

NEGOTIATED RULEMAKING SOURCEBOOK

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**OFFICE OF THE CHAIRMAN
ADMINISTRATIVE CONFERENCE OF THE UNITED
STATES**

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Administrative Conference of the United States

The Administrative Conference of the United States was established by statute as an independent agency of the federal government in 1964. Its purpose is to promote improvements in the efficiency, adequacy and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.

To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished through direct action on the part of the affected agencies or legislative changes.



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CHAIRMAN'S FOREWORD

The Administrative Conference published the *Negotiated Rulemaking Sourcebook* in 1990 as a handbook and reference manual intended primarily for use by federal agencies interested in improving their rulemaking procedures. Since that time, interest in negotiated rulemaking (or "reg-neg") has grown substantially. With bipartisan support Congress subsequently passed the Negotiated Rulemaking Act of 1990, which was signed into law by President Bush. The Clinton Administration and the National Performance Review have also been strong supporters of this innovative procedure, which is designed to increase and improve public participation in federal agency programs. Meanwhile, Congress on several occasions has required specific use of reg-neg. Thus the need for education, advice and assistance in the effective and appropriate use of the process continues to grow. With the encouragement and financial support of the Environmental Protection Agency, the Administrative Conference has now prepared an updated version of the *Sourcebook*.

In passing the Negotiated Rulemaking Act, Congress noted that the ordinary rulemaking procedures used by agencies tend to discourage the affected parties from meeting and communicating with each other. Furthermore, the traditional processes often cause parties with different interests to assume conflicting and antagonistic positions and to engage in protracted and expensive litigation. It is precisely to respond to this situation that the Administrative Conference pioneered the application of negotiations and mediation to agency rulemaking.

In a 1982 recommendation, the Conference suggested that by bringing interested parties together in a cooperative setting at the front end of the rulemaking process, much of the litigation that occurs at the conclusion of a rulemaking would be obviated. The concept of negotiated rulemaking gives the people who have real interests at stake in a particular rule the opportunity to work toward finding solutions to shared problems. Reg-neg has the capacity to reduce the likelihood of litigation, to produce faster and less costly rulemaking -- and to create objectively better rules. Moreover, such rules are likely to be more acceptable to the parties involved.

The Conference originally worked closely with officials of those agencies that were willing to be pioneers in this field. As interest in reg-neg has grown in both the legislative and executive branches, we have expanded our program to include written materials, training, and technical assistance. Through ongoing contacts with agencies, convenors, academics, and private participants, we have acted as an information clearinghouse about how both the public and the agencies can benefit from using negotiations in rulemaking. The *Negotiated Rulemaking Sourcebook* is a compilation of this experience in a convenient package and is a key element of our assistance.

To our knowledge, the *Sourcebook* is the only volume available devoted to the conduct of negotiated rulemaking. I hope that publication of the revised version will continue to stimulate increased interest and activity in the search for cooperative solutions to regulatory problems. Our ultimate goal, of course, is greater efficiency and fairness in the rulemaking process, and we believe that the expanded use of negotiated rulemaking by federal agencies constitutes a major step in that direction.

Thomasina V. Rogers
Chairman

INTRODUCTION

The 1995 revision of the *Negotiated Rulemaking Sourcebook* has been prepared as a guide and reference manual for federal agencies and others interested in use of negotiated rulemaking. The *Sourcebook* is based on the best available research and the collected experience of the government agencies and other parties that were willing to try this innovative technique for resolving disputes arising in rulemaking.

After introductory chapters that explain the procedure, when to use it, and the statutory basis for negotiated rulemaking, the book addresses sequentially the steps involved in convening, training participants, conducting negotiations, and concluding a "reg-neg" proceeding. The Negotiated Rulemaking Act of 1990 is reprinted in the appendix to chapter 3, and its provisions are discussed throughout the first eight chapters. Relevant state experience is summarized in chapter 9. A compendium of negotiated rulemaking experience of federal agencies through May 1995 appears in chapter 10, including citations to many of the significant notices published. A partial list of sources of assistance follows in chapter 11. Chapter 12 contains an extensive bibliography. Finally, we have included a collection of articles that may help illuminate the issues and the experience to date. An index to the articles appears at the beginning of chapter 13.

