



## Administrative Conference of the United States

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### **NEGOTIATED RULEMAKING**

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## I. Introduction

Since the enactment of the Administrative Procedure Act (APA) in 1946, stakeholder input has been an integral component of the so-called “informal rulemaking” process. Under the APA’s notice-and-comment provisions, an agency seeking to promulgate a rule must publish a notice of proposed rulemaking (NPRM) in the Federal Register, solicit public comments on the rule, and then consider the “significant matter presented” in these comments and modify the proposed rule as appropriate. To the extent the agency fails to do so, an aggrieved party can challenge the agency’s rule in court, seeking to establish that the agency acted “arbitrarily and capriciously” in failing to account for pertinent information contained in the public comments.

The public comment process arguably democratizes federal agency rulemaking and certainly gives agencies access to information that they might not otherwise develop internally. Still, the model contains inherent limitations in that it assigns an essentially reactive role to the general public and, accordingly, often places the agency in a defensive posture. Specifically, once the agency has prepared an NPRM, it has already committed at least to an overall strategy and may incur significant costs in modifying its preferred approach. For their part, stakeholders may be disinclined to engage constructively with the process, instead simply filing comments in order to preserve the opportunity to challenge the agency’s rule in court once it is finalized.

In the 1970s and 1980s, 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 alleviate some of these tensions and create a more constructive, collaborative dynamic between agencies and stakeholders. The procedure that they ultimately devised, known as “negotiated rulemaking,” brings together an advisory committee of key stakeholder groups to collaborate on the formulation of an NPRM. The committee is typically led by an ADR expert (usually termed a “convenor” or “facilitator” at different stages of the process)<sup>1</sup> who establishes mutually agreed upon ground rules for the negotiation, seeks to flesh out the stakeholders’ positions, identifies and gathers information on relevant questions of fact, and guides participants towards producing a draft rule text based on group consensus. In theory, this should lead to a more well-informed, broadly acceptable NPRM than an agency could have produced using only notice-and-comment. Further, the process should simplify the agency’s task by ensuring that various conflicts among stakeholder groups are resolved prior to the issuance of an NPRM and should reduce the incidence of post-promulgation litigation, given that the key stakeholders have essentially agreed to the rule in principle.

Of course, even based on this oversimplified description of the model, one can identify any number of potential limitations. For instance, if a convenor cannot identify all relevant stakeholder groups, or if they are too numerous, the negotiation would be imbalanced and should not proceed. Indeed, recruiting only institutionalized, well-resourced stakeholders could promote a sort of agency capture, while those excluded would be especially likely to challenge the rule in court. In

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<sup>1</sup> As defined by the Negotiated Rulemaking Act, 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,” while 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. In practice, these functions are frequently undertaken by the same individual. See *infra* pp. 26–27.

these cases, negotiated rulemaking would impose added procedural burdens on agencies without netting promised efficiencies. To better understand when negotiated rulemaking might suffer from these limitations—and under what circumstances the process is likely to yield benefits—an examination of its use is in order.

Over the last thirty years, numerous agencies have conducted negotiated rulemakings, providing a record for assessing the procedure's success in accomplishing its purported goals. The Administrative Conference championed the use of negotiated rulemaking in the 1980s, issuing two recommendations that encouraged agencies to consider the procedure and exploring the instances in which it was likely to prove effective. Congress formally blessed the practice in 1990 by enacting the Negotiated Rulemaking Act (though a handful of agencies had already conducted negotiated rulemakings prior to that point), and the procedure became increasingly popular over the course of the 1990s. Its use peaked in the late-1990s, and its prevalence declined markedly over the 2000s. In the last few years, the procedure has enjoyed something of a mini-resurgence, as the Departments of Transportation and Energy have deployed it in a handful of high-profile rulemakings, but it has not come close to recapturing the popularity it enjoyed in its heyday.

One can posit any number of possible explanations for this pattern. It may be that reaching consensus on complex, contested policy questions is too difficult to achieve in most circumstances. Or, flawed execution, misperceptions as to its usefulness, or cost or external legal constraints could hobble the process. Unfortunately, it is quite challenging to test the causes for negotiated rulemaking's decline, or the optimal circumstances under which it could be used, empirically. No agency could conduct a controlled experiment in which it compares the effectiveness of negotiated rulemaking to some alternative procedure and determines which produces a superior result. One is therefore left to examine the instances in which agencies have conducted negotiated rulemakings and attempt to discern which factors cut for or against its success. Yet the impossibility of constructing a counter-factual scenario warrants caution in making assertions about negotiated rulemaking's effectiveness *vel non* via this approach.<sup>2</sup>

In that light, this report does not attempt to definitively explain the rise and fall of negotiated rulemaking over the past decades. Similarly, it takes no position on whether agencies should use negotiated rulemaking more or less frequently. Instead, it draws upon case studies, the scholarly literature, and interviews with negotiated rulemaking experts (including proponents and skeptics in agencies, the private sector, and academia) in order to get a better sense of how agencies have structured their stakeholder outreach efforts and where negotiated rulemaking fits into the array of options they have available.

As the report will show, negotiated rulemaking is simply one tool among many that agencies can use to leverage stakeholder input in order to improve the quality of their rules. The

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<sup>2</sup> Specifically, though some negotiated rulemakings may be deemed “successful,” it is entirely possible that a less burdensome approach (e.g., enhanced stakeholder outreach) could have produced a similar result at a much lower cost to the agency. By the same token, though some negotiated rulemakings may be deemed to have “failed,” it is always possible that the agency would have “succeeded” had it restructured the process (or that external constraints, such as adherence to the requirements of the Federal Advisory Committee Act, doomed the process from the outset). Similarly, it is possible that the agency might have “succeeded” had it set different goals at the outset. Finally, even some “failures” can be deemed at least partially successful due to the information obtained by the agency, especially as to where a partial consensus might exist.

report seeks to highlight this spectrum of options and identify the considerations that may counsel in favor of any given approach. It also reviews the cases in which negotiated rulemaking has yielded a result that is deemed satisfactory to both the agency and stakeholders in order to identify the factors that maximize the probability that the process will produce a constructive outcome. In many respects, this involves managing the expectations of the participants, clearly announcing what the agency hopes to achieve with the process and carefully defining the committee’s mandate (e.g., identifying certain approaches that the agency is statutorily prohibited from taking). It also requires a levelheaded appreciation of the limitations of the process. For instance, negotiated rulemaking neither can nor should replace regulatory review by the Office of Information and Regulatory Affairs or the notice-and-comment process. The ensuing recommendations should prove useful to agencies as they consider the range of options for stakeholder engagement and decide both which approach to take and how to structure the process to maximize success.

The authors would note one final point before delving into the discussion. The primary purpose of the report is to offer an overview of the range of available stakeholder engagement opportunities and of the considerations that factor into selecting negotiated rulemaking or one of the other potential options. For those who seek a more detailed overview of these matters, the authors would highly recommend David Pritzker and Deborah Dalton’s *Negotiated Rulemaking Sourcebook*, copies of which are available in the Administrative Conference library.

## II. Background

For decades, administrative law practitioners and scholars have searched for remedies to the delay, high cost, and litigation that often afflict the rulemaking process.<sup>3</sup> First proposed in the 1980s, negotiated rulemaking is a procedure designed to remedy what has been considered one significant, underlying cause of each of these ills—entrenched adversarial positions among agencies and various stakeholder groups.

In connection with the rise of ADR in courts and other contexts throughout the 1970s and 1980s, a small cohort of scholars<sup>4</sup> and agency officials<sup>5</sup> advocated for the use of negotiation and consensus-building methods in the development of proposed rules. They ultimately designed a process that came to be called “regulatory negotiation” or “negotiated rulemaking” (often shortened to Reg Neg). In conducting a Reg Neg, an agency convenes an advisory committee—comprised of agency officials and the range of stakeholders interested in a potential rule—to openly debate the arguments, data, and priorities at issue with the goal of reaching consensus on the content of a draft notice of proposed rulemaking (NPRM). After the committee agrees on the content of a proposed rule, an agency issues the consensus NPRM and the standard procedural safeguards of the notice-and-comment process then proceed as prescribed by the APA.<sup>6</sup>

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<sup>3</sup> Philip Harter traces such concerns back to the late 1960s, only 20 years after the Administrative Procedure Act was passed. Philip J. Harter, *Negotiating Regulations: A Cure for the Malaise*, 71 GEO. L.J. 1, 1–2 (1982).

<sup>4</sup> See, e.g., Peter H. Schuck, *Litigation, Bargaining, and Regulation*, 3 REG. 26, 32 (1979); Harter, *supra* note 3, *passim*.

<sup>5</sup> Administrative Conference of the United States, Recommendation 82-4, *Procedures for Negotiating Proposed Regulations*, 47 Fed. Reg. 30,701 (July 15, 1982); Administrative Conference of the United States, Recommendation 85-5, *Procedures for Negotiating Proposed Regulations*, 50 Fed. Reg. 52,893 (Dec. 27, 1985).

<sup>6</sup> 5 U.S.C. § 553.

Such a collaborative process was designed not only to reduce the incentive to posture in anticipation of litigation, as had become increasingly common in traditional informal rulemaking, but also to produce a better rule reflecting input from key stakeholders and incorporating information to which the agency might not have otherwise had access. Nevertheless, following the APA's existing notice-and-comment requirements would ensure that any inaccuracies or omissions could be commented upon by the public and that any parties not invited to participate in the Reg Neg would still have an opportunity to comment (of course, participants themselves can and do comment on the proposal). Notably, as originally envisioned, post-negotiation notice-and-comment procedures should act as a failsafe; stakeholders selected to serve on the negotiated rulemaking committee are intended to represent the broader interests and concerns of the group of which they are a part, rather than only the perspective of their own organization. As such, through this procedural design, the developers of Reg Neg hoped to increase the efficiency of the rulemaking process as well as the ultimate quality of final rules.

#### A. Development of Negotiated Rulemaking

Suggestions that some form of negotiation may assist agencies in the rulemaking process had been made since the late 1970s.<sup>7</sup> However, the process known today as negotiated rulemaking only began to take shape in connection with a set of research articles and recommendations issued by the Administrative Conference of the United States (ACUS) in 1982 and 1985. As an independent agency tasked with advising federal agencies, Congress, and the courts on improvements to administrative procedures, ACUS was well-situated to bring together scholars, agency officials, and experts in ADR and related fields to propose how negotiation and consensus-building could be used to draft regulations.

The Conference twice addressed the subject through Recommendations 82-4 and 85-5, both entitled *Procedures for Negotiating Proposed Regulations*. The first of these recommendations noted that negotiation on the content of a rule was not without precedent; such efforts were often undertaken in the context of settling legal challenges to rules brought by affected parties.<sup>8</sup> Professor Philip Harter, the consultant to the 1982 ACUS project, drafted the first proposal to bring this negotiation process to the front-end of rulemaking.

In his report to the Conference, Harter examined methods that provided antecedents for the structured negotiated rulemaking process that he proposed would “cure the malaise” of adversarialism in rulemaking.<sup>9</sup> These analogous methods included not only the use of negotiated settlements but also the development of consensus standards in highly technical policy areas<sup>10</sup> and innovative cases such as the National Coal Policy Project, an initiative led by the coal industry to identify areas of agreement with environmental groups.<sup>11</sup> Harter aimed to build on the strengths

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<sup>7</sup> See Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1261–62 (1997).

<sup>8</sup> ACUS Recommendation 82-4, *supra* note 5, at preamble.

<sup>9</sup> Harter, *supra* note 3, at 31–41.

<sup>10</sup> Examples of such technical standards range from those on the “threads for fitting light bulbs to lamps . . . [to] control technologies for nuclear power plants.” Harter, *supra* note 3, at 34–35.

<sup>11</sup> The National Coal Policy Project (NCPP) originated in the mid-1970s with industry efforts to work with environmentalists to identify common points of agreement among the two traditionally adversarial groups. Industry stakeholders believed it was important to more heavily use coal, compared to oil and natural gas, but recognized environmental groups would object. In an effort to minimize disagreement, over a period of five years the NCPP

of these efforts by designing a holistic procedure for negotiation that would take place before an agency issued an NPRM. By charging the committee to reach consensus on the content of what would become the NPRM, all parties would be sufficiently invested in the outcome to deliberate on its content, bargain over priorities, and support the rule once final.

However, even the strongest proponents of the process never claimed that regulatory negotiation would be appropriate in all circumstances. A key element for success in such a process is that each party must feel it will gain more by participating than by pursuing other options, including litigation.<sup>12</sup> Harter proposed a number of considerations to help agencies determine when investing resources in Reg Neg might be worthwhile. Specifically, there should be a sufficiently limited and identifiable number of stakeholders such that parties can effectively meet and negotiate; the questions at issue must be mature for discussion; trade-offs must be possible; it must be clear that the agency intends to imminently decide the questions under consideration; and the questions must not turn on “fundamental values” of the participating parties.<sup>13</sup>

Drawing on Harter’s report, the 1982 ACUS recommendation sketches out the procedural structure for a consensus-building process. Broadly, an agency would establish a regulatory negotiation committee comprised of an agency official—with the seniority to speak with authority on the agency’s policy goals, possible trade-offs, etc.—and representatives of various industry groups, non-profits, tribal or local authorities, and other stakeholders who would be affected by the agency’s decision.<sup>14</sup> Once the decision to engage in the process was made, it was proposed that the agency should publish a notice of intent to form a negotiated rulemaking committee in the Federal Register.<sup>15</sup> As such, stakeholders who may not have already been selected for the committee may petition to join.

In order to facilitate negotiation among the participants, Harter emphasized that the agency should select a neutral individual, preferably a practitioner with experience in mediation or related fields, to act as a convenor.<sup>16</sup> The convenor would help identify appropriate individuals to serve as part of the negotiation committee, and frame the questions for discussion to ensure the committee’s deliberations addressed all relevant issues.<sup>17</sup> Additionally, the convenor (or facilitator) would play a central role in educating participants about the goals and norms of the negotiation; prompting participants to identify data, arguments and priorities for debate; supporting the ranking of priorities; and ensuring no one voice drowns out others.<sup>18</sup>

The first agency effort to implement the model proposed by ACUS Recommendation 82-4 and Harter’s report was the Federal Aviation Administration’s (FAA) 1983 Flight Time rule.<sup>19</sup> The Environmental Protection Agency (EPA) and Occupational Safety and Health Administration (OSHA) had also experimented with the process and achieved useful results, if not always full

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identified and published 200 points on which industry and environmental groups agreed. Harter, *supra* note 3, at 38–40.

<sup>12</sup> *Id.* at 43.

<sup>13</sup> *Id.* at 46–51.

<sup>14</sup> ACUS Recommendation 82-4, *supra* note 5, at Recommendations 7 and 8.

<sup>15</sup> *Id.* at Recommendation 7.

<sup>16</sup> *Id.* at Recommendation 3.

<sup>17</sup> *Id.* at Recommendations 3 and 4.

<sup>18</sup> *Id.* at Recommendation 4.

