



Negotiated Rulemaking

Committee on Rulemaking

Proposed Recommendation for Committee | March 23, 2017

1 Since the enactment of the Administrative Procedure Act (APA) in 1946, stakeholder
2 input has been an integral component of informal rulemaking. The public comment process
3 arguably democratizes federal agency rulemaking and gives agencies access to information that
4 supports the development of quality rules. As early as the 1960s, however, many agencies found
5 that notice-and-comment rulemaking “had become increasingly adversarial and formalized.”¹

6 Starting in the late 1970s, as legal reform advocates sought to expand the use of
7 alternative dispute resolution (ADR) to reduce the incidence of litigation, administrative law
8 scholars began to consider whether importing ADR norms into the rulemaking process might
9 promote a more constructive, collaborative dynamic between agencies and stakeholders. The
10 procedure that they ultimately devised, known as “negotiated rulemaking,” brings together an
11 advisory committee² of representative stakeholder groups, agency officials, and a “neutral”³
12 trained in mediation and facilitation techniques who work to reach consensus on the text of a

¹ Administrative Conference of the United States, Recommendation 85-5, Procedures for Negotiating Proposed Regulations, 50 Fed. Reg. 52,893 (Dec. 27, 1985), available at <https://www.acus.gov/sites/default/files/documents/85-5.pdf>.

² Negotiated rulemaking committees are advisory committees that must comply with the Federal Advisory Committee Act (FACA). 5 U.S.C. § 565(a).

³ Here, a “neutral” refers to an expert with experience in ADR techniques who actively supports the negotiation and consensus-building process, without taking a position on the substantive outcome. In the context of negotiated rulemaking, both convenors and facilitators are neutrals who may support the process at various stages. As defined by the Negotiated Rulemaking Act of 1996, a convenor “means a person who impartially assists an agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate in a particular rulemaking,” whereas a facilitator is “a person who impartially aids in the discussions and negotiations among the members of a negotiated rulemaking committee to develop a proposed rule.” 5 U.S.C. § 562.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

13 notice of proposed rulemaking (NPRM). Negotiated rulemaking was designed to reduce
14 adversarialism in informal rulemaking. The process was also intended to improve the quality of
15 final rules by bringing valuable information—and the cross-pollination of ideas—to the forefront
16 of policy development.

17 The Administrative Conference twice issued recommendations on the use of negotiated
18 rulemaking. The first, Recommendation 82-4, *Procedures for Negotiating Proposed*
19 *Regulations*, represented an early effort to articulate the steps agencies should take to use the
20 process successfully.⁴ In 1985, the Administrative Conference issued a subsequent
21 recommendation, Recommendation 85-5, *Procedures for Negotiating Proposed Regulations*, that
22 documented best practices based on agency experience with negotiated rulemaking in the
23 preceding years.⁵ Congress formally blessed the process in 1990 through the Negotiated
24 Rulemaking Act,⁶ and the Clinton administration endorsed the use of negotiated rulemaking in
25 appropriate contexts as a method for better informing agency rules and enabling public
26 participation.⁷ Thereafter, Congress occasionally mandated the use of negotiated rulemaking
27 when passing new legislation that directed agencies to address certain complex policy problems.⁸

⁴ Administrative Conference of the United States, Recommendation 82-4, *Procedures for Negotiating Proposed Regulations*, 47 Fed. Reg. 30,701 (July 15, 1982), available at <https://www.acus.gov/sites/default/files/documents/82-4.pdf>. These recommendations were based on Professor Philip Harter's report to the Administrative Conference (Philip J. Harter, *Negotiating Regulations: A Cure for the Malaise*, 71 GEO. L.J. 1 (1982)). The procedural steps proposed in Recommendation 82-4 formed the basis of the Negotiated Rulemaking Act.

⁵ Recommendation 85-5, *supra* note 1.

⁶ Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified with some differences in language at 5 U.S.C § 561–70).

⁷ See, e.g., Presidential Memorandum for Exec. Dep'ts & Selected Agencies; Administrator Office of Info. & Reg. Affairs, Negotiated Rulemaking (Sept. 30, 1993), available at <http://govinfo.library.unt.edu/npr/library/direct/memos/2682.html>. See also Exec. Order 12,866, § 6(a)(1).

