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

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

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

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

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\(^5\) Recommendation 85-5, supra note 1.


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

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

RECOMMENDATION

Selecting the Optimal Approach to Stakeholder Engagement

1. Negotiated rulemaking is one option of many that agencies should consider when seeking stakeholder input on a contemplated rule. The following alternatives to negotiated rulemaking are likely to prove preferable under certain circumstances:

a. Notice-and-comment rulemaking is likely adequate when the goal is simply to obtain documentary information from a wide array of stakeholders.


b. Agencies should consider meeting with selected groups of stakeholders where they contemplate a two-way exchange of information but do not consider it worthwhile to convene a larger assemblage of stakeholders to provide group-level advice.

c. In situations in which the agency is interested in determining the views of various stakeholder groups in connection with a contemplated rule but does not consider it worthwhile to push for a consensus position on a proposed rule, the agency should consider convening an ad hoc assemblage of stakeholders to provide input (often referred to as “Reg Neg Lite”).

d. Where the agency seeks group-based input on a discrete aspect of a proposed policy (whether or not connected with a contemplated rule), the agency should convene an advisory committee, observing all requirements prescribed by the Federal Advisory Committee Act (FACA).

Deciding When to Use Negotiated Rulemaking

2. An agency should consider utilizing negotiated rulemaking when it determines that there is a high probability that it can convene a discrete, representative group of stakeholders that can reach consensus on the text of a proposed rule. The factors identified in the Negotiated Rulemaking Act remain relevant in deciding whether to pursue this course. Specifically, the agency must be mindful of the following:

- “[T]here are a limited number of identifiable interests that will be significantly affected by the rule.”\(^{10}\)
- “[T]here is a reasonable likelihood that a committee can be convened with a balanced representation of persons who (a) can adequately represent the

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\(^{10}\) 5 U.S.C. § 563(a)(2).
[identifiable and significantly affected] interests and (b) are willing to negotiate in
good faith to reach a consensus on the proposed rule.”\(^{11}\)

- The agency possesses the resources necessary to conduct a negotiated rulemaking
and determines that the institutional benefits outweigh the costs.\(^{12}\)
- “[T]he agency, to the maximum extent possible consistent with the legal
obligations of the agency, will use the consensus of the committee with respect to
the proposed rule as the basis for the rule proposed by the agency for notice and
comment.”\(^{13}\)

3. As a general matter, Congress should not statutorily direct an agency to use negotiated
rulemaking, except in instances in which it has actually determined that the probability of
achieving stakeholder consensus on a proposed rule is high. If Congress wishes to
enhance stakeholder input, alternatives such as a requirement to issue an advance notice
of proposed rulemaking or to convene an advisory committee will often be preferable to
mandated negotiated rulemaking.

**Structuring a Negotiated Rulemaking Committee to Maximize the Probability of Success**

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

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\(^{11}\) 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).
rulemaking committee meetings and documents submitted in connection therewith are
available to the public as a default.

5. Agencies should appoint an official with sufficient authority to speak on behalf of the
agency to attend all negotiated rulemaking committee meetings. This individual should
actively manage stakeholder expectations, informing participants of any legal or other
constraints that would limit the range of options available to the committee members.

6. Agencies should clearly define the convenor and facilitator’s roles at the outset of a
negotiated rulemaking. Agencies also should draw upon the convenor and facilitator’s
expertise in selecting committee members, defining the issues the committee will
address, and setting the goals for the committee’s work.

7. Agencies should be mindful of OIRA’s role in the rulemaking process when conducting
negotiated rulemaking. This includes inviting the agency’s OIRA desk officer to
participate in the committee meetings or providing him or her with briefings on the
meetings, informing the committee members of OIRA’s role in the process, and using the
committee process to develop the elements of a regulatory impact analysis.

Considerations Associated with FACA

8. Congress should amend the Negotiated Rulemaking Act to exempt negotiated rulemaking
committees from the requirements of FACA.\textsuperscript{14} Congress should then also amend the
Negotiated Rulemaking Act to require that negotiated rulemaking committee meetings be
noticed in advance and permit public participation.

9. In the absence of a statutory reform rendering FACA inapplicable to negotiated
rulemaking, agencies should take advantage of FACA’s flexibilities in convening
negotiated rulemaking committees. In particular, agencies should consider maintaining
standing committees from which a negotiated rulemaking committee can be formed on an

\textsuperscript{14} Administrative Conference of the United States, Recommendation 2011-7, The Federal Advisory Committee Act
as-needed basis, rather than chartering a new committee anytime the agency wishes to undertake a negotiated rulemaking.