<sup>19</sup> Coglianese, *supra* note 7, at 1263.



consensus on a draft NPRM.<sup>20</sup> Though agencies had enthusiastically pursued this initial wave of experimentation, the process for Reg Neg remained somewhat abstract—and, for some, of uncertain legality.<sup>21</sup> To assess recent agency experience with regulatory negotiation and advance use of the process, ACUS issued another set of recommendations in 1985. To effectuate the procedural guidelines outlined in the first set of recommendations, ACUS made additional proposals including the development of opportunities to train agency staff in negotiation and facilitation and the maintenance of rosters of facilitators. The recommendations also emphasized the varied forms negotiations could take and the possibility that agencies might use negotiation at various stages in the rulemaking process.<sup>22</sup>

Both sets of recommendations, in concert with advocacy by those involved in developing and experimenting with the process, led to the passage of the Negotiated Rulemaking Act in 1990. The Act's main purpose was to clarify agencies' legal authority to use Reg Neg, rather than to impose additional requirements. The Act directed agency heads to consider the following factors when deciding whether using Reg Neg would be in the public interest: the need for a rule, the number of identifiable interests significantly affected by a proposed rule, the likelihood of convening a balanced committee, the likelihood of reaching consensus in a fixed period of time, whether using the procedure would introduce unreasonable delay in the rulemaking process, whether the agency has adequate resources to commit to the process, and whether the agency is willing to rely on the committee's consensus, consistent with its other legal obligations.<sup>23</sup>

Further, the Act provided the following steps an agency should take during Reg Neg:

1. The agency should engage a convenor to identify stakeholders likely to be affected by a rule, and the convenor should establish whether forming a negotiated rulemaking committee would be "feasible and appropriate."<sup>24</sup> The convenor should then make recommendations to the agency.
2. Assuming the convenor and agency's assessment is positive, the agency should publish a notice of intent to form a negotiated rulemaking committee in the Federal Register. The notice should describe the subject of the proposed rule, list the interests that will be affected along with individuals identified to represent those interests, allow members of the public to petition to be included on the committee, propose an agenda and schedule for the negotiation, and allow for public comments.<sup>25</sup>
3. If an agency decides to proceed based on public comments and petitions to join the committee submitted in response to the preceding notice, it should establish a committee in compliance with the applicable provisions of the Federal Advisory Committee Act (FACA). If the agency decides not to proceed, the agency should publish a Federal Register notice explaining why.<sup>26</sup>

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<sup>20</sup> ACUS Recommendation 85-5, *supra* note 5, at preamble.

<sup>21</sup> Cornelius M. Kerwin, *Assessing the Effects of Consensual Processes in Regulatory Programs: Methodological and Policy Issues*, 32 AM. U. L. REV. 401, 409 (1983).

<sup>22</sup> ACUS Recommendation 85-5, *supra* note 5, at Recommendation 3.

<sup>23</sup> Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969, 5 U.S.C § 583.

<sup>24</sup> *Id.* at § 583(b).

<sup>25</sup> *Id.* at § 584.

<sup>26</sup> *Id.* at § 585(a).

4. The agency should select a facilitator to chair the committee meetings, “impartially assist the members of the committee in conducting discussions and negotiations,” and “manage the keeping of minutes and records as required” by FACA.<sup>27</sup>
5. During the negotiation, the committee is charged to consider the matter proposed by the agency and work to reach consensus. Agency representatives should sit on the committee with the same rights and responsibilities as other participants, and will be authorized to represent the agency in discussions.<sup>28</sup>
6. If a committee reaches full or partial consensus, it should prepare a report to the agency documenting the areas on which it agreed along with any other material it deems appropriate. The committee will also submit records required by FACA.<sup>29</sup>
7. Finally, the committee shall terminate, consistent with its charter, once its task is complete.<sup>30</sup>

In addition to these procedures, the Act authorized agencies to terminate a committee, use appropriated funds for a Reg Neg, and employ the services of a private facilitator or the Federal Mediation and Conciliation Service (FMCS).<sup>31</sup> ACUS was further authorized to provide training on Reg Neg to agencies, maintain a roster of qualified facilitators, and report to Congress on the use and advancement of the process.<sup>32</sup> Notably, the ACUS Chairman was authorized to cover the expenses of an agency’s negotiated rulemaking, should the head of that agency request it.<sup>33</sup> The role envisioned for ACUS to continuously monitor and support the use of Reg Neg came to an end when the agency was defunded in 1995.<sup>34</sup> When the Negotiated Rulemaking Act was permanently reauthorized in 1996, no other entity was empowered to take on a similar role with respect to negotiated rulemaking.<sup>35</sup>

#### B. Scholarly Assessments of Negotiated Rulemaking

Throughout the 1990s, agencies continued to use Reg Neg. Along with other regulatory reform efforts, the Clinton administration endorsed the use of Reg Neg in appropriate contexts as a method for better informing agency rules and enabling public participation.<sup>36</sup> Further, Congress occasionally mandated the use of the process when passing new legislation that directed agencies to address certain complex policy problems.<sup>37</sup> These actions demonstrate the widespread

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<sup>27</sup> *Id.* at § 586(c).

<sup>28</sup> *Id.* at § 586(a)–(b).

<sup>29</sup> *Id.* at § 586(f).

<sup>30</sup> *Id.* at § 587.

<sup>31</sup> *Id.* at § 589.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> The Office of the Chairman published a comprehensive sourcebook on negotiated rulemaking authored by David Pritzker and Deborah Dalton. The publication remains an excellent resource on the process and, as noted in the introduction, copies are available in the ACUS library. NEGOTIATED RULEMAKING SOURCEBOOK (David M. Pritzker & Deborah S. Dalton, eds., 1995).

<sup>35</sup> The Negotiated Rulemaking Act of 1996, Pub. L. 104-320 (amending Pub. L. 101-648 and Pub. L. 102-354).

<sup>36</sup> *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).

<sup>37</sup> Coglianese, *supra* note 7, at 1256, 1268. *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 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

agreement among government actors that a collaborative process like Reg Neg had the potential to address certain shortcomings in the rulemaking process.

Though support for the goals behind the process remained strong, at this time there was little systematic analysis on the question of whether Reg Neg had met its stated aims—or whether it was the only way of doing so. In response, scholars sought to determine whether the benefits of the process were being achieved in practice, in addition to debating the strengths and weaknesses of Reg Neg. It is worth noting that the goal of the following discussion is to describe the history of scholarly analysis of Reg Neg. In so doing, we hope to clearly flesh out many of the process’s benefits, as well as the concerns of critics, which will be referred to in later sections.

Among the first quantitative analyses of negotiated rulemaking was Professor Cary Coglianese’s empirical assessment of all Reg Negs commenced since 1985.<sup>38</sup> Previous scholarly publications had tended to focus on case studies, which provided qualitative assessments and lessons learned based on an agency or practitioner’s experience with Reg Neg.<sup>39</sup> By analyzing data in aggregate, Coglianese’s study intended to answer whether the process had achieved two of its stated goals: “reducing overall rulemaking time and decreasing the number of judicial challenges to agency rules.”<sup>40</sup> While these are only two of the several stated goals of Reg Neg, they are the most straightforward to assess empirically.

To assess whether using negotiated rulemaking saved time in the development of rules, Coglianese analyzed the 35 instances in which the process had led to final rules.<sup>41</sup> The shortest took half a year and the longest took nearly seven.<sup>42</sup> Comparing EPA’s negotiated versus traditional rulemakings—based on the time between the publication of an initial notice and final rule—tended to show that Reg Negs saved roughly three months compared to rules promulgated under notice-and-comment, though it is worth noting that the exact amount of time varied based on the measures and samples used.<sup>43</sup> Coglianese also noted that Reg Negs could take more

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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, *infra* note 68, at 995). For a case study of the congressionally-mandated use of Reg Neg 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, app. IV at 90 (2015), available at [http://www.help.senate.gov/imo/media/Regulations\\_Task\\_Force\\_Report\\_2015\\_FINAL.pdf](http://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf).

<sup>38</sup> This dataset totaled 35 negotiated rulemakings, of which roughly one-third (a total of 12) had come from Environmental Protection Agency. Seven had been done by the Department of Transportation, six by the Department of Education, and a total of ten by other agencies.

<sup>39</sup> Coglianese, *supra* note 7, at 1258.

<sup>40</sup> *Id.* at 1259.

<sup>41</sup> *Id.* at 1279.

<sup>42</sup> *Id.* at 1279.

<sup>43</sup> *Id.* at 1280–84. It is also worth noting that, while the comparison between EPA’s negotiated and traditional rulemakings was undertaken because of the high number of Reg Negs the agency had undertaken and the amount of attention focused on the agency by other scholars and advocates of the process (particularly as shown in the legislative history of the Negotiated Rulemaking Act), it is possible that EPA’s results are not fully generalizable to all other agencies. In the process of drawing conclusions from the variety of studies undertaken, all readers should closely examine the variety of factors influencing why Reg Neg seems to have achieved, or failed to achieve, particular results under a given set of circumstances.

aggregate time because they are more effortful than traditional rulemaking, thus requiring greater investment of time and resources that could have been applied to other rulemaking efforts.<sup>44</sup>

Next, Coglianesi turned to whether Reg Neg reduced the number of judicial challenges brought against rules. First, it was necessary to establish a baseline for the litigation rate in traditional rulemaking. A review of the legislative history leading up to the passage of the Negotiated Rulemaking Act reveals heightened concern about the cost and delay of judicial challenges to rules—in particular, an oft-quoted figure asserted that 80% of EPA rules faced litigation.<sup>45</sup> Finding no underlying source for this statistic, Coglianesi undertook an independent analysis of the EPA and D.C. Circuit litigation dockets.<sup>46</sup> In so doing, he found the true litigation rate to be only 26%.<sup>47</sup>

However, if Reg Neg was designed to facilitate rulemaking in particularly contentious circumstances, a comparison to all rulemaking may not be warranted. As such, Coglianesi further narrowed the scope of challenged regulations to those that were significant<sup>48</sup> and promulgated under two major statutes—the Clean Air Act and Resource Conservation and Recovery Act.<sup>49</sup> Even for this subset of rules, the litigation rate hovered in the range of 30% to 40%, not 80%.<sup>50</sup> By comparison, six of EPA’s twelve Reg Negs (i.e., 50%) had faced judicial challenge.<sup>51</sup> This analysis suggested that not only was the perceived litigation rate much greater than the reality, but that Reg Neg did not seem to result in the promised decrease in litigation (at least based on this dataset). Coglianesi therefore argued that the resource investment required by the process may not be justified, particularly given that negotiation among stakeholders and the agency, even if done more informally, nevertheless occurs in traditional notice-and-comment rulemaking.<sup>52</sup>

Moreover, Coglianesi argued that Reg Neg may introduce new sources of conflict. For instance, parties may contest who is included at the negotiating table and whether final rules reflect the negotiated consensus; there may also be greater attention to the potential costs of a rule, rather than potential net benefits.<sup>53</sup> Even should these obstacles be overcome, a consensus-based NPRM must still be open to change based on public comment and review by the Office of Information and Regulatory Affairs (OIRA), whose oversight process accounts for a non-trivial portion of

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<sup>44</sup> *Id.* at 1284. This analysis reveals, at the very least, that those considering whether to use Reg Neg should be attentive to precisely how the process might save time or other resources. Details of the factors that influence when and how Reg Neg works best are discussed at length, *infra*. One brief example is that chartering a negotiated rulemaking committee under the Federal Advisory Committee Act can take a substantial amount of time, a burden mitigated when an agency is statutorily exempted from complying with the Act or when the agency charters a standing committee from which sub-committees can be created, without the need for additional paperwork or approval.

<sup>45</sup> *Id.* at 1264–67.

<sup>46</sup> *Id.* at 1298.

<sup>47</sup> *Id.*

<sup>48</sup> As used in this study, significant refers to those proposed rules EPA deemed of sufficient importance to publish in its Unified Agenda, whether because they exceeded the annual economic impact threshold of \$100 million or for other reasons. *Id.* at 1299–1300.

<sup>49</sup> *Id.* at 1300.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1301.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1322.

rulemaking time.<sup>54</sup> Ultimately, Coglianese asserted that, on the whole, agencies and stakeholders are no better off trying to achieve consensus in Reg Neg than they are in using the more informal consultative engagements.<sup>55</sup>

In response to Coglianese's research Philip Harter argued that not only did Reg Neg have other goals not accounted for in the article, but that the methodology was not appropriately applied.<sup>56</sup> Harter raised qualitative concerns that he argued were not captured in an empirical analysis. For example, Harter posited that agencies may use Reg Neg to achieve more immediate goals than a final rule, as in the case of the Coast Guard's use of the process to negotiate an interim agreement in response to a presidential deadline.<sup>57</sup> In such cases, Harter argued, the agency's final goals were achieved more quickly than could have been done in conventional rulemaking. Indeed, in contentious cases where an agency might otherwise take decades to issue a rule, negotiated rulemaking might be one of few ways to advance the process along a reasonable timeline.<sup>58</sup> Further, he argued that judicial challenges in Reg Negs did not target the final rule's substance, but focused on procedural issues.<sup>59</sup>

At a minimum, this exchange highlights the difficulties of clearly assessing a process with benefits that are not readily quantifiable. Still, Coglianese's response to Harter highlights that, given the experimental nature of Reg Neg, the process requires rigorous evaluation to determine whether the demands it places on agencies and stakeholders result in the anticipated benefits.<sup>60</sup> Coglianese's article emphasizes that the qualitative considerations raised by Harter do not displace the empirical findings. For example, in the context of measuring the duration of rulemaking, Coglianese cautions against Harter's argument that Reg Negs should be considered complete when the negotiation is over. Coglianese argues the publication date of the final rule must be used in order to compare negotiated and traditional rulemakings, because that is the only kind of end date the two procedures have in common. Basing comparisons on researchers' "ad hoc decisions" about start and end dates or other metrics undermines reliability and comparability among studies.<sup>61</sup>

Another noteworthy empirical study by Professors Cornelius Kerwin and Laura Langbein compared participants' perceptions of the negotiated rulemaking process and conventional notice-and-comment rulemaking. Through in-depth interviews from participants in eight regulatory negotiations and six comparable rules promulgated under notice-and-comment, their study found that participants considered Reg Neg to produce "more learning [among stakeholders], better

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<sup>54</sup> *Id.* at 1329.

<sup>55</sup> *Id.* at 1334.

<sup>56</sup> Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 32 (2000).

<sup>57</sup> *Id.* at 43. Overall, Harter argues the time savings of Reg Neg are significant. *Id.* at 39–49.

<sup>58</sup> See *infra* Section IV.C for a discussion of the challenges facing the National Park Service's efforts to regulate the use of Off-Road Vehicles on Cape Hatteras and the agency's efforts to overcome them using negotiated rulemaking.

<sup>59</sup> *Id.* at 49–50.

<sup>60</sup> Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENVTL. L.J. 386, 388, 393 (2001).

<sup>61</sup> *Id.* at 408–09.

quality rules, and higher [participant] satisfaction compared to conventional rulemaking.”<sup>62</sup> As Kerwin and Langbein note, however, participants’ perceptions of quality or satisfaction with rulemaking outcomes do not necessarily measure the actual quality of final rules themselves (although self-reported satisfaction with the process is nevertheless a meaningful finding in and of itself).<sup>63</sup> And, as noted by Professor Coglianese, Kerwin and Langbein’s sample of participants in Reg Negs contains several EPA staff as well as state and local officials, while the sample of participants from the traditional rulemakings contains no EPA staff and only a few state and local officials.<sup>64</sup> He argues that government actors (as opposed to regulated entities) are more likely to view regulatory actions positively in any process.<sup>65</sup>

Occurring simultaneously with this empirical debate, other scholars raised normative concerns with Reg Neg. Professor William Funk argued that negotiated rulemaking undermined key principles of administrative law.<sup>66</sup> In this view, because an agency’s statutory authority now served as an outer limit on parties’ negotiation—rather than the driving force behind proposed policy—regulatory negotiation undermined rule of law and the technical rationality that served as the *raison d’être* of agencies.<sup>67</sup> Funk also suggested that Reg Neg could constrain agencies from independently ascertaining the public interest, and lead to agency capture.<sup>68</sup> In a similar vein, Professor Susan Rose-Ackerman expressed concern that Reg Neg could not be “democratically legitimate unless all interested parties are adequately represented. Agreement among only the subset of interests that have organized advocates is not sufficient.”<sup>69</sup> To these arguments advocates of Reg Neg would point out that it is indeed for these kinds of reasons that the Negotiated Rulemaking Act emphasizes the need for a balanced committee and for a convenor to advise the agency on whether the issues under consideration are appropriate for negotiation. Nevertheless, agencies should be aware that these concerns have been raised and be conscious of avoiding them.