Most chapters in the *Sourcebook* consist of a text that discusses the subject of the chapter, followed by an appendix. These appendices contain relevant statutes, Federal Register notices, Administrative Conference recommendations, brief articles, and other illustrative material. In general, a reference in a particular chapter to a document appearing "in the appendix" (without referring to a chapter number) means that that document is reprinted in the appendix to the same chapter.

The primary audience for the *Sourcebook* is intended to be agency officials -- those who are considering use of negotiated rulemaking and need to know more about it, and those who have decided to use the process and need a practical guide. To serve these needs, we have included a large number of sample documents

of the kinds that will have to be drafted at various stages of conducting a reg-neg. While we have tried to include a variety of such material from different agencies and different proceedings, we have also chosen to retain from the 1990 *Sourcebook* virtually the entire collection of public notices from a single negotiated rulemaking -- EPA's woodburning stove proceeding -- so that the user of the *Sourcebook* can follow its development. Although the woodburning stove reg-neg preceded the Reg-Neg Act (and therefore contains no references to it), the notices do illustrate all of the steps required. Other more recent examples are also included for reference.

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The Administrative Conference is grateful to the Environmental Protection Agency for its generous financial support that has made possible the publication of a revised and updated printing of the *Sourcebook*. The Conference also wishes to thank EPA for making available the services of co-author Deborah S. Dalton, and to express appreciation to Thomas E. Kelly, Director, Office of Regulatory Management and Evaluation, for his support of this project.

Many individuals contributed to the *Negotiated Rulemaking Sourcebook* in a variety of ways. On the Administrative Conference staff, special thanks are due to Deborah Laufer and Katie Zeigler for bibliographic and general research assistance. Oskian Kouzouian helped with the details of publication of the volume. Diane Liff, Kimberly D'Souza, Sharon Anderson and Gloria Coffey each helped out at a moment of special need. Valuable comments on the revised draft and organization of the *Sourcebook* were received from Charles Pou, Jr.

We acknowledge also the cooperation of the numerous private publishers who granted permission to reprint copyrighted material in the *Sourcebook*.

David M. Pritzker
Project Director

CHAPTER 1 - WHAT IS NEGOTIATED RULEMAKING?

Negotiated rulemaking (sometimes known as "regulatory negotiation" or "reg-neg") emerged in the 1980's as an alternative to traditional procedures for drafting proposed regulations. With the passage of the Negotiated Rulemaking Act of 1990, the recommendations of the National Performance Review in 1993, and various directives by President Clinton, negotiated rulemaking enjoys increasing and widespread bipartisan support as a means of achieving better regulation through the cooperative efforts of government agencies and the private sector.

The essence of the idea is that in certain situations it is possible to bring together representatives of the agency and the various interest groups to negotiate the text of a proposed rule. The negotiators try to reach a consensus through a process of evaluating their own priorities and making tradeoffs to achieve an acceptable outcome on the issues of greatest importance to them. If they do achieve a consensus, then the resulting rule is likely to be easier to implement and the likelihood of subsequent litigation is diminished.

The Administrative Procedure Act does not require public participation in the drafting stage of agency rulemaking. It requires only that the agency publish any proposed rule and allow an opportunity for comment. (See chapter 3 for a discussion of the Administrative Procedure Act and negotiated rulemaking.) Under the ordinary rulemaking procedure, an agency may or may not have contacts with persons whose activities are regulated -- or with the general public -- for the purpose of acquiring information that may be helpful. However, any such contacts are usually informal and unstructured. They may be initiated by the agency or by the public. Typically, there is no opportunity for interchange of views among the parties, even where an agency chooses to conduct a hearing. Reg-neg offers such an opportunity through procedures designed to achieve consensus.