⁸ Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1256, 1268 (1997). See discussion in footnotes 5 and 75 of Coglianese's article for legislation in the 1990s mandating the use of negotiated rulemaking. Over a dozen such statutes were passed before 1997, including the Student Loan Reform Act of 1993 (Pub. L. No. 103-66, § 4021, 107 Stat. 341, 353) and the Native American Housing Assistance and Self-Determination Act of 1996 (Pub. L. No. 104-330, § 106(b), 110 Stat. 4016, 4029). Despite the rise and fall in negotiated rulemaking's popularity, Congress has continued to mandate that agencies use negotiated rulemaking in connection with programs conducted under certain statutes. A recent example is the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7212, 118 Stat. 3638, 2829 (cited in Lubbers,



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

28 By the early 2000s, however, negotiated rulemaking fell into relative decline.⁹ In part,
29 this may be due to the proliferation of alternative stakeholder engagement options such as
30 technical workshops, listening sessions, and other forums that allow agencies to gain many of the
31 benefits of direct stakeholder feedback early in the policymaking process while retaining greater
32 procedural flexibility. Nevertheless, where an agency's goals would best be served by
33 developing a consensus-based NPRM, or where the policy issues or stakeholder relationships
34 involved are particularly complex or contentious, negotiated rulemaking may very well be a
35 worthwhile investment.

36 To guide agencies in choosing among the various kinds of stakeholder engagement
37 methods they may use to meet their goals, and to offer suggestions on how agencies might
38 maximize the probability of success when choosing to undertake negotiated rulemaking, the
39 Administrative Conference recommends the following best practices for consideration.

RECOMMENDATION

Selecting the Optimal Approach to Stakeholder Engagement

- 40 1. Negotiated rulemaking is one option of many that agencies should consider when seeking
41 stakeholder input on a contemplated rule. The following alternatives to negotiated
42 rulemaking are likely to prove preferable under certain circumstances:
- 43 a. Notice-and-comment rulemaking is likely adequate when the goal is simply to
44 obtain documentary information from a wide array of stakeholders.

infra note 9, at 995). For a case study of the congressionally-mandated use of negotiated rulemaking by the U.S. Department of Education, see Jeffrey S. Lubbers, *Enhancing the Use of Negotiated Rulemaking by the U.S. Department of Education* (Dec. 5, 2014), in RECALIBRATING REGULATION OF COLLEGES AND UNIVERSITIES, REPORT OF THE TASK FORCE ON FEDERAL REGULATION OF HIGHER EDUCATION 90 (2015), available at http://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf.

⁹ Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 TEX. L. REV. 987, 1001 (2008); Reeve T. Bull, *The Federal Advisory Committee Act: Issues and Proposed Reforms* 52 & app. A (Sept. 12, 2011), available at <https://www.acus.gov/sites/default/files/documents/COCG-Reeve-Bull-Draft-FACA-Report-9-12-11.pdf>.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 45 b. Agencies should consider meeting with selected groups of stakeholders where
46 they contemplate a two-way exchange of information but do not consider it
47 worthwhile to convene a larger assemblage of stakeholders to provide group-level
48 advice.
- 49 c. In situations in which the agency is interested in determining the views of various
50 stakeholder groups in connection with a contemplated rule but does not consider it
51 worthwhile to push for a consensus position on a proposed rule, the agency should
52 consider convening an ad hoc assemblage of stakeholders to provide input (often
53 referred to as “Reg Neg Lite”).
- 54 d. Where the agency seeks group-based input on a discrete aspect of a proposed
55 policy (whether or not connected with a contemplated rule), the agency should
56 convene an advisory committee, observing all requirements prescribed by the
57 Federal Advisory Committee Act (FACA).