### C. Current Status of Negotiated Rulemaking and Alternative Consultation Procedures

Criticisms about the efficacy and desirability of Reg Neg seem to have dampened much of the initial enthusiasm for the process—although other factors no doubt contributed as well. In his article analyzing the reasons for Reg Neg’s decline, Professor Jeffrey Lubbers suggests that constrained budgets have caused agency decision-makers to balk at the cost of convening a committee and hiring a facilitator.<sup>70</sup> Even if the process were to save costs in other ways, such savings would be deferred to future fiscal years. Real and perceived challenges in the FACA

<sup>62</sup> Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVIRO. L.J. 60, 62 (2000); Laura I. Langbein & Cornelius M. Kerwin, *Regulatory Negotiation versus Conventional Rulemaking: Claims, Counterclaims, and Empirical Evidence*, 10 J. PUB. ADMIN. RES. 599, 600 (2000).

<sup>63</sup> Coglianese, *supra* note 60, at 430.

<sup>64</sup> *Id.* at 431. Specifically, 11% of the total 101 negotiated rulemaking participants were EPA staff and 25% were state and local officials. By contrast, no EPA staff were interviewed in the sample of traditional rulemaking participants; three of the total 51 in this group were state or local officials.

<sup>65</sup> *Id.*

<sup>66</sup> William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1375 (1997).

<sup>67</sup> *Id.* at 1375–76.

<sup>68</sup> *Id.* at 1384.

<sup>69</sup> Susan Rose-Ackerman, *Consensus versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206, 1211 (1994).

<sup>70</sup> Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 TEX. L. REV. 987, 997 (2008).

committee chartering process further dissuaded agencies from engaging in negotiated rulemaking.<sup>71</sup>

Whatever the precise combination of reasons, agency reliance on Reg Neg has clearly declined. Lubbers's survey of trends in negotiated rulemaking shows that between 1991 and 1996, agencies formed 63 negotiated rulemaking committees.<sup>72</sup> Only 22 were formed between 2000 and 2007—a significant drop-off.<sup>73</sup> A more recent study by Professors Peter Schuck and Steven Kochevar found that roughly the same number of Reg Negs were undertaken between 2007 and 2014 as between 2000 and 2007.<sup>74</sup> Notably, 85% of these were statutorily mandated.<sup>75</sup>

To better understand the reasons behind this decline in the use of negotiated rulemaking—and identify what other forms of stakeholder consultation agencies have used—this report draws on case studies and unstructured interviews with agency officials, facilitators, and other experts.<sup>76</sup> This research aims to better identify what contexts are attractive candidates for Reg Neg, and when less structured or costly collaborative or consultative efforts could be useful. One theme carrying through this analysis is the importance of defining an agency's goals in the initial instance (before deciding to use Reg Neg or some alternative approach). When successfully achieving these goals may require exchange and deliberation short of consensus, alternatives to Reg Neg may be most appropriate.

### III. Negotiated Rulemaking in Context

To determine when Reg Neg is most appropriate, it is necessary to assess the process in comparison with other methods agencies might use to develop policy—particularly in instances where stakeholder input is desirable or required. As discussed above, Reg Neg originated at a time when ADR techniques first became widespread during the 1970s and 80s. Techniques such as arbitration and mediation originated in an effort to reduce the financial expense, delay, and damage to parties' relationships that often resulted from litigation. Negotiated rulemaking represented a novel effort to bring such tools to the forefront of decision-making, with the intention of managing anticipated conflict early on.

This period did not mark the end of efforts to experiment with robust stakeholder engagement in the early stages of government decision- or policy-making. Over the subsequent decades, a variety of techniques and processes have been deployed that are increasingly tailored to address different agency goals, financial and resource constraints, and other concerns. While engagement methods that are procedurally less intensive do much to reduce cost, they also may not net the same benefits—including cross-pollination of ideas and stakeholder buy-in—as a more structured process like Reg Neg. As such, practitioners have sought to identify forms of

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<sup>71</sup> *Id.* at 1001.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* A recent ACUS report on FACA similarly bears out this decline. Reeve T. Bull, *The Federal Advisory Committee Act: Issues and Proposed Reforms*, (Sept. 12, 2011), 52 and Appendix A, available at <https://www.acus.gov/sites/default/files/documents/COCG-Reeve-Bull-Draft-FACA-Report-9-12-11.pdf>.

<sup>74</sup> Peter H. Schuck & Steven Kochevar, *Reg Neg Redux: The Career of a Procedural Reform*, 15 THEORETICAL INQUIRIES IN LAW 417, 439 (2014).

<sup>75</sup> *Id.*

<sup>76</sup> Interviews were conducted off the record, and as such this report does not quote or refer directly to those conversations.

engagement that capture the benefits of dialogue, which “can result in deeper and more practical insights . . . than if the interested parties acted individually,”<sup>77</sup> while minimizing procedural burdens.

A fully detailed overview of these approaches is beyond the scope of this report. Indeed, many agency officials, academics, and other experts have published a number of resources that analyze, in greater depth, the spectrum of collaboration and engagement options that are available. Rather, here we discuss public consultation and collaboration options with the goal of placing Reg Neg in context. We hope that this context will support agency staff as they work to gauge what kinds of processes will achieve their goals and enable them to make the most of their investment of time and resources. With this caveat, the next section will proceed to analyze the considerations that play a role in whether Reg Neg is the optimal engagement vehicle in a particular set of circumstances.

#### A. Spectrum of Stakeholder Engagement Options

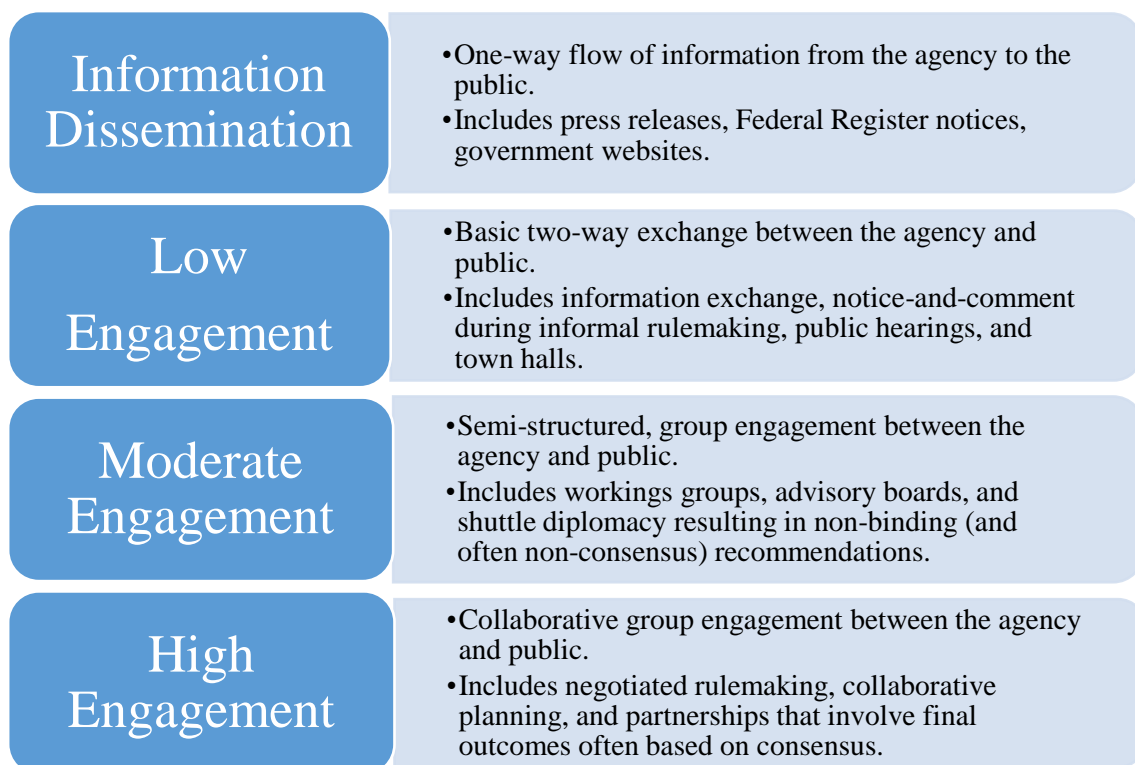
For the purposes of situating Reg Neg in the context of other outreach activities agencies might undertake, four levels or categories of agency-stakeholder engagement in policymaking may prove illustrative.<sup>78</sup> Each level of engagement is characterized by different tools and strategies, as well as different outcomes an agency seeks to accomplish. It is also worth noting that whatever engagement strategies an agency uses will require buy-in from agency leadership. Lack of support from leadership will likely inhibit successful execution of a process and reduce the agency’s return on its investment in stakeholder engagement.

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<sup>77</sup> ENVIRONMENTAL PROTECTION AGENCY, BETTER DECISIONS THROUGH CONSULTATION AND COLLABORATION 1 (2008), available for download at <https://www.epa.gov/international-cooperation/better-decisions-through-consultation-and-collaboration> (hereinafter, *Better Decisions*).

<sup>78</sup> This report uses an original, simplified four-category model to help readers easily navigate the vast range of methods by which agencies might engage with stakeholders. Other agency experts and scholars have drawn the lines between categories of stakeholder engagement somewhat differently, though all analyses aim to clearly distinguish stakeholder engagement options based on the varying amount of information exchange, capacity for consensus-building, and level of effort required by participants. For more, see, e.g., *Id.* at 6 and *Spectrum of Collaborative Processes*, ADR.GOV, [https://www.adr.gov/pdf/spectrum\\_6\\_23\\_16\\_clean.pdf](https://www.adr.gov/pdf/spectrum_6_23_16_clean.pdf).





*Figure 1: Levels of Agency-Stakeholder Engagement*

The first level is agency information dissemination or one-way communication to the public, where there is no collaboration or engagement because information does not flow from the public back to the agency. Information dissemination primarily deals with public outreach about agency activities, services, or regulatory requirements. Delivery mechanisms include press releases, fact sheets, Federal Register notices, videos, government websites, and other media. The anticipated outcome is not that the agency directly receives input, but that stakeholders and members of the public at large are informed about the agency's activities and policies.

A second level might be termed low engagement, where basic two-way exchange exists between the agency and the public.<sup>79</sup> Such efforts might also be deemed "consultation," denoting that agencies gather stakeholder feedback but have not yet reached the level of collaborating with stakeholders to produce advice, recommendations, or agreements.<sup>80</sup> Low engagement activities include workshops, listening sessions, public hearings, or town halls; the notice-and-comment period of informal rulemaking may also be considered a form of low engagement. As described by the Department of Justice's ADR Working group, agencies may use these processes to solicit feedback for the purposes of "enhanc[ing] the [agency's] organizational decision-making or

<sup>79</sup> For a concise summary of agency goals, processes, and other details encompassed in what is here called "low engagement," see *Spectrum of Collaborative Processes*, *supra* note 78, which refers to these as "inquiry" and "information exchange."

<sup>80</sup> *Better Decisions*, *supra* note 77, at 6. FACA should generally not apply to such engagement efforts, as the participants are providing individual information to the agency rather than group advice. *Id.* at 9.

effectiveness” or ask stakeholders to “provid[e] and exchang[e] data, opinions, or options” on specific issues.<sup>81</sup>

A third level, moderate engagement, encompasses semi-structured, formalized engagement between stakeholders and an agency over time. In comparison to communication and low engagement methods, moderate (to high) engagement efforts contemplate a smaller number of stakeholders who can collaborate on policy matters.<sup>82</sup> Examples of moderate engagement include working groups, advisory boards, and policy dialogues. These typically result in non-binding recommendations.

EPA’s iterative stakeholder negotiation model, which some have referred to as “shuttle diplomacy,” may straddle the line between low and moderate engagement.<sup>83</sup> After preparing an initial draft of a proposed rule, agency staff use low engagement activities such as listening sessions and one-on-one meetings with stakeholders to solicit feedback and revise the draft accordingly. Although it does sacrifice the cross-pollination of ideas among participants that is a significant benefit of negotiated rulemaking, some of those inter-participant reactions can still be captured at listening sessions, technical workshops, and similar fora.<sup>84</sup>

Indeed, some scholars have identified a set of low to moderate engagement processes—including listening sessions, technical workshops, and shuttle diplomacy—as “Reg Neg Lite,” a catch-all term describing mechanisms designed to capture the benefits of group exchange (though not consensus) at lower procedural and financial cost. It is also worth noting that even in moderate engagement processes, robust interaction between high-level administrators from the agency and stakeholders is essential to demonstrate the agency’s commitment to the process and guarantee stakeholder buy-in.

“Reg Neg Lite” is, as a legal matter, indistinguishable from informal stakeholder outreach, except that the agency must exercise greater caution to avoid moving from “individual input” to “group advice” and thereby triggering FACA. Examining the various processes often referred to as Reg Neg Lite, one could define it as generally including the following elements: (a) the goal is to obtain detailed information from or determine the policy preferences of certain stakeholder groups but not to achieve group consensus on a draft rule; (b) the assemblage of stakeholders is generally not organized as an advisory committee subject to FACA, as the goal is not to provide group advice but rather to flesh out the views of the various stakeholders; and (c) the charge of the

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<sup>81</sup> *Spectrum of Collaborative Processes*, *supra* note 78.

<sup>82</sup> *Better Decisions*, *supra* note 77, at 8.

<sup>83</sup> *Id.* at 55. The term “shuttle diplomacy” is not intended to draw a bright line distinction between EPA practice and the efforts many agencies routinely undertake in the course of developing ANPRMs, etc. Rather, this term simply denotes how EPA thinks of these various stakeholder engagement opportunities in a unified way, undertaken iteratively and with a particular set of goals in mind throughout.

<sup>84</sup> A few notes on cost savings may be worthwhile here. In both shuttle diplomacy and the somewhat more structured technical workshops and listening sessions deployed by EPA, cost savings in comparison to negotiated rulemaking are primarily realized as reduced pressure on agency resources to charter a FACA committee and convene a representative group of stakeholders. There may also be financial savings on the salary of a facilitator or travel expenses, though, depending on the nature of the engagement, these costs may be still present in listening sessions and technical workshops.

stakeholder group is somewhat more loosely defined than it would be under a negotiated rulemaking or in the case of an advisory committee.

Finally, high engagement efforts include Reg Neg, collaborative planning,<sup>85</sup> and public-private partnerships.<sup>86</sup> Here, significant collaboration among parties is intended to lead to a concrete, mutually agreed upon, final outcome. High engagement may additionally encompass some form of stakeholder action, such as implementation of voluntary pollution reduction programs.<sup>87</sup> An added benefit of deep, face-to-face engagement is that personal connections establish trust. Because stakeholder engagement is not a one-off activity, use of Reg Neg and other high engagement efforts may also help build trust that enables more functional working relationships among agencies and repeat players in the rulemaking process. Though it stands to reason that increasing trust should reduce the incidence of litigation and other conflicts over time, such outcomes are likely impossible to measure.