In 1982, the Administrative Conference of the United States set forth criteria for identifying rulemaking situations for which reg-neg is likely to be successful (Recommendation 82-4, 1 CFR §305.82-

4). These criteria were intended to guide agencies in making the key determination whether reg-neg is appropriate for particular regulatory problems. The Conference also suggested specific procedures to be followed by agencies in applying this approach. Additional refinements, based on a study of initial agency experiences with reg-neg, were recommended in 1985 (Recommendation 85-5, 1 CFR §305.85-5). The Conference recommendations, of course, are not mandatory procedures, but may best be used by agencies as a starting point for applying the concept of negotiated rulemaking to their own situations. Both recommendations are reprinted in the appendix.

The Negotiated Rulemaking Act of 1990 (Public Law No. 101-648, codified at 5 U.S.C. §§561-570) establishes basic statutory requirements for the use of reg-neg, but allows great flexibility for implementation by federal agencies. The Act emphasizes effective communication with the affected public, adequate opportunity for public participation, and openness of the entire process. The Act encourages "innovation and experimentation with the negotiated rulemaking process or with other innovative rulemaking procedures otherwise authorized by law." (5 U.S.C. §561) The statute is reprinted in the appendix to chapter 3.

Negotiated rulemaking should be viewed as a supplement to the rulemaking provisions of the Administrative Procedure Act. This means that the negotiation sessions generally take place prior to issuance of the notice and the opportunity for the public to comment on a proposed rule that are required by the Act (5 U.S.C. §553). In some instances, negotiations may be appropriate at a later stage of the proceeding.

Why Use Negotiated Rulemaking?

The adversarial nature of the normal rulemaking process is often criticized as a major contributor to the expense and delay associated with regulatory proceedings. Agency rulemaking may be perceived as merely the first round in a battle that will culminate in a court decision. The need to establish a formal record as a basis for potential litigation sharpens the divisions between parties, and may foreclose any willingness to recognize the legitimate viewpoints of others.

In these circumstances, parties often take extreme positions in their written and oral statements. They may choose to withhold information that they view as damaging. A party may appear to put

equal weight on every argument, giving the agency little clue as to the relative importance it places on the various issues. What is lacking is an opportunity for the parties to exchange views and to focus on finding constructive, creative solutions to problems.

The negotiated rulemaking process uses negotiation and consensus, not to avoid conflict, but to channel the resources and efforts of the parties toward solving the problems presented. In short, the process fosters creative activity by a broad spectrum of interested persons, focused on producing better, more acceptable rules.

Benefits of Negotiated Rulemaking

When an agency considers using negotiated rulemaking to solve a regulatory problem, it must weigh the advantages and disadvantages of using the process. While some of the considerations derive from the specific circumstances of a rule and cannot be discussed here, others are more general.

The long-term benefits of negotiated rulemaking include:

- reduced time, money and effort expended on developing and enforcing rules,
- earlier implementation,
- higher compliance rates, and
- more cooperative relationships between the agency and other parties.

These benefits flow from the broader participation of the parties, the opportunity for creative solutions to regulatory problems, and the potential for avoiding litigation.

In programs with a history of adversarial rulemaking, it is not unusual for parties to negotiate a settlement under the supervision of a court after the rule has been published. Particularly in such programs, negotiation of a rule *prior to the agency's publication of a proposed rule* can save the agency and other parties both time and resources.

By avoiding litigation, regulated businesses (or others who need to plan for the future) can ordinarily know at an earlier time how the rule will affect them. This knowledge enables them to plan capital expenditures or production changes earlier than if they faced years of litigation and uncertainty about the outcome. Similarly, the

public would receive on a more timely schedule those benefits that Congress intended to flow from the promulgation of the rule. (See, for example, "*Regulating Wood-Stove Emissions*," Washington Post, September 25, 1986, reprinted in chapter 13.)

Reducing the risk of costly litigation, however, is only one of the benefits of negotiated rulemaking. Even in programs with no history of adversarial rulemaking, negotiations can provide the agency with a better understanding of the concerns of potentially affected parties, of the relative importance to them of different regulatory choices, and of the factual basis for the regulation. This is true whether or not consensus is attained. Regulatory negotiations can have the effect of enfranchising parties who have important interests at stake, but who may be relatively quiet or may feel relatively powerless under normal rulemaking procedures. Rules drafted by persons who must ultimately be governed by them are more likely to be practical, and therefore more acceptable to affected persons.

