-negotiation stages.

### **Citations:**

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