## B. Choosing between Negotiated Rulemaking and Other Engagement Options

There are many issues—such as the particular goals of a given stakeholder engagement exercise or the resources an agency is able to invest—that are at play in deciding which kind of process would be best for an agency to deploy in a given policymaking context. Some scholars and practitioners, particularly those focused on web-enabled public participation in policymaking, have framed engagement as a design problem.<sup>88</sup> A focus on design, or structure, is useful in that it brings to the surface that public engagement is a multi-faceted, long-term undertaking done with a particular set of outcomes in mind.<sup>89</sup>

It is worth noting that agency staff are not limited to using just one method of stakeholder engagement. As one moves forward in the policy development process, kinds of engagement that were not appropriate at early stages may become more beneficial. Throughout the discussion

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<sup>85</sup> One example of collaborative planning involved the development of a structured, repeatable multi-disciplinary analysis of IT projects, plans, and infrastructure overseen by the Office of Management and Budget (OMB) in connection with numerous stakeholder agencies. As with other collaborative engagement mechanisms, collaborative planning intends to draw on the benefits of stakeholder buy-in and trust-based, working relationships that result in more well-informed, streamlined outcomes than would be possible in more ad hoc engagement processes. *Collaborative Planning Methodology*, PHASEONE, <http://www.pocg.com/collaborative-planning-methodology/>.

<sup>86</sup> Public-private partnerships can be defined as long-term contracts between government and private entities, where private entities “participat[e] in the delivery and financing” of public projects. *P3 Defined*, FED. HIGHWAY ADMIN., <https://www.fhwa.dot.gov/ipd/p3/defined/>

<sup>87</sup> *Better Decisions*, *supra* note 77, at 6. It is worth noting that this handbook distinguishes agreement/consensus-building mechanisms such as negotiated rulemaking from kinds of engagement designed to lead to stakeholder action. In light of this report’s focus on negotiated rulemaking, we do not elaborate on that distinction here.

<sup>88</sup> Scholars (Archon Fung, *Putting the Public Back into Governance: The Challenges of Citizen Participation and its Future*, 75 PUB. ADMIN. REV. 513 (2015)), governments (*Designing a Public Engagement & Decision Making Program*, FED. HIGHWAY ADMIN., <http://contextsensitivesolutions.org/content/topics/process/involving-stakeholders/public-engagement/>), and civil society organizations (Becky Michelson, *Digital Citizenship and Engagement: Guides, Playbooks, and Resources*, <https://medium.com/engagement-lab-emerson-college/digital-citizenship-and-engagement-guides-playbooks-and-resources-1715302c17de#a2chbnsn9>) have recently focused on the design of stakeholder engagement and public participation processes in government decision-making.

<sup>89</sup> Lisa Blomgren Bingham, et al., *The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government*, 65 PUBLIC ADMIN. REV. 547, 555 (2005).

below, the focus remains on Reg Neg, although other processes are discussed in comparison to demonstrate the factors that cut for or against its use.

The list of factors examined below are intended to help agencies decide when using Reg Neg, compared to other stakeholder engagement options might be most appropriate. The factors have been drawn from the interviews with practitioners conducted as part of this study, in addition to a review of the literature. This list intends to highlight the most significant matters agency decision-makers must attend to. Ultimately, the guiding principle is that agency decision-makers must be thoughtful in their choice of process and endeavor to identify whether a particular process will meet the needs of the agency and stakeholders alike.

### 1. Stage in Policy Development

The early stages of policy development—when an agency is still gathering necessary facts and data, identifying stakeholder groups that could be affected, or choosing among the various alternative policy positions it may adopt—lend themselves to communication or low engagement efforts. By informing the public of the issues and goals an agency has under consideration, an agency promotes transparency and allows for early input of potentially valuable information.

Even at these early stages, however, agencies should anticipate how Reg Neg or other moderate to high engagement efforts may advance the latter stages of policy development. In particular, agencies can begin to identify the range of industry, public interest, and other stakeholders who could participate later on in technical workshops, listening sessions, and other forums. Indeed, EPA has relied on mechanisms like technical workshops frequently, often as procedurally simpler alternatives to Reg Neg.<sup>90</sup> Still, as the agency itself notes, different processes lead to different outcomes.<sup>91</sup> It is therefore essential for an agency to continuously evaluate what processes will meet its goals at any given time.

It is once the agency has fully fleshed out its policy aims—or at least narrowed these down to a few concrete options—and has gathered existing data and other materials on which it intends to rely, that it may best consider using Reg Neg to develop a consensus-based NPRM. Additionally, the immediacy with which an agency intends to act may influence the level of investment potential participants are willing to make. Particularly for those participants who have not previously engaged in Reg Neg, the knowledge that an NPRM is likely to issue with or without intensive stakeholder engagement is likely to incentivize participants to come—and stay—at the table.

### 2. Goals and Anticipated Outcomes of the Process

The nature of an agency's goals may be the most important determinant of the kind of public engagement to undertake. At the most basic level, every agency's goals will be shaped by its mandate, as specified by its founding statute and other legislation that directs the agency to take

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<sup>90</sup> For example, the EPA explains its use of technical workshops in the course of studying hydraulic fracturing in a report titled *2013 Technical Workshop Series on Hydraulic Fracturing: How Workshops Informed the EPA Study*, available at [https://www.epa.gov/sites/production/files/2013-12/documents/how\\_technical\\_workshops\\_informed\\_the\\_epa\\_study.pdf](https://www.epa.gov/sites/production/files/2013-12/documents/how_technical_workshops_informed_the_epa_study.pdf).

<sup>91</sup> The EPA's Better Decisions handbook is devoted to comprehensively defining and comparing the structures, methods, and outcomes of a range of engagement mechanisms. *Better Decisions*, *supra* note 77.

certain action.<sup>92</sup> Within these greater statutory boundaries, there are many goals an agency might pursue. As discussed above, these goals could range from communication that is designed to support public awareness of agency activities all the way to Reg Neg or collaborative planning, which involve iterative dialogue toward agreement between the agency and stakeholders. When an agency seeks in-depth feedback on a proposal, Reg Neg is one out of several options in the moderate to high engagement categories from which it might choose.

Some agencies have opted to use technical workshops and other processes rather than Reg Neg, citing not only cost but the fact that full consensus (full consensus here meaning unanimity on all issues) has been difficult to achieve. Since Reg Neg was originally developed, however, there has been significant debate about whether the process must result in full consensus to be considered successful. Reaching consensus on several issues, even if a few remain short of agreement, often places the proposal in a better position than it would have been otherwise.<sup>93</sup> It is not uncommon for negotiations to end with some unresolved problems—and it is impossible to know at the outset how a negotiation will play out. This need not detract from the success of a procedure. Rather, the committee should carefully consider at the outset what level of agreement it will consider successful.

When consensus, however defined, is the goal, it signals that participants must invest heavily in the process. This can cut against the process if parties are hesitant to commit to a single negotiated agreement that binds everyone. Hosting dialogues through technical workshops could be a preferable alternative in such cases, particularly where parties have not previously engaged in collaborative decision-making. Furthermore, an agency could explore during workshops and similar engagements whether Reg Neg would be worthwhile, before resources have been invested in the process.

On the other hand, the level of commitment required to reach consensus can incentivize participants to engage. While some have argued that contentious issues result in gridlock, which would stymie a consensus-oriented process, facilitators have argued that the goal of consensus can actually help address such gridlock. Rather than having “disparate groups [advocating for their own views], you have one group with a common problem [to solve].”<sup>94</sup> Indeed, Reg Neg inherently contemplates a neutral facilitator supporting the process, which may be particularly beneficial in contentious cases where parties could not otherwise coordinate agreement themselves.

Ultimately, agencies should decide at the outset whether consensus on all or some issues is the goal of a Reg Neg. Agencies should not give lip-service to consensus while seeing something short of consensus as “good enough.” If consensus is deemed necessary, the agency will have to

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<sup>92</sup> This raises additional challenges in interagency policymaking contexts. Agencies such as EPA and the Army Corps of Engineers must often work together, but they have different mandates. Communicating these statutory boundaries to stakeholders—whether in the course of negotiated rulemaking or another engagement process—will clarify what is on the table for discussion.

<sup>93</sup> Indeed, a committee has the power to decide how it defines consensus. That may mean unanimity on all issues, some issues, or none at all—partial consensus on all or part of a draft NPRM may be chosen as the most workable option. See the discussion *infra* Section IV.

<sup>94</sup> *Administrative Law & Regulation: What Next for Negotiated Rulemaking?*, Panel Transcript, National Lawyers Convention, FED. SOC. (Nov. 15, 2001), available for download at <http://www.fed-soc.org/publications/detail/what-next-for-negotiated-rulemaking-transcript> (hereinafter, Negotiated Rulemaking Panel).

frame issues appropriately and rely on a facilitator to guide parties toward agreement. If there is uncertainty as to whether participants can agree on a subset of issues being negotiated, the committee should prioritize transparency about these concerns. If these ground rules are not established at the outset, the agency and various participants may very well have divergent expectations. When these expectations are violated, the process is likely to break down. Agencies should not jeopardize their investment in Reg Neg by failing to establish goals and define success—whether that is full unanimity or only agreement on a subset of issues—from the beginning.

The foregoing considerations are also relevant to congressional decisions about whether and when to mandate that an agency use Reg Neg. Where issues have been contentious, the procedural protections of Reg Neg, and particularly the benefits of having a neutral facilitator, could help address them. Because the choice of process is no longer up to the agency, at least one point of contention has been removed. And, Congress’s mandate will make it clear to participants that a rule will be issued. However, as discussed in more detail below, Congress should also be aware that not all subjects are equally suited to negotiated rulemaking.

### 3. Issues for Discussion

The next factor an agency must consider when determining the optimal mechanism for public engagement is: what sorts of issues does it seek public input on? Here we focus on what is required to properly select and frame issues for Reg Neg.

One reason it is essential to adequately select and frame issues is to ensure that the agency can accurately identify the range of stakeholders who should participate in the negotiation. The Negotiated Rulemaking Act lists several factors for agencies to consider when deciding whether Reg Neg is appropriate. One factor explicitly directs agency decision-makers to consider whether “there are a limited number of identifiable interests that will be significantly affected by the rule.”<sup>95</sup> This factor was originally intended to underscore that too many parties would make the process unmanageable. However, this consideration also reinforces that the choice of participants is closely tied to the issues under consideration. If issues are not prepared thoughtfully in advance of Reg Neg, they could be framed in such a way that they appeal to more, or different, participants than the agency envisioned.

Further, for participants to negotiate effectively, the issues must be clearly defined. Vague questions are not suited to the kind of precise argumentation, well-informed by the best available evidence, that is needed for parties to reach consensus on a draft proposal. Clearly defining the issues becomes even more important when the questions under consideration are value-laden. Parties cannot bargain over or reach agreement on values, such as whether protecting waterways is more important than promoting business growth. However, parties can agree on choices or positions underlying their values—such as which pollution standards to implement to protect a waterway, or the period of time over which such standards will be implemented.<sup>96</sup> A skilled convenor can help remind participants that the purpose of the negotiation is not to determine which

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<sup>95</sup> The Negotiated Rulemaking Act of 1996, Pub. L. 104-320 (amending Pub. L. 101-648 and Pub. L. 102-354), § 563.

<sup>96</sup> Michelle Maiese, *Interests, Positions, Needs, and Values*, BEYOND INTRACTABILITY, <http://www.beyondintractability.org/essay/interests>.

value will “win,” but how to best achieve balance among co-existing values by choosing from a set of policy options to achieve a particular regulatory goal.

If the issues are well-defined, but the underlying facts and data are uncertain or conflicting, Reg Neg can be used to clarify information. Especially where such data is needed to conduct benefit-cost analysis, Reg Neg may enable the agency to gather information it would otherwise be unable to access. For example, in its negotiated rulemakings to set energy efficiency standards, the Department of Energy has used consultants to gather data from members of industry and present the information in aggregate.<sup>97</sup>

One final set of questions that fall under the umbrella of framing issues for discussion is whether there are positions an agency is not willing to negotiate on. If a Reg Neg gets close to consensus but is then halted because the agreement was deviating from an agency’s preferred outcome, participants’ investment in the process and trust in the agency may be significantly damaged. Clearly defining what is and is not up for negotiation—or, what the acceptable alternatives would look like for an agency—is essential at the outset of a negotiation. In a similar vein, the agency should be sensitive to issues that, without consensus, will block the negotiation. It may largely fall to the convenor/facilitator to determine such fault lines early in the process of framing issues and identifying participants.

The questions involved in properly selecting and framing issues for Reg Neg are also essential for Congress to consider when mandating that an agency use the process. Where issues are nebulous or involve a great number of stakeholders, it is likely that the process will not resolve the most difficult aspects of a rule. If the agency is left to resolve the thorniest questions, the process may not have been worth the cost, because it is with respect to the most difficult questions that Reg Neg is most useful. One way to address this could be for agencies or experienced facilitators to offer technical assistance on legislation proposing to mandate negotiated rulemaking.

#### 4. Other Constraints to Consider

Finally, even where the stage in the policymaking process, goals, and issues seem appropriate for Reg Neg, resource and other constraints may caution against use of the process. When assessing the cost of using Reg Neg, however, agency decision-makers should balance that cost against the benefits the process can bring (particularly that no other process is as well-suited to develop broad stakeholder consensus) and the cost that will necessarily be incurred by using another process.<sup>98</sup>

Cost. The major costs involved in conducting Reg Neg involve hiring a facilitator, unless the agency has facilitators on staff, and, in some cases, another expert who consults on technical questions for the committee. As mentioned above, consultants can assist a committee in making factual determinations, but this presents an added cost. Reports for each federal advisory committee disclose the amount paid to experts, facilitators, and others who assist the advisory

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<sup>97</sup> E.g., *ASRAC Full Committee Meeting Minutes Summary*, DEP’T OF ENERGY. (April 28, 2016), available for download at <https://www.regulations.gov/document?D=EERE-2013-BT-NOC-0005-0080>.

<sup>98</sup> In other words, the agency should determine the marginal cost of Reg Neg (i.e., [Cost of Reg Neg] – [Cost of the Alternative the Agency Would Otherwise Select]). The question, then, is whether investing in additional resources would be worthwhile to capture the additional benefits negotiated rulemaking would bring.

process. The cost depends on the scope of the issues being analyzed; for an entire Reg Neg, the amount paid to experts is typically \$10,000 to \$15,000 for a relatively bounded issue.<sup>99</sup> Another set of cost concerns revolves around whether interested groups who should be at the table will be unable to participate due to the cost of travel, limited staff availability, etc. Video conferencing can mitigate this barrier, though in-person attendance is ideal to promote consensus-building.

*Time.* Another set of considerations that may caution against the use of negotiated rulemaking involves the existence of a deadline for issuing a rule, whether imposed internally, by statute, or by a court. Reg Neg has been criticized for taking longer, in a number of cases, than traditional rulemaking. At least part of this delay (usually a minimum of six months) can be attributed to the need to form an advisory committee—which is not required in typical informal rulemaking. Gridlock in the negotiation process could introduce further delay. As such, under these circumstances it may be preferable to use listening sessions or workshops to gather information from stakeholders and foster dialogue, where possible, while proceeding with the agency’s usual informal rulemaking schedule.

On the other hand, cheaper, less structured alternatives to Reg Neg like listening sessions and technical workshops could, under certain circumstances, become subject to FACA, which would defeat the purpose of avoiding Reg Neg out of concern for delay. EPA notes that FACA is not necessarily “limited to situations in which the Agency looks for consensus recommendations or advice. Rather, it is the group dynamic that can make an information exchange meeting subject to a legal challenge.”<sup>100</sup> As such, agency staff must “exercise caution to manage the meeting carefully so that discussion does not move into group advice that would be subject to FACA.”<sup>101</sup>

*External legal requirements.* Two final constraints—which have halted Reg Negs in the past—are worth noting in this section. The first is that agencies should be mindful of circumstances where changes to other rules could impact the negotiation at hand. For instance, a Reg Neg that refers to external energy efficiency standards or the calculation of payments to doctors under Medicare<sup>102</sup> could fail to reach agreement if those outside rules are subject to planned review in the near future. Secondly, agencies should be aware of unresolved legal questions, or differing interpretations of a legal provision, that would affect the issues under negotiation. If parties do not agree on the nature of some legal rights and obligations, negotiation likely will be unable to settle those disagreements.