Agencies typically receive a lot of both solicited and unsolicited input from affected parties during the pre-proposal stage of rulemaking. Frequently, data and opinions are received from affected parties sequentially: party A submits data on its industry's products or services; then party B, in a separate submission, describes the problems with the products or services provided to the public by the industry. Parties A and B do not communicate directly with each other, and are usually more interested in building a record that states their best positions rather than reaching some practical accommodation on the issues. The agency staff is presented only with polar views from the regulated community and the interested public. Staff must then fashion a regulation that is statutorily sound, practical, and capable of implementation, but without much "reality testing." This means that the rule is not subjected to any procedure whereby agency staff can learn the practical consequences of one or more alternatives under consideration, through observing reactions and interactions among potentially affected parties. In a negotiated rulemaking proceeding, representatives of all of the affected interests come together and can hear and discuss one another's positions and concerns. The give-and-take of the negotiation process can provide all participants, including the agency, with a realistic opportunity to have their assumptions and data questioned and tested by parties with other viewpoints. The result will be a more effective rule.

Under normal rulemaking procedures, an agency is frequently the only party generating solutions to rulemaking dilemmas. Affected outside parties state their most favorable positions and criticize agency proposals without proposing practical solutions. The dynamic nature of negotiating forces each party to participate in crafting solutions to issues that are on the table for resolution. A party is usually not able merely to criticize a proposal under consideration. Other parties will press for finding an alternative proposal that might satisfy the dissenting party. The range of parties at the table in a well-structured regulatory negotiation provides the raw materials, the incentives, and the opportunity for greater creativity in crafting solutions than would be present if the rule were drafted by agency staff alone.

Experience shows that parties in a reg-neg, faced with the reality that the agency will write its own rule if they cannot do it themselves, will have a strong incentive to achieve in a draft rule those points that are most important to them, while compromising on matters that are of less importance. Where consensus is achieved, participants in the negotiations often tend to acquire an interest in seeing the process succeed. They may feel that they have a stake in the resulting regulation. EPA has called this "ownership" of the negotiated rule.

The benefits noted are discussed more fully in "*An Assessment of EPA's Negotiated Rulemaking Activities*," which is reprinted in the appendix.

Some Drawbacks

Negotiated rulemaking can be resource-intensive in the short term for both the agency and the other affected interests. While there are likely to be significant long-term savings in total resources required, the concentration in the short term may cause concern.

For the agency, there will be extra expenditures just to conduct the reg-neg process including costs of the convenor and mediator. In addition, the compression of the rulemaking schedule may require the agency to allocate staff and technical contractor resources for use over a shorter period of time than in rulemakings not involving reg-neg. The agency would also have to assign a senior manager to sit at the negotiating table.

Agency internal review schedules during the negotiations are also compressed. Each related office or manager that needs to

review the resolution of the issues has to respond in a timely manner so that the agency's negotiator can use the information and opinions generated in the negotiations. This can be an advantage for the conduct of the negotiations, but obviously can add to the administrative burdens of other agency personnel who are assisting the agency's representative or are otherwise involved in the rulemaking.

Some parties, such as public interest groups, may have to provide staff time and resources in excess of what they normally spend on pre-proposal contacts with the agency and on post-proposal public comments. Participation in a negotiating committee brings with it the responsibility to review additional documents and to generate ideas, proposals, and perhaps data, which can take significant time to develop. The rule must be of major importance to such a group, or it will not likely want to commit itself to participate so heavily in the proceeding.

The reader is referred to many of the papers included in chapter 13 of this *Sourcebook*, which comment further on the advantages and disadvantages of negotiated rulemaking. (An index to the articles appears at the beginning of chapter 13.)