Deciding When to Use Negotiated Rulemaking

- 58 2. An agency should consider utilizing negotiated rulemaking when it determines that there
59 is a high probability that it can convene a discrete, representative group of stakeholders
60 that can reach consensus on the text of a proposed rule. The factors identified in the
61 Negotiated Rulemaking Act remain relevant in deciding whether to pursue this course.
62 Specifically, the agency must be mindful of the following:
- 63 • “[T]here are a limited number of identifiable interests that will be significantly
64 affected by the rule.”¹⁰
 - 65 • “[T]here is a reasonable likelihood that a committee can be convened with a
66 balanced representation of persons who (a) can adequately represent the

¹⁰ 5 U.S.C. § 563(a)(2).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 67 [identifiable and significantly affected] interests and (b) are willing to negotiate in
68 good faith to reach a consensus on the proposed rule.”¹¹
- 69 • The agency possesses the resources necessary to conduct a negotiated rulemaking
70 and determines that the institutional benefits outweigh the costs.¹²
 - 71 • “[T]he agency, to the maximum extent possible consistent with the legal
72 obligations of the agency, will use the consensus of the committee with respect to
73 the proposed rule as the basis for the rule proposed by the agency for notice and
74 comment.”¹³
- 75 3. As a general matter, Congress should not statutorily direct an agency to use negotiated
76 rulemaking, except in instances in which it has actually determined that the probability of
77 achieving stakeholder consensus on a proposed rule is high. If Congress wishes to
78 enhance stakeholder input, alternatives such as a requirement to issue an advance notice
79 of proposed rulemaking or to convene an advisory committee will often be preferable to
80 mandated negotiated rulemaking.

Structuring a Negotiated Rulemaking Committee to Maximize the Probability of Success

- 81 4. Agency officials should clearly define the charge of the negotiated rulemaking committee
82 at the outset. This involves explicitly stating all restraints on the universe of options the
83 committee is authorized to consider, including legal prohibitions and policy positions that
84 the agency is unwilling to take. It also involves informing the committee of the use to
85 which the information they provide will be put and notifying them that negotiated

¹¹ *Id.* § 563(a)(3).

¹² *See id.* §§ 563(a)(4)–(6) (providing that “there is a reasonable likelihood that the committee will reach consensus on the proposed rule within a fixed period of time”; “the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule”; and “the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee”).

¹³ *Id.* § 563(a)(7).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 86 rulemaking committee meetings and documents submitted in connection therewith are
87 available to the public as a default.
- 88 5. Agencies should appoint an official with sufficient authority to speak on behalf of the
89 agency to attend all negotiated rulemaking committee meetings. This individual should
90 actively manage stakeholder expectations, informing participants of any legal or other
91 constraints that would limit the range of options available to the committee members.
- 92 6. Agencies should clearly define the convenor and facilitator's roles at the outset of a
93 negotiated rulemaking. Agencies also should draw upon the convenor and facilitator's
94 expertise in selecting committee members, defining the issues the committee will
95 address, and setting the goals for the committee's work.
- 96 7. Agencies should be mindful of OIRA's role in the rulemaking process when conducting
97 negotiated rulemaking. This includes inviting the agency's OIRA desk officer to
98 participate in the committee meetings or providing him or her with briefings on the
99 meetings, informing the committee members of OIRA's role in the process, and using the
100 committee process to develop the elements of a regulatory impact analysis.

101 102 **Considerations Associated with FACA**

- 103
- 104 8. Congress should amend the Negotiated Rulemaking Act to exempt negotiated rulemaking
105 committees from the requirements of FACA.¹⁴ Congress should then also amend the
106 Negotiated Rulemaking Act to require that negotiated rulemaking committee meetings be
107 noticed in advance and permit public participation.
- 108 9. In the absence of a statutory reform rendering FACA inapplicable to negotiated
109 rulemaking, agencies should take advantage of FACA's flexibilities in convening
110 negotiated rulemaking committees. In particular, agencies should consider maintaining
111 standing committees from which a negotiated rulemaking committee can be formed on an

¹⁴ Administrative Conference of the United States, Recommendation 2011-7, The Federal Advisory Committee Act – Issues and Proposed Reforms, 77 Fed. Reg. 2257 (Jan. 17, 2012), *available at* <https://www.acus.gov/sites/default/files/documents/Recommendation-2011-7-Federal-Advisory-Committee-Act.pdf>.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

112 as-needed basis, rather than chartering a new committee anytime the agency wishes to
113 undertake a negotiated rulemaking.