Ultimately, if there are serious concerns on any of the foregoing possible constraints, Reg Neg may not be the optimal choice for stakeholder engagement. However, if other engagement methods present similar problems, or if Reg Neg is likely to present benefits such as consensus that cannot otherwise be achieved, the process should be conducted with careful planning.

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<sup>99</sup> *E.g.*, Committee Cost, Appliance Standards and Rulemaking Federal Advisory Committee, FACA DATABASE, <http://www.facadatabase.gov/committee/committee-cost.aspx?t=c&cid=2445&aid=42>. As always, these costs are highly variable depending on the nature of the Reg Neg. For the same reason we do not attempt here to quantify the total costs of Reg Negs in general.

<sup>100</sup> *Better Decisions*, *supra* note 77, at 9.

<sup>101</sup> *Id.* at 9.

<sup>102</sup> Coglianesse, *supra* note 7, 1268 (discussion in footnote 75).



## IV. Case Studies

We now review a sample of Reg Neg case studies, some of which reached consensus, some of which did not reach consensus but were considered successful by those involved, and some that failed to reach a successful outcome as defined by the negotiation committee. In describing and analyzing these cases, we hope to illustrate the foregoing discussion of factors that influence the success of Reg Neg.

### A. Full Consensus: Coast Guard's *Oil Spill Vessel Response Plans* Rulemaking

Shortly after the *Exxon Valdez* oil spill, Congress passed the Oil Pollution Act of 1990 (OPA).<sup>103</sup> The Act required oil tankers to prepare and file oil spill clean-up plans by February 18, 1993; tankers that failed to do so would no longer be able to “handle, store, or transport oil” without authorization from the President.<sup>104</sup> Directed by Congress to implement the Act, the Coast Guard quickly moved to set standards so that affected entities would have adequate time to develop plans in compliance with the statute.

After issuing its notice of proposed rulemaking in August 1991,<sup>105</sup> the Coast Guard held a public workshop on November 14, 1991.<sup>106</sup> Based on feedback from the roughly 200 attendees, the agency issued a notice of intent to form a negotiated rulemaking committee on November 18, 1991. The committee was established on January 20, 1992 and, after only two and a half months of meetings, reached consensus on a draft notice of proposed rulemaking.<sup>107</sup> The rule went into effect seven months later.<sup>108</sup>

The driving forces behind the committee's ability to reach full consensus—and at such speed—were the immediacy of the timeline and clarity of requirements imposed by the OPA. The only questions left on the table were how to accomplish what Congress had mandated. Additionally, a discrete, readily identifiable set of stakeholders—many of whom already interacted with the Coast Guard on a repeat basis—were likely to be affected and could easily be brought into the negotiation. Finally, these stakeholders had a concrete incentive to work quickly toward negotiated agreement. In the absence of clear guidelines issued by the Coast Guard well in advance of the February 18, 1993 deadline, oil tanker operators would have been forced to seek potentially uncertain Presidential authorization to continue shipping.

### B. Partial Consensus: EPA's *Asbestos in Schools* Rulemaking

In 1986, Congress passed the Asbestos Hazard Emergency Response Act (AHERA)<sup>109</sup> in response to heightened concern, and confusion, about the risks posed by asbestos in schools.

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<sup>103</sup> Harter, *supra* note 56, at 43.

<sup>104</sup> *Id.* 33 U.S.C. S 1321(j)(5)(F) & (G).

<sup>105</sup> Harter, *supra* note 56, at 43.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> While a number of additional steps took place—such as the issuance of an interim final rule and a final rule much later—Harter rightly notes that the agency quickly achieved its primary goal of issuing clear, standard guidelines such that regulated entities could proceed with certainty and rapidly develop oil spill clean-up plans before the statutory deadline.

<sup>109</sup> Toxic Substances Control Act Subchapter II: Asbestos Hazard Emergency Response (15 U.S.C. § 2641-2656).

Although parents and educators were by this time well aware that asbestos posed a significant health risk, and Congress had previously addressed the matter through the Asbestos School Hazard Abatement Act (ASHAA) of 1984, there remained continued uncertainty about whether removal was the best method for asbestos abatement.<sup>110</sup> Additionally, by this time there was growing awareness that contractors often lacked the necessary guidelines to identify asbestos and remove it properly without increasing the amount of asbestos dust to which contractors, students, and educators would be exposed.<sup>111</sup>

AHERA directed EPA to promulgate rules defining how asbestos-containing materials should be identified in school buildings, defining the appropriate response of schools when such materials are damaged (e.g., could release asbestos dust into the air), setting standards for the transportation and disposal of asbestos-containing waste, and requiring local educational agencies to develop asbestos management plans.<sup>112</sup> AHERA required EPA to issue a notice of proposed rulemaking covering these directives by April 20, 1987—180 days after the statute’s enactment.<sup>113</sup> Should the agency fail to do so, the Act required local educational agencies to nevertheless carry out the Act’s regulatory directives in accordance with EPA’s current guidance.<sup>114</sup>

EPA elected to use Reg Neg, and convened a committee comprised of “representatives of education groups, school service employees, asbestos product manufacturers, asbestos abatement workers, contractors, designers, industrial hygienists, school districts, public interest groups, States, and EPA.”<sup>115</sup> Meeting for eleven days between February and April 1987, 20 out of 24 total members agreed on the content of the proposed rule issued April 30, 1987.<sup>116</sup> As such, EPA’s effort to reach agreement on a complex, far-ranging set of rules in a compressed timeline was largely successful.

Some members of the committee expressed concerns—some of which related to the rule’s substance and some of which related to the conduct of the negotiation. Substantively, several experts disagreed that visual inspection was sufficient to accurately identify asbestos risk, arguing air sampling was instead the only reliable method.<sup>117</sup> Additionally, the continued emphasis on removal, rather than other methods of asbestos abatement, failed to account for the fact that asbestos removal often increased exposure above pre-removal levels.<sup>118</sup> As to the conduct of the negotiation, some participants felt the composition of the group had over-included some groups and under-included others.<sup>119</sup>

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<sup>110</sup> JACQUELINE KARN CORN, ENVIRONMENTAL PUBLIC HEALTH POLICY FOR ASBESTOS IN SCHOOLS: UNINTENDED CONSEQUENCES, 80–82 (1999).

<sup>111</sup> *Id.*

<sup>112</sup> Toxic Substances Control Act Subchapter II: Asbestos Hazard Emergency Response (15 U.S.C. § 2641-2656).

<sup>113</sup> *Negotiated Rulemaking at the Environmental Protection Agency*, in ESD REGULATORY PROCEDURES MANUAL, ENVIRO. PROTECTION AGENCY (Nov. 18, 1994), available at <https://yosemite.epa.gov/oaqps/rdms.nsf/591caf4ab155e210852566de00539f57/24159174b32278f085256707005b8dc9!OpenDocument> (hereinafter, *Negotiated Rulemaking at EPA*).

<sup>114</sup> Toxic Substances Control Act Subchapter II: Asbestos Hazard Emergency Response (15 U.S.C. § 2641-2656).

<sup>115</sup> *Negotiated Rulemaking at EPA*, *supra* note 112.

<sup>116</sup> CORN, *supra* note 109, at 84.

<sup>117</sup> *Id.* at 83–84.

<sup>118</sup> *Id.* at 84.

<sup>119</sup> Freeman & Langbein, *supra* note 62, at 83.

Nevertheless, subsequent interviews with participants in the asbestos negotiation reported satisfaction with the process. Of the 16 participants interviewed by Kerwin and Langbein, 91% agreed that over three-quarters of issues were resolved through negotiation or determined by the presentation of data and analysis.<sup>120</sup> Educators involved in the process viewed it so favorably that they urged senators to include a negotiated rulemaking mandate for the Department of Education’s rulemaking on compensatory-education programs.<sup>121</sup> Notably, this group did not take a strict, unanimous view of consensus at the outset of the negotiation.<sup>122</sup> This flexible approach may have helped the negotiation proceed smoothly, despite the concerns mentioned above.

Additionally, this flexibility may have helped mitigate the restrictions imposed by the tight timeline mandated by Congress. Indeed, according to Kerwin and Langbein, 27% of respondents involved in the negotiation felt they had too little time to draft the proposal.<sup>123</sup> Had a stricter view of consensus been taken, the participants would likely not have been able to reach agreement in the timeline required by AHERA. If EPA had proceeded without a consensus-based proposal, stakeholder groups would certainly not have felt as positively about the process, and may have had significantly greater cause to bring legal challenges to the rule.<sup>124</sup>

### C. Failure to Reach Consensus: NPS Cape Hatteras Off-Road Vehicles Rulemaking

In 2005, the National Park Service (NPS) began exploring the feasibility of using Reg Neg to develop a proposed rule for the use of off-road vehicles (ORV)<sup>125</sup> at the Cape Hatteras National Seashore (CAHA).<sup>126</sup> Executive Order 11,644 directs the NPS to use informal rulemaking to establish acceptable routes and other requirements for the use of off-road vehicles on all public lands the agency oversees.<sup>127</sup> Due to significant disagreement among the stakeholders who would be affected by the regulation, NPS had not yet successfully put an ORV management plan in place for CAHA.<sup>128</sup>

<sup>120</sup> *Id.* at 86.

<sup>121</sup> The final bill did not ultimately require the Department of Education to use negotiated rulemaking, but rather strongly urged its use. Julie A. Miller, *E.D. to Try ‘Negotiated Rulemaking’ Process*, *EDU. WEEK* (Feb. 17, 1988).

<sup>122</sup> Freeman & Langbein, *supra* note 62, at 92.

<sup>123</sup> *Id.* at 104.

<sup>124</sup> *Id.* One legal challenge to the asbestos rule was brought, but failed. While this indicates that negotiated rulemaking does not eliminate legal challenges, it stands to reason in this case that potential challenges were reduced in scope and number.

<sup>125</sup> *Environmental Mediation Services/Consensus Building Institute to Conduct Feasibility Study*, NAT’L PARK SERV., March 6, 2005, available for download at <https://parkplanning.nps.gov/document.cfm?parkID=358&projectID=10641&documentID=11056> (hereinafter, *CBI to Conduct Feasibility Study*). Off-road vehicles are “any motorized vehicle designed for or capable of cross-country travel on or immediately over land, water, sand, snow, ice, marsh, swampland, or other natural terrain,” except motor boats or military and emergency vehicles, and include “motorcycles, minibikes, trial bikes, snowmobiles, dune-buggies, all-terrain vehicles, and others.” Exec. Order 11,644, 37 Fed. Reg. 2877 (Feb. 9, 1972), 3 C.F.R. 322 (1974), as amended by Exec. Order No. 11,989, 3 C.F.R. 120-21 (1978).

<sup>126</sup> *CBI to Conduct Feasibility Study*, *supra* note 125.

<sup>127</sup> Exec. Order 11,644, 37 Fed. Reg. 2877 (Feb. 9, 1972), 3 C.F.R. 322 (1974), as amended by Exec. Order No. 11,989, 3 C.F.R. 120-21 (1978).

<sup>128</sup> *Negotiated Rulemaking Feasibility Assessment Report*, CONSENSUS BUILDING INSTITUTE, April 4, 2005, at ii, available for download at <https://parkplanning.nps.gov/document.cfm?parkID=358&projectID=10641&documentID=14670> (hereinafter, *Final Feasibility Report*).

Though both federal and local actors recognized the need to balance between environmental concerns and the tourism-based local economy on Cape Hatteras, the parties struggled to determine what the right balance should be. Since the 1930s, the relationship between the NPS and locals on the Outer Banks had been contentious.<sup>129</sup> Local and state officials largely opposed federal control of the seashore, and wanted to retain decision-making control over the socially and economically important land at issue.<sup>130</sup> Federal officials, however, had been charged with a number of overlapping duties related to environmental conservation—including protecting the habitat of the piping plover, listed as threatened in 1986.

Given this complicated history, NPS hoped that Reg Neg would help manage the conflict it anticipated would arise in the course of its rulemaking. NPS therefore requested that the U.S. Institute for Environmental Conflict Resolution conduct a feasibility assessment with stakeholders—including local businesses, civic organizations, and environmental groups—to determine whether Reg Neg would likely “be successful in resolving issues around CAHA ORV management and regulations.”<sup>131</sup>

Based on the interviews the Institute’s mediators conducted with stakeholders, the final feasibility report identified several themes. Unsurprisingly, the two main, competing perspectives that arose were 1) concerns that ORV restrictions would burden residents’ and tourists’ use of the beaches and, in the latter case, harm local businesses and 2) that use of ORVs would pose a persistent risk to both protected and unlisted plants and wildlife.<sup>132</sup> At the same time, each of the interviewed stakeholders expressed interest in negotiated rulemaking, and many noted that existing ad hoc management of ORV use failed to achieve “the certainty and predictability that a management plan and regulations [would] provide.”<sup>133</sup> Long-time residents in particular hoped to improve the relationship between themselves and NPS—whether through Reg Neg or other means.

The foregoing factors cut both for and against Reg Neg. Taking stock of this, the Institute nevertheless made a cautious recommendation that NPS proceed with the process, noting that the process “can yield important benefits even if agreement is not reached, and has a modest chance of success if [certain] conditions are met.”<sup>134</sup> Notably, around this time NPS had received both petitions for rulemaking and notices of intent to sue from environmental groups on issues related to the ORV and endangered species management.<sup>135</sup> Given this heightened pressure to proceed with regulation of ORV use in CAHA, and the prospect that Reg Neg offered the highest chance of success, NPS decided to proceed with the process, establishing the committee in December 2007.<sup>136</sup>

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<sup>129</sup> Lavell Merritt, *Evaluating a Negotiated Rulemaking Process at Cape Hatteras National Seashore: Toward Piping Plover and People in One Place*, Dissertation (Dec. 2009), at 9–10, <http://oaktrust.library.tamu.edu/bitstream/handle/1969.1/ETD-TAMU-2009-12-7524/MERRITT-DISSERTATION.pdf?sequence=3> (hereinafter, Merritt, *Evaluating Negotiated Rulemaking at Cape Hatteras*).

<sup>130</sup> *Id.* at 10.

<sup>131</sup> *Final Feasibility Report*, *supra* note 128, at i.

<sup>132</sup> *Id.* at ii.

<sup>133</sup> *Id.* at iii.

<sup>134</sup> *Id.* at iii to iv.

<sup>135</sup> *Id.* at ii.

<sup>136</sup> Establishment of Negotiated Rulemaking Advisory Committee for Off-Road Vehicle Management, Cape Hatteras National Seashore, 72 Fed. Reg. 72,316 (Dec. 20, 2007).

Ultimately, after just over a year of public meetings, the committee determined that it could not reach consensus. After the final committee meeting on February 3, 2009, an Integration Workgroup was formed to consolidate the information and proposals developed in the preceding year and make recommendations for a consensus plan, if possible, to the full committee.<sup>137</sup> Though the Workgroup struggled to agree on what documents to provide the committee, it ultimately presented two proposals—Option A and Option B—mapping different possible routes for areas closed, open, or seasonally open to ORVs.<sup>138</sup> Option A largely expressed the preferences of the local community and business owners, as well as the county government, while Option B reflected the concerns of environmentalists and stakeholders who privileged pedestrian, rather than vehicular, access.<sup>139</sup>

Though both plans had some areas of agreement, the stakeholders representing the opposing perspectives were unable to propose a consensus agreement, nor was the committee able to reach agreement in its consideration of the two options.<sup>140</sup> Ultimately, the complexity of the issues involved in striking the right balance between environmental groups, the local community, and business concerns undermined the committee’s ability to reach consensus. For example, while all might have agreed that some areas should be protected by seasonal route closures to protect nesting or mating wildlife, not all stakeholders agreed on the length of these seasons. As a procedural matter, some committee members viewed Options A and B as packages. Because each Option necessarily attempted to balance competing interests through various trade-offs, particularly in the details of which routes and areas would be closed or open at what times, these members felt that deviating from the two proposals would have subverted the Workgroup’s deliberations (and, in effect, would have put the committee back in the same position as when it created the Workgroup).<sup>141</sup>

In reviewing the outcome of this Reg Neg, it appears the history of conflict among stakeholders proved fatal to the parties’ ability to reach consensus. By all accounts, the committee seemed well-balanced, guided by knowledgeable facilitators, and fully aware of the relevant facts and data—all indicators of what should lead to a successful Reg Neg capable of drafting a consensus NPRM. Moreover, participants were willing to negotiate and hoped the process would help repair relationships among federal officials and the local community.

A review of public comments submitted at the committee’s final meeting illuminate some possible reasons why the committee, despite its strengths, was unable to fully address local stakeholders concerns. Numerous public commenters criticized the scientific considerations underlying suggested beach closures, suggesting instead that pedestrian traffic, natural occurrences including unseasonal heat waves, storms, and waves were just as damaging, if not more so, to threatened habitats than ORVs.<sup>142</sup> To be sure, these comments do not necessarily reflect the views of the committee, which was equipped with significantly more information and capacity to

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<sup>137</sup> *Meeting 13 Summary - Cape Hatteras National Seashore Negotiated Rulemaking*, NAT’L PARK SERV. (May 18, 2009) 2, <https://parkplanning.nps.gov/document.cfm?parkID=358&projectID=10641&documentID=27588> (hereinafter Meeting #13 Summary).

<sup>138</sup> *Id.* at 2–3.

<sup>139</sup> *Id.* at 3.

<sup>140</sup> *Id.* at 5.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 5–7.

deliberate. Nevertheless, they demonstrate that many in the local community perceived that environmental concerns had placed undue emphasis on ORV use in comparison to other factors.

Importantly, however, NPS was directed to regulate ORV use with concern for environmental impacts, not to regulate the totality of beach activity in light of environmental concerns. It is unclear how, or whether, NPS could have effectively remedied the pervasive misunderstanding of the legal landscape, particularly given how values and factual determinations were interwoven in the local business community's position. While the inevitability that a rule will issue typically cuts in favor of Reg Neg, here the decades-long delay NPS faced in achieving its regulatory mandate may have reduced the urgency parties would feel to come to consensus. In spite of the negotiation's ultimate failure, use of Reg Neg was likely one of the most effective avenues NPS could have pursued. Certainly, this is a case where an agency was struggling to issue a rule at all.<sup>143</sup>

## V. Planning for a Successful Negotiated Rulemaking

This report has reviewed the origin, early use, and decline of Reg Neg—most importantly highlighting the goals the process is meant to achieve and the original factors that proponents suggested would most likely lead to successful outcomes. Situating Reg Neg in the context of other stakeholder engagement options that agencies might use, as well as examination of relevant case studies, further illustrate when and why agencies might elect to undertake the process.

Once an agency has made the decision to undertake Reg Neg—or if Congress has mandated that the agency use the process—staff should take care in planning for each stage. Indeed, Philip Harter has expressed the concern that “inattention to detail and taking short-cuts” have reduced the effectiveness of Reg Neg and negatively affected how the process is perceived.<sup>144</sup>

This section will examine each of the following stages of a Reg Neg in turn: selecting a neutral; assembling a committee; conducting the negotiation and finalizing the proposal; and issuing the NPRM and proceeding with informal rulemaking. It will discuss existing agency approaches to each of these steps in the process and highlight best practices.

### A. Selecting a Neutral

*Role of the neutral.* When selecting a neutral (convenor and/or facilitator) for a Reg Neg, the agency should clearly define the scope of his or her responsibilities. As referenced above, the Negotiated Rulemaking Act refers to a convenor as the neutral responsible for helping an agency decide whether to proceed with the process and, if so, define the issues for discussion and select participants; the Act goes on to define a facilitator as a neutral who mediates throughout the negotiation itself.<sup>145</sup> The same person can fill both roles, and the terms are therefore sometimes used interchangeably.

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<sup>143</sup> Negotiated Rulemaking Panel, *supra* note 94.

<sup>144</sup> *Id.*

<sup>145</sup> Pub. L. No. 101-648, 104 Stat. 4969, §562. For further discussion and examples of the convening process, see NEGOTIATED RULEMAKING SOURCEBOOK, *supra* note 34, at 123–192.

Attentiveness to such terminology matters only to the extent that confusion may result if the terms are unclear or carry certain connotations for other participants. For example, some agencies might avoid referring to their neutral as a mediator, insofar as the term calls to mind the adversarial posture of litigation. What is most important is ensuring that agency staff, the neutral(s), and participants are aware of what role the neutral will play.

All such individuals avoid taking positions as to the substance of a negotiation, but the extent to which they move the process along can vary from intensive to minimal.<sup>146</sup> Agency staff may envision using a neutral playing primarily an organizational role from the outset of the negotiation to its conclusion—selecting committee participants, overseeing meetings, and preparing the committee’s reports. Because it is an agency’s responsibility to formulate policy, there may be sensitivity when a neutral moves beyond these organizational responsibilities.

While a Reg Neg can be conducted with a minimal role for the neutral, many would see their role in the negotiation as much more active.<sup>147</sup> Individuals with ADR, facilitation, and mediation experience are trained to move the committee toward the process’s goal—which, in Reg Neg, is to develop a well-informed, consensus-based draft NRPM. Under this view, the neutral may advance the negotiation in many ways, including by helping participants identify areas where more facts are needed, clearly articulating issues and concerns, and ranking priorities.

Additionally, in contentious negotiations, the neutral can work one-on-one with individual participants, when necessary, to persuade those who are dissatisfied to stay at the table and be productive. Such techniques are classic in mediation contexts and take advantage of the neutral’s role as a non-party. Given the time and resources invested in Reg Neg, it is likely that selecting a neutral who can actively advance, rather than merely organize, the negotiation will lead to a better draft proposal.

*Framing the issues.* The timing of when a facilitator is brought into the process makes a difference. If an agency contacts a convenor as soon as it is considering using Reg Neg, he or she can provide input into whether the issues the agency wants to negotiate are suitable for the process. The convenor can then also help frame the issues for negotiation by the committee.

In some cases, particularly where there is a statutory mandate directing the agency to assemble a committee, an agency may take the lead on defining the issues for negotiation and identifying participants, only recruiting a convenor after these steps are complete. Regardless of when a convenor is brought in, however, there may be value in opening the negotiation with a proposal covering all topics that would need to be in an NPRM. This can support the negotiation by allowing participants to see there are some areas on which they agree. Participants may find this easier than having to negotiate only the thorniest issues under negotiation.

#### B. Assembling the Committee

*FACA requirements.* First, the procedural aspects of assembling the negotiated rulemaking committee largely revolve around FACA. As has been mentioned briefly in the previous sections,

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<sup>146</sup> *Better Decisions*, *supra* note 77, at 31.

<sup>147</sup> *Id.*

many have pointed to FACA requirements as a significant contributor to delay and complexity in Reg Neg.

In 1993, President Clinton issued an Executive Order to reduce the number of federal advisory committees, and limit the creation of new committees not required by statute.<sup>148</sup> The General Services Administration (GSA), which reviews and approves all FACA charters, has been tasked with enforcing an upper limit of 534 discretionary committees.<sup>149</sup> Although this ceiling has not been reached, a widespread perception persists that securing approval for a discretionary advisory committee is challenging. As a result, many agencies have sought to minimize use of advisory committees and, when they do prepare charters, staff may invest significant resources into drafting the charter to support its approval.<sup>150</sup>

While the internal procedures for establishing an advisory committee can be time-consuming, the process does not otherwise appear to be difficult. From our interviews, a six-month waiting period to approve and form a committee seems common. Agency decision-makers have often sought to avoid such delay through technical workshops and other methods that provide some structure for soliciting input, but avoid group advice. However, where systematic feedback from multiple stakeholders is needed, other mechanisms may be more procedurally stymied. For example, it could take well over a year to create and receive approval for a survey instrument under the Paperwork Reduction Act.<sup>151</sup> If an agency contemplates using such an instrument to inform a rulemaking, Reg Neg could prove a procedurally preferable process—assuming the policy under development is otherwise suited to the considerations discussed throughout this report.

Still, there are several ways agencies can manage the delay and resource costs associated with creating advisory committees. One approach is to charter a parent advisory committee, and create sub-committees for individual Reg Negs. In this way, the agency need only go through the chartering process once, though the charter does need to be renewed periodically. Sub-committees may comply with FACA requirements—such as opening meetings to the public and publishing notices in the Federal Register—but need not do so. The parent committee could be large, and serve as the primary source of participants on individual sub-committees. Alternatively, an agency could use a small, steering parent committee and select participants for individual Reg Negs even if those individuals do not sit on the parent committee.

The latter approach may be most appropriate in highly technical areas of rulemaking where stakeholders will frequently work together. The Department of Energy’s (DOE) Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC) serves as a standing Reg Neg

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<sup>148</sup> Exec. Order No. 12,838, 58 Fed. Reg. 8207 (Feb. 10, 1993).

<sup>149</sup> Administrative Conference Recommendation 2011-7, *The Federal Advisory Committee Act – Issues and Proposed Reforms*, at preamble.

<sup>150</sup> Bull, *supra* note 73, at 36–37.

<sup>151</sup> The Department of Health and Human Services estimates that clearance of a survey instrument (or other “information collection” under the Paperwork Reduction Act takes six to nine months. This does not include the time an agency spends drafting and reviewing a survey before initiating the clearance process. *Frequently Asked Questions about PRA/Information Collection*, DEP’T HEALTH & HUMAN SERV., <https://www.hhs.gov/ocio/policy/collection/infocollectfaq.html>.



body for setting energy efficiency standards for appliances and commercial equipment.<sup>152</sup> The ASRAC itself is comprised of 13 members who oversee the negotiations of sub-committees (“working groups,” in DOE parlance) on discrete topics, such as manufactured housing.<sup>153</sup> These sub-committees will necessarily be comprised of members other than those who serve on the parent committee, though the participants who serve on both the parent and particular sub-committee can supplement the facilitator’s effort to mentor new participants in the norms of negotiation. Parent committee members also facilitate exchange with the other members of the parent committee. The latter role is particularly important, because under FACA parent committees may not merely rubber stamp the work of sub-groups.

Another approach to the parent-sub structure is used by the Federal Aviation Administration (FAA). FAA uses rulemaking committees,<sup>154</sup> which are ad hoc bodies unique to the agency, to advise on technical aspects of a particular ongoing rulemaking (Aviation Rulemaking Committees or ARCs); FAA also uses a standing advisory committee for Reg Neg and other structured public participation (Aviation Rulemaking Advisory Committees or ARACs).<sup>155</sup> ARACs comply with FACA (unlike ARCs, which are statutorily exempt). ARAC sub-committees, much like those used by DOE, are formed to address particular topics (whether through formal negotiated rulemaking or otherwise) and also voluntarily comply with all FACA requirements other than chartering, such as holding open meetings and keeping detailed meeting minutes.<sup>156</sup>

Though the above approaches can net significant benefits, a few potential drawbacks of the parent-sub process should be noted. Depending on an agency’s policies, the time required to form a sub-committee could be equal to that required for chartering a new advisory committee. Agencies should also exercise caution in using an existing committee to serve as the parent for a Reg Neg sub-committee when the parent committee was not designed for that purpose. Because the activities of the sub-committee must be routed through the parent, the sub-committee’s work could be disrupted if the parent imposes its procedural requirements (e.g., rule on preparing meeting summaries) on the sub-committee without consideration for how the two committees’ goals differ.

Finally, when Congress mandates that an agency use Reg Neg, an advisory committee would thereby be required by statute and not fall under the category of discretionary committees

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<sup>152</sup> *Appliance Standards and Rulemaking Federal Advisory Committee*, DEP’T OF ENERGY, <https://energy.gov/eere/buildings/appliance-standards-and-rulemaking-federal-advisory-committee> (hereinafter, ASRAC overview).

<sup>153</sup> *Id.*

<sup>154</sup> FAA is authorized by statute to use rulemaking committees—“groups of aviation specialist[s] who evaluate issues that could result in rulemaking”—that are exempt from FACA. *The Office of Rulemaking Committee Manual*, OFFICE OF RULEMAKING, FED. AVIATION. ADMIN., Part I: Chapter 2.1, [https://www.faa.gov/regulations\\_policies/rulemaking/committees/documents/media/Comm\\_001\\_015.pdf](https://www.faa.gov/regulations_policies/rulemaking/committees/documents/media/Comm_001_015.pdf) (hereinafter, FAA Committee Manual).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at Part III: Chapter 1.8. Professor Hannah Wiseman provides another example of how agencies might use standing advisory committees to engage in negotiated rulemaking in her case study on the Federal Railroad Administration’s rulemaking to “address accidents involving trains carrying crude oil and ethanol.” See Hannah J. Wiseman, *Negotiated Rulemaking and New Risks: A Rail Safety Case Study*, 7 WAKE FOREST J. L. & POL’Y (forthcoming 2017), 106–108, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2796577](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2796577).

capped by GSA. In some cases, Congress has exempted agencies from FACA requirements when mandating the use of Reg Neg. If Congress chooses not to do so, an agency will likely require at least six months to form the committee before it can begin substantive work on the rules it has been directed to issue.

*Selecting the participants.* Second, the convenor will recommend and the agency will select the participating stakeholders who will serve on the committee (or, in the case of some statutorily mandated Reg Negs, the agency will select the stakeholders directly). The main requirement here is balance—ensuring all identifiable interests are represented at the negotiating table. As highlighted by Philip Harter’s original report to ACUS on Reg Neg, “negotiation would be inappropriate for a regulation that would affect many interests in such diverse ways that representation by a few individuals or teams of individuals would be impossible.”<sup>157</sup>

From past interactions with stakeholders, agencies will have a general sense of the parties who may be interested in a specific Reg Neg. However, it is important to avoid defaulting to the “usual players.” Indeed, the role of a convenor here can parallel his or her role in framing the issues for discussion. Through informational interviews with stakeholders the agency has already identified, a convenor can identify sub-groups or alternative positions taken by different members of industrial, civil, and other interest groups. In so doing, the convenor can best ensure that each group that will be affected differently by the proposed rule has its own seat at the table. If done properly, Reg Neg can in this way “level the playing field and eliminate the chance that [one party] is going to hijack [other interests]”.<sup>158</sup>

### C. Conducting the Negotiation and Reaching Consensus

While the conduct of the negotiation will comprise the bulk of time and effort invested by the agency, most relevant considerations have already been discussed in this report. This only reinforces how essential early, thoughtful planning is to conducting a successful Reg Neg. Ultimately, pre-planning is in large part designed to avoid last minute surprises that could derail the negotiation.<sup>159</sup>

In particular, the role of the convenor is worth revisiting here. If the agency has had a strong hand in selecting the participants, and has elected to use the convenor as more of an organizer than a mediator, there may be some tension insofar as the agency is also a party to the negotiation.<sup>160</sup> The agency should make clear for itself and all other members what role different agency staff play in the process.

Setting the bounds of negotiation early will support a smooth negotiation process. This includes mindfulness of the agency’s statutory mandate, which largely means there will only be discussion about how to accomplish a goal, not what goal should be accomplished. Insofar as this

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<sup>157</sup> Harter, *supra* note 3, at 46.

<sup>158</sup> Negotiated Rulemaking Panel, *supra* note 92.

<sup>159</sup> For further discussion and examples related to conducting and finalizing the negotiation, see NEGOTIATED RULEMAKING SOURCEBOOK, *supra* note 34, at 207–266.

<sup>160</sup> The Negotiated Rulemaking Act specifies that the agency will be represented as a member on the negotiated rulemaking committee.

means the agency is unwilling to negotiate on some positions, that should be made clear to the participants.

Similarly, all participants should be mindful of what Reg Neg cannot do. The committee cannot elect to exclude certain issues from consideration in order to reach agreement. Doing so could, among other ramifications, undermine the agency's original justification for the rule, which would jeopardize the rulemaking as a whole. In such circumstances, the proposal is likely to be modified substantially despite the consensus agreement, particularly if avoiding certain issues raises concerns with the agency's benefit-cost analysis.

#### D. Issuing the NPRM and Proceeding with Informal Rulemaking

One of the arguments in favor of Reg Neg has been that, because it is followed by the traditional informal rulemaking process, any potential flaws in the selection of participants, information or facts laid out by the parties, etc. will be rectified through notice-and-comment. However, it is worth bearing in mind that this should only be a failsafe, if the Reg Neg was conducted properly.

Much of Reg Neg's success relies on thoughtful advance planning—which includes anticipation of how the post-negotiation process will play out. One essential piece of this is ensuring that the participants understand the totality of the rulemaking process. Participants should know that their final agreement is subject to outside revision in accordance with the agency's legal requirements—including OIRA review. If participants are not cautioned about the post-negotiation process, deviations from their final agreement would likely come as a surprise and could undermine participants' faith in the process.

In addition to educating participants about the rulemaking process, it may be good practice for an agency to keep OIRA desk officers informed of ongoing negotiations. Though desk officers may not have the resources to attend meetings of the negotiation committee, some interface between agency officials and OIRA could enable desk officers to voice concerns about the data and other evidence under negotiation that is related to benefit-cost and related analyses.

## VI. Recommendations

### 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” in agency parlance).*

- 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 FACA.*

Prior to determining what stakeholder outreach (if any) it wishes to undertake beyond the minimum requirements of notice-and-comment rulemaking,<sup>161</sup> the agency should consider its long term goals and determine which stakeholder engagement tool is most likely to advance those ends. In many cases, notice-and-comment alone may be adequate. Specifically, if the agency is simply looking to obtain additional technical information or to ascertain the views of stakeholder groups that are likely to file a comment of their own volition,<sup>162</sup> notice-and-comment is likely completely sufficient.

The primary limitation of the notice-and-comment process is that it lacks engagement, as defined above, between the public and the agency. The agency does not, as a general matter, consult commenters to obtain additional information or to flesh out the information contained in the comments received. In circumstances in which the agency perceives some benefit in more active interaction with certain stakeholder groups, it may wish to undertake affirmative outreach to solicit information from specific stakeholders or groups thereof. As a general matter, there is no prohibition on agencies’ engaging in so-called “ex parte contacts” with private parties, especially prior to the issuance of a notice of proposed rulemaking.<sup>163</sup> Though the agency should strive to ensure that it is obtaining a balanced set of perspectives (e.g., it should not reach out solely to large corporations or to environmental organizations), there is no legal requirement that the agency do so (other than the risk that a rule informed by only one set of views may be less likely to survive judicial review). As such, the agency should simply use its discretion in deciding which stakeholders to contact and on which specific issues to solicit their input.

As discussed in Section III, Reg Neg Lite is much less formal than Reg Neg or the advisory committee process, which gives the agency much greater flexibility in determining precisely how it will structure the dialogue among the stakeholders. Most importantly, as there is no expectation that the group will reach a consensus position or produce a draft rule, the agency can decide precisely what it wishes to achieve from the process. In this light, the agency should be as precise

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<sup>161</sup> 5 U.S.C. § 553.

<sup>162</sup> Certain commentators have argued that traditional notice-and-comment gives a skewed picture of stakeholders’ views, as only especially well-financed entities are likely to participate in the process. *See, e.g.,* JOHN E. CHUBB, INTEREST GROUPS AND THE BUREAUCRACY: THE POLITICS OF ENERGY 251 (1983); Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 123 (2011). In this light, agencies may consider undertaking affirmative steps to obtain the views of stakeholders that are unlikely to be represented (e.g., small business organizations), though resource constraints may render such outreach infeasible.

<sup>163</sup> *Sierra Club v. Costle*, 657 F.2d 298, 400–01 (D.C. Cir. 1981); Esa L. Sferra-Bonistalli, *Ex Parte Communications in Informal Rulemaking* 25 (May 1, 2014), <https://www.acus.gov/report/final-ex-parte-communications-report>.

and transparent as possible in communicating its goals to the participants. For instance, if the agency wishes only to receive technical information from the stakeholder groups and is not interested in those groups' position on whether or not issuing a rule is advisable as a policy matter, it should explicitly state that at the outset.

If handled properly, Reg Neg Lite can produce highly valuable information without constraining the agencies' decisionmaking discretion by binding it to issuing the rule agreed upon by the stakeholders. On the other hand, stakeholders may be much less willing to engage constructively in the Reg Neg Lite process, as they have no firm commitment from the agency that it will ultimately act on the stakeholders' recommendations. Thus, the agency may prefer formal negotiated rulemaking if it believes that the benefits of incentivizing serious stakeholder engagement outweigh the costs of tying its hands to a certain extent. Of course, if the agency opts to use Reg Neg Lite, then it must scrupulously manage stakeholder expectations by carefully explaining what it hopes to achieve. Otherwise, stakeholder groups are likely to be highly wary of the process and to refuse to engage constructively.

A final consideration associated with the use of Reg Neg Lite is avoiding inadvertently triggering FACA. FACA applies when an assemblage of stakeholders is providing "group advice" to the agency.<sup>164</sup> Accordingly, so long as the various stakeholders do not engage with each other and attempt to formulate common advice to the agency, the interaction should qualify for the so-called "individual advice" exemption to FACA.<sup>165</sup> Of course, the precise point at which "individual advice-giving" matures into "group advice-giving" is difficult to define, so the agency must maintain a level of vigilance in conducting such meetings. Some agencies ensure that an attorney from the General Counsel's office is on hand at all times and can terminate the meeting if the discussion moves in a direction that may trigger FACA.

The final option for stakeholder outreach is actually convening an advisory committee under the procedures set forth under FACA. Agencies are understandably reluctant to invoke this procedure, as the formation of an advisory committee can be a protracted process,<sup>166</sup> and FACA imposes various strictures on the operation of committee meetings (e.g., requirements for Federal Register notice, open meetings, solicitation of public comments, public availability of committee documents).<sup>167</sup> Nevertheless, as the 2011 Conference project on FACA demonstrated, many of the hurdles to effective use of advisory committees are self-created, and agencies can considerably expedite at least the committee formation process considerably if they are diligent. For instance, agencies can quickly approve draft committee charters if they obtain all internal approvals simultaneously rather than passing along the document from one reviewer to the next (the external review of the charter by the General Services Administration is actually relatively quick).<sup>168</sup>

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<sup>164</sup> 5 U.S.C. app. § 3(2); Bull, *supra* note 73, at 13.

<sup>165</sup> *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993); *Nader v. Baroody*, 396 F. Supp. 1231, 1234 (D.D.C. 1975); Bull, *supra* note 73, at 13–14.

<sup>166</sup> Bull, *supra* note 164 73, at 47.

<sup>167</sup> *See generally* 5 U.S.C. app.

<sup>168</sup> Bull, *supra* note 73, at 47–48.

The advisory committee process is optimal when the agency has identified a discrete issue on which it requires the formal advice of a balanced group of stakeholders. As a general matter, the committee will be tasked with opining on some specific component of a broader rulemaking process (e.g., commenting on a study that undergirds a proposed rule) rather than advising on the overall rule itself. If the agency simply wishes to solicit broader stakeholder input on a proposed rule, Reg Neg Lite or informal stakeholder outreach is likely to be more suitable.

### 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.*

*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.*

For all of the reasons explored previously, the universe of proposed regulations in which negotiated rulemaking is the optimal course of action is likely quite small. Conducting a negotiated rulemaking is resource intensive, and any number of alternative options, including Reg Neg Lite, often prove preferable. The research contained in the previous sections of this report suggests that 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 is a limited number of identifiable interests that will be significantly affected by the rule.”<sup>169</sup> Given the inherent challenges of group dynamics, a negotiated rulemaking committee with any more than roughly 25 members is unlikely to operate effectively.<sup>170</sup> Consequently, if there are more than 25 discrete stakeholder interests that must be represented on the committee to achieve any durable consensus, negotiated rulemaking is not an attractive option.

Though the interests not represented on the committee can of course submit public comments after the fact, or could attend public meetings and comment but not vote,<sup>171</sup> this opportunity for participation pales in comparison to a seat on the negotiated rulemaking committee. A negotiated rulemaking failing to include all affected interests would be flawed, as has been noted since the original development of the process. Indeed, such an exclusionary approach would give credence to the argument that negotiated rulemaking is

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<sup>169</sup> 5 U.S.C. § 563(a)(2).

<sup>170</sup> *Id.* § 565(b). Recall that members represent the interests of their overall stakeholder group, rather than only the interests of their own organization.

<sup>171</sup> *Id.* § 553(c).

a form of institutionalized capture in which large stakeholders reach a mutually desirable bargain at the expense of small stakeholders.<sup>172</sup> In particular, agencies should be highly sensitive to whether small and medium enterprises can appoint one or more representatives that can adequately represent the full diversity of interests prevailing in that community.

- “[T]here is a reasonable likelihood that a committee can be convened with a balanced representation of persons who (a) can adequately represent the [identifiable and significantly affected] interests and (b) are willing to negotiate in good faith to reach a consensus on the proposed rule.”<sup>173</sup> For the reasons explored previously, it is absolutely imperative that the committee include a balanced set of stakeholders that represents all or nearly all of the key interest groups. Any omission of a significant interest group or any imbalance in representation will necessarily lead to charges of favoritism and capture, dooming the process from the very outset.

It is also critical that the committee is capable of reaching a non-zero sum outcome, such that all stakeholders are satisfied that the committee’s product is preferable to what would have been achieved had the agency proceeded with a rule in the absence of convening a negotiated rulemaking committee. As in any almost non-zero sum game, some parties will obtain a more favorable outcome than others, but each participant must leave the process believing that its views received a fair hearing and that the final outcome is acceptable. Otherwise, disaffected participants are unlikely to live by the bargain reached and may decide to challenge the rule in court, which they remain perfectly free to do.<sup>174</sup> Indeed, at least one prominent scholar has contended that negotiated rulemaking does not reduce the incidence of litigation surrounding a rule,<sup>175</sup> and the ease with which any disaffected participant can challenge the consensus rule is perhaps one reason why. Of course, participants that agreed to the proposed rule text can also challenge the end product in court, but they are presumably much less likely to do so if they believe that the committee’s rule is more favorable to their interests than a rule issued exclusively by the agency would be.

- *The agency possesses the resources necessary to conduct a negotiated rulemaking and determines that the institutional benefits outweigh the costs.*<sup>176</sup> From an institutional perspective, an agency will not pursue negotiated rulemaking unless it deems the benefits to exceed the costs. For reasons explored earlier in the report, the costs are often less

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<sup>172</sup> Funk, *supra* note 66, at 1375.

<sup>173</sup> 5 U.S.C. § 563(a)(3).

<sup>174</sup> While the Negotiated Rulemaking Act provides that a negotiated rulemaking committee should attempt to reach a consensus, no section of the statute imposes or implies that parties to the negotiation are prohibited from bringing legal challenge to the rule (regardless of whether the committee reaches consensus). The Negotiated Rulemaking Act of 1996, Pub. L. 104-320 (amending Pub. L. 101-648 and Pub. L. 102-354), §566.

<sup>175</sup> Coglianesse, *supra* note 7, at 1298.

<sup>176</sup> See 5 U.S.C. §§ 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.”).

substantial than the agency might initially assume: the services of a convenor/facilitator can often be acquired inexpensively (on the order of tens of thousands of dollars), and the initial investment of time can often pay dividends on the back end if the notice-and-comment process proceeds more smoothly or the final rule is less likely to be challenged in court.<sup>177</sup> Nevertheless, the benefits are often difficult to quantify, whereas the costs are concrete and immediately apparent, which likely creates a disincentive to pursue negotiated rulemaking.<sup>178</sup> Furthermore, many of the same benefits can often be captured through the use of Reg Neg Lite or an even less formal mechanisms of stakeholder outreach, such that the marginal benefits of negotiated rulemaking may not outweigh the marginal costs.

Unfortunately, there are no overarching principles that an agency can apply here; each rulemaking situation is unique. Of course, an agency should not pursue negotiated rulemaking if it faces an imminent statutory deadline or otherwise must act very quickly in promulgating a rule. Nevertheless, in those instances in which negotiated rulemaking could be a viable option but in which the agency is unsure of whether the benefits exceed the costs, some degree of speculation is inevitable. In these circumstances, the relevant agency officials must ask: (a) Have the aforementioned statutory factors been satisfied, such that the likelihood of achieving group consensus on a draft rule is relatively high? -and- (b) Do the marginal benefits associated with negotiated rulemaking exceed the marginal costs vis-à-vis some less formal alternative such as Reg Neg Lite? Though the agency can never answer these questions with anything approaching complete certainty, it should at least be able to identify areas in which the probability of a successful negotiated rulemaking is high, especially as it acquires experience in using the procedure.

- “[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.”<sup>179</sup> In order to ensure that the participants in the negotiated rulemaking bargain in good faith, the agency must provide some level of commitment that it will actually use the draft consensus rule achieved as part of the process. Of course, the draft rule is still subject to notice and comment,<sup>180</sup> and it therefore may change as the agency finalizes the rule, but the parties should at least receive the assurance that the agency will introduce the draft text as a proposed rule. If the agency reserves the right to tinker with the product after the fact, then the parties have essentially no incentive to bargain in good faith (especially if they are

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<sup>177</sup> Agencies and regulated entities are likely to benefit over the long-term from having better working relationships. For example, parties who better understand the regulatory process participate in the rulemaking process and comply with regulatory requirements more effectively. For their part, agencies would likely more easily access stakeholder data and be able to promulgate higher quality rules.

<sup>178</sup> There is also a practical imbalance in costs versus savings. For example, savings from avoiding litigation are deferred to the future; they may also accrue to the Department of Justice rather than an agency’s own budget. See Lubbers, *supra* note 70, at 997.

<sup>179</sup> 5 U.S.C. § 563(a)(7).

<sup>180</sup> Lubbers, *supra* note 70, at 989.



compromising the position they might otherwise take in litigation against the agency) and the process is almost certainly doomed from the outset.

By the same token, for reasons that will be explored in greater detail in subsequent recommendations, the agency must clearly articulate any statutory and regulatory limitations that would constrain the contents of the final rule. If the parties ultimately agree to a position that the agency is foreclosed from taking as a matter of law, then the agency cannot issue the consensus rule, and this outcome will necessarily produce alienation on the part of the participants. As such, the agency must be very explicit in drafting the committee's charge, defining the precise parameters of what the committee can and cannot do under existing law.

Given the complexity of the foregoing calculations, the agency will, as a general matter, be the party that is best situated to determine whether negotiated rulemaking is optimal in any given set of circumstances. It would be challenging for Congress to make this determination when directing an agency to regulate in a particular area. If the goal is to require the agency to engage more closely with key stakeholders, alternatives such as an advance notice of proposed rulemaking requirement are likely to prove far more productive. That is not to say that Congress could not identify an area wherein a discrete group of stakeholders is likely to reach consensus on a draft rule (especially if the relevant stakeholders are lobbying members of Congress for a negotiated rulemaking requirement), but the circumstances in which that outcome is likely to obtain are almost certainly exceedingly rare. Accordingly, Congress should generally leave the decision of whether to invoke negotiated rulemaking to the agencies.<sup>181</sup>

#### 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 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.*

Managing stakeholder expectations is a critical component to ensuring the success of the negotiated rulemaking process. If the agency does not clearly communicate the committee's charge and explicitly delineate the range of policy options the committee can consider, the

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<sup>181</sup> The authors have not closely analyzed the situations in which Congress has mandated the use of negotiated rulemaking, and they therefore express no opinion on whether Congress should eliminate the negotiated rulemaking requirement in those cases.

probability that the committee will ultimately produce a draft rule that the agency cannot introduce is greatly increased. This, in turn, alienates committee members, who are then much less likely to engage constructively in subsequent negotiated rulemakings or other stakeholder engagement efforts the agency undertakes. As such, the agency officials structuring the committee must very clearly describe both the committee's mandate and the legal constraints under which the agency operates to the members. To the extent that the agency can appoint an official to participate in the committee's work and notify the committee when they are contemplating a course of action that the agency cannot ultimately support, the likelihood of a downstream conflict is further minimized.

By the same token, agency officials should explicitly communicate the legal strictures that govern negotiated rulemaking committee meetings. Most importantly, since negotiated rulemaking committee meetings are advisory committee meetings subject to FACA (with a handful of exceptions, wherein Congress has explicitly exempted certain agencies' negotiated rulemaking committee meetings from FACA), all committee meetings are open to public participation,<sup>182</sup> and any documents considered by the committee are subject to public inspection on request.<sup>183</sup> As such, participants should not be operating under the mistaken assumption that anything they say or submit to the larger committee will be confidential. FACA does contain a provision for closing committee meetings or portions thereof, which requires that agency invoke one of the exceptions to the open meeting requirements set forth in the Government in the Sunshine Act,<sup>184</sup> but those exceptions would not typically be met in the context of a negotiated rulemaking committee meeting.<sup>185</sup> Furthermore, as a matter of policy, the agency would likely wish to maintain the highest level of openness possible, especially given the concern that negotiated rulemaking promotes a form of institutionalized capture wherein well-connected players reach a backroom deal outside of the public gaze.

*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.*

As explored earlier in the report, negotiated rulemaking grew from a broader movement to import many of the norms of ADR into agency decisionmaking. Agencies have traditionally drawn on the expertise residing in the ADR community by appointing a convenor (who helps structure the negotiated rulemaking committee and define its charge) and/or a facilitator (who effectively acts as a mediator among the various stakeholder groups during the actual committee meetings) to assist in certain negotiated rulemakings. Whether the agency uses one or more such ADR professionals will depend on the circumstances surrounding a contemplated rule (including the resources that the agency can dedicate to any given negotiated rulemaking effort), and this report therefore expresses no opinion on whether agencies should always appoint convenors or

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<sup>182</sup> 5 U.S.C. app. § 10(a)(1).

<sup>183</sup> *Id.* § 10(b).

<sup>184</sup> *Id.* § 10(d).

<sup>185</sup> The exception that is most likely to be met in connection with a negotiated rulemaking committee meeting is that for "trade secrets and commercial or financial information." 5 U.S.C. § 552b(b)(4).

facilitators or the contexts in which it may be especially productive to do so.<sup>186</sup> Ultimately, this is a decision the agency will need to make on a case-by-case basis.

Nevertheless, to the extent that the agency elects to involve an ADR professional, he or she should be included in the process as early as possible. Having the same individual serve as both the convenor and facilitator can be beneficial in that he or she is involved in the entire lifecycle of the committee process.<sup>187</sup> ADR professionals can offer valuable insights on the stakeholder groups the agency should include and on the types of stakeholder representatives who are most likely to engage constructively in the process. ADR professionals can also help identify the types of problems that lend themselves to non-zero sum solutions and set realistic goals for what the committee can accomplish. Thus, if it elects to use an ADR professional, the agency should not bring in the individual as an afterthought, after it has already formed a committee and provided it with a charge. The upfront investment associated with hiring a professional early in the process can pay significant dividends in maximizing the probability that the negotiation will proceed smoothly and that the committee will ultimately produce a viable work product.

*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.*

From its very inception, negotiated rulemaking has been in some tension with the OIRA process for reviewing significant regulations.<sup>188</sup> The reason why is not too difficult to grasp: a negotiated rulemaking committee is tasked with producing a fully-formed draft rule that the agency will propose, yet OIRA has an important role in scrutinizing significant proposed rules prior to the issuance of a notice of proposed rulemaking (including assessing the economic analysis underpinning the rule and coordinating an interagency review process).<sup>189</sup> To the extent a conflict arises, understandable frustrations can emerge on both sides: OIRA may feel as if it is being frozen out of the process, and committee members may feel that their work is all for naught if OIRA upsets the bargain struck among the stakeholders after-the-fact.

Fortunately, the risk of such a conflict can be greatly reduced (though likely not eliminated entirely) by carefully managing the expectations of the stakeholders. Ultimately, OIRA's role in the regulatory process is well-established, and negotiated rulemaking need not displace or diminish that role in any respect. As such, committee members should be informed of OIRA's role in

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<sup>186</sup> Nevertheless, agency staff pursuing (or considering whether to pursue) negotiated rulemaking might refer to the recommendations on how agencies might most effectively use facilitators made by Jeff Lubbers as part of a report of the Task Force on Federal Regulation of Higher Education. Jeffrey S. Lubbers, *supra* note 37, at 100-101.

<sup>187</sup> The agency should nevertheless be aware that a convenor may have a conflict of interest in that he or she may have an incentive to recommend proceeding with a Reg Neg in order to maximize the probability that he or she will be selected as facilitator.

<sup>188</sup> Lubbers, *supra* note 70, at 999-1000.

<sup>189</sup> Exec. Order No. 12,866, § 6(b), 58 Fed. Reg. 51,735, 51,742-43 (Oct. 4, 1993); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1841-42 (2013).

reviewing significant regulations and notified that OIRA may ultimately recommend changes to the draft rule that the committee produces. The agency should also advise the committee of steps the agency is taking to anticipate and preemptively address the possible reasons OIRA would request changes. Committee members should also be informed of OIRA's role in reviewing the regulatory impact analysis undergirding economically significant regulations,<sup>190</sup> and they should be encouraged to produce the sort of economic analysis of regulatory benefits and costs associated with the key regulatory alternatives that will ultimately be included in the agency's regulatory impact analysis that is reviewed by OIRA. Finally, the agency component conducting the negotiated rulemaking should invite its OIRA desk officer to participate in the committee meetings, or offer to brief the officer on the meetings. Unfortunately, OIRA is currently quite understaffed by historical standards,<sup>191</sup> and resource constraints may limit the extent to which the desk officer can actively participate, but the agency should proffer the desk officer an opportunity to attend meetings and provide periodic updates on the committee's work if the desk officer ultimately cannot participate.

Again, even if the agency scrupulously observes these recommendations, OIRA may ultimately question certain aspects of the draft rule produced, and the committee members should be informed that OIRA is fully empowered to do so. Nevertheless, the proposed practices should significantly reduce the likelihood of a conflict, especially insofar as the stakeholders involved in the negotiated rulemaking process are the same as those that would meet with OIRA and urge reforms to an agency's proposed rule.

*8. Congress should amend the Negotiated Rulemaking Act to exempt negotiated rulemaking committees from the requirements of FACA. 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 as-needed basis, rather than chartering a new committee anytime the agency wishes to undertake a negotiated rulemaking.*

In 2011, the Administrative Conference recommended that negotiated rulemaking committees be exempt from FACA.<sup>192</sup> A detailed explanation of the rationale for that proposal appears in an earlier report that one of the instant paper's authors prepared for the Conference in connection with that project.<sup>193</sup> In essence, the idea is that the Negotiated Rulemaking Act already

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<sup>190</sup> Exec. Order No. 12,866, §§ 6(a)(3)(C), 6(b), 58 Fed. Reg. 51,735, 51,741–43 (Oct. 4, 1993).

<sup>191</sup> Susan E. Dudley, *Ten Regulatory Process Reform Recommendations for President-Elect Trump*, FORBES, Dec. 8, 2016, <http://www.forbes.com/sites/susandudley/2016/12/08/ten-regulatory-process-reform-recommendations-for-president-elect-trump/#4c82df3a1630>.

<sup>192</sup> Administrative Conference of the United States, Recommendation 2011-7, *The Federal Advisory Committee Act—Issues and Proposed Reforms*, ¶ 7, 77 Fed. Reg. 2261, 2263 (Jan. 17, 2012).

<sup>193</sup> Bull, *supra* note 73, at 51–55.

requires that agencies take care to ensure that negotiated rulemaking committees contain an appropriate balance of committee members<sup>194</sup> (and is duplicative of FACA in that respect) and that it could easily be amended to include an open meeting requirement. The other elements of FACA, such as the requirement that advisory committees be chartered, fit poorly in the context of negotiated rulemaking and have potentially deterred agencies from using that process.<sup>195</sup> Indeed, Congress has already exempted certain negotiated rulemakings conducted by specific agencies from FACA,<sup>196</sup> and extending this carveout to all negotiated rulemaking would ideally make it a more attractive option for agencies. Accordingly, this report reaffirms and endorses the 2011 recommendation that Congress render FACA inapplicable to negotiated rulemaking.

Assuming that Congress does not take up this recommendation, agencies should at least take advantage of the flexibilities within FACA to minimize the constraints it places upon their negotiated rulemaking activities. As explored earlier in the report, two agencies have adopted an innovative approach to structuring negotiated rulemaking committees that other agencies should carefully consider.

The first approach, pioneered by the Federal Aviation Administration (hereafter the “FAA approach”) involves creating a large standing committee with a wide array of members representing the full panoply of stakeholder groups the agency is likely to encounter. Whenever the FAA wishes to open a new negotiated rulemaking, it simply creates a subcommittee that includes a selection of members from the parent committee who represent the key interest groups. Since FACA does not apply to subcommittee meetings,<sup>197</sup> this assemblage can operate outside the constraints of the Act. Of course, the subcommittee should not operate in secrecy, and the FAA therefore voluntarily complies with the FACA open meeting requirements in connection with subcommittee meetings (though it is under no legal obligation to do so), but the subcommittee is not chartered and otherwise does not observe the FACA requirements that create an unnecessary hindrance to efficient committee operations. This arrangement still faces some potential legal hurdles, as a parent committee cannot rubber-stamp the decisions reached by a subcommittee,<sup>198</sup>

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<sup>194</sup> 5 U.S.C. § 563(a)(3).

<sup>195</sup> Lubbers, *supra* note 70, at 1001. In addition to the various strictures imposed by FACA itself, Executive Order 12,838 places a cap on the total number of discretionary advisory committees (i.e., those not mandated by statute) in the federal government. Exec. Order No. 12,838, 58 Fed. Reg. 8207 (Feb. 10, 1993); Office of Management & Budget, Circular A-135: Management of Federal Advisory Committees, 59 Fed. Reg. 53,856, 53,857 (Oct. 26, 1994). Since negotiated rulemaking committees qualify as federal advisory committees, this cap may prove a further deterrent to establishing new negotiated rulemaking committees. Of course, the total number of advisory committees currently falls well below the cap, but some agency officials may be unaware of this and may be chilled in forming new advisory committees. Bull, *supra* note 164, at 38. Accordingly, this report reaffirms and endorses the Conference’s 2011 recommendation that Executive Order 12,838’s cap be rescinded. Administrative Conference of the United States, Recommendation 2011-7, *The Federal Advisory Committee Act—Issues and Proposed Reforms*, ¶ 4, 77 Fed. Reg. 2261, 2263 (Jan. 17, 2012).

<sup>196</sup> See, e.g., 20 U.S.C. § 6571(b)(4) (exempting the Department of Education from the strictures of FACA for a statutorily required negotiated rulemaking); Pub. L. No. 111-239, § 2(b)(2)–(3), 124 Stat. 2501 (2010) (“Any negotiated rulemaking committee established by the Secretary of Agriculture pursuant to [the section authorizing the negotiated rulemaking committee] shall not be subject to the Federal Advisory Committee Act . . .”).

<sup>197</sup> 41 C.F.R. § 102-3.35(a).

<sup>198</sup> Charles Howton et al., FACA for Facilitators 30, *available at* <http://www.fs.fed.us/emc/nepa/ecr2008/sessions/materials/25/FACA%20for%20Facilitators%20Presentation.pdf>.

but FAA ensures that the parent committee carefully considers the subcommittee's recommendation and issues a final vote.

The second approach, pioneered by the Department of Energy (hereafter the "DOE approach"), involves creating a much smaller parent committee with a handful of members that represent key stakeholder constituencies. When the agency wishes to undertake a negotiated rulemaking, the parent committee establishes a subcommittee that includes one or more members of the parent committee and also includes additional stakeholders who do not sit on the parent committee. As with the FAA approach, the agency voluntarily complies with the open meeting provisions of FACA, but the subcommittee is not chartered. Once the subcommittee has settled upon the text of a proposed rule, the parent committee then reviews the subcommittee's work and transmits the draft rule to the agency.

Absent a statutory change rendering FACA inapplicable to negotiated rulemaking, agencies should closely consider the FAA and DOE approaches to forming negotiated rulemaking committees. Which of these approaches the agency selects ultimately depends upon the universe of stakeholders with an interest in the agency's work. If the agency regularly interacts with a relatively small, discrete group of stakeholders, the FAA approach may prove optimal: each of the stakeholder groups should have at least one representative on the parent committee, and the agency should then form a subcommittee that includes each stakeholder group with an interest in a particular rule. If, by contrast, the universe of stakeholders with which the agency interacts is larger or more fluid, the DOE approach may be preferable. The parent committee can include representatives of broad categories of stakeholders (e.g., major industry groups, environmental organizations, consumer representatives), and the agency can then ascertain the specific interest groups involved in a particular rule at a more granular level when forming the subcommittee. As such, this report endorses neither approach as preferable to the other but commends both approaches to agencies' consideration.

Of course, both the FAA and DOE approaches depend on the continued viability of the so-called subcommittee exemption under FACA. In the last several years, the House has considered (and on at least four separate occasions passed) a bill that would, among other things, eliminate the subcommittee exemption.<sup>199</sup> The authors echo the 2011 recommendation of the Conference in urging Congress not to eliminate the subcommittee exception, both because it is critical to conducting negotiated rulemaking efficiently and because agencies rely on it more broadly to ensure that they can effectively organize and plan for advisory committee meetings without constantly running up against the public meeting requirements.<sup>200</sup>

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<sup>199</sup> H.R. 70, 115th Cong. (2017) (passed the House on January 4, 2017); H.R. 2347, 114th Cong. (2016) (passed the House on March 1, 2016); H.R. 1320, 111th Cong. (passed the House on July 26, 2010); H.R. 5687, 110th Cong. (passed the House on June 24, 2008).

<sup>200</sup> Administrative Conference of the United States, Recommendation 2011-7, *The Federal Advisory Committee Act—Issues and Proposed Reforms*, ¶ 5, 77 Fed. Reg. 2261, 2263 (Jan. 17, 2012); Bull, *supra* note 73, at 43–45.

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In conclusion, there are many circumstances under which agencies are likely to find negotiated rulemaking to be beneficial. Where the issues an agency has under consideration, or where the relationships among the agency and various stakeholder groups, are contentious, the process's structure may well offer the best chance for productive discussion of the underlying facts and ultimate disposition of complex issues. Even in cases that are not contentious but are complex and technical, convening a committee of stakeholders to exchange data and dig into the details will almost certainly produce a draft rule superior to what an agency could have done on its own. There are also many cases where negotiated rulemaking provides little added benefit over other stakeholder engagement options. Agencies should carefully consider goals and constraints to determine the process most suited to their needs. Because no one-size-fits-all approach is possible for the varied work agencies undertake, hopefully the foregoing discussion provides insight into the circumstances under which negotiated rulemaking is likely to prove most useful.