Criteria for Negotiated Rulemaking

The Negotiated Rulemaking Act requires a determination by the agency head that the use of the reg-neg process is in the public interest (5 U.S.C. §563). The Act gives some guidelines to assist in this determination, based on agency experience and the recommendations of the Administrative Conference. Ultimately, the decision will depend on a judgment as to whether there is a reasonable likelihood that an appropriate committee can be formed that will be able to reach consensus on a proposed rule within a fixed period of time. The decision must also take into account the availability of sufficient resources to support the process and whether the agency is willing to commit those resources.

An important consideration is whether the number of distinct interests concerned with the proposed rule, including any relevant government agencies, is small enough so that they can be fairly represented by not more than 20 to 25 negotiators. (Although the Administrative Conference initially recommended a maximum of 15, experience has shown 20 to 25 to be manageable.) The Act specifies a maximum of 25 unless the agency head determines that a larger number is necessary (5 U.S.C. §565(b)).

There should be a number of diverse issues that participants can rank according to their own priorities, so that there will be room for compromise on some of the issues as an agreement is sought. However, it is essential that the issues to be negotiated not require compromise of principles so fundamental to the parties that there will be no willingness to negotiate.

Parties must indicate a willingness to negotiate in good faith, and no single interest should be able to dominate the negotiations. The existence of a deadline for completion of negotiations, whether imposed by statute, by the agency, or by other circumstances, has been found to impart a degree of urgency that can aid the negotiators in reaching a consensus on a proposed rule.

Reg-neg is clearly not suitable for all agency rulemaking. The circumstances in which it is likely to succeed are discussed in chapter 2.

Procedures for Negotiated Rulemaking

An agency contemplating use of negotiated rulemaking must first determine whether the problem that requires drafting of a rule is amenable to this approach. The agency would normally ask one or more "convenors" -- either outside contractors or government employees who are not otherwise involved in the proceeding -- to assess how well the circumstances meet the above criteria. The convenor would recommend to the agency whether to establish a committee to negotiate a draft rule and might also submit a proposal for the composition of the committee.

In most instances, the committee would be formally chartered under the procedures of the Federal Advisory Committee Act (FACA). While the Negotiated Rulemaking Act makes FACA applicable to reg-neg committees in general (with some modifications discussed in chapter 3), Congress has occasionally exempted certain legislatively required reg-neg committees from FACA. Also, the Unfunded Mandates Reform Act of 1995 (Public Law No. 104-4, §204) provides that FACA will not apply in certain instances involving only federal officials and elected officers of state, local, and tribal governments, or their designated employee representatives.

It is essential for the success of reg-neg that all concerned interests be represented in the negotiations. Therefore, the agency and the convenor must make reasonable efforts to ensure that all relevant interest groups and others who may be affected by the rule are aware of the proceeding. Public notices explaining the agency's

plans for the proceeding, in addition to any general requirements for establishing advisory committees, can be very useful as a check against an essential party being overlooked.

Agencies have found that the actual negotiations tend to be more successful when the committee has the assistance of one or more persons with specific experience in helping others negotiate solutions to complex multi-party problems. Whether referred to as "mediators" or "facilitators," persons skilled in techniques of dispute resolution have invariably been helpful to committees attempting to negotiate rules. Persons performing this role may be the same individuals who acted as convenors, but this is not essential.

If the issues are unusually complex, or if any of the negotiators need assistance in dealing with their constituencies, then it may be advisable to have more than one mediator or facilitator. In some instances, prior knowledge of the subject matter of the negotiations may be necessary. However, in general, the most important factors in choosing "neutral" persons to assist a negotiating committee are skillfulness in dispute resolution and personal acceptability to all of the participants.

It is also important for the agency to participate fully in the negotiations, making sure that at all times the participants are aware of what action the agency is likely to take if the committee does not reach an agreement.

The goal of the committee is to reach consensus on a draft rule. The word "consensus" is usually understood in this context to mean that each interest represented concurs in the result, unless all members of the committee agree at the outset to a different meaning. If a consensus is reached by the committee, the agency ordinarily would publish the draft rule based on that consensus in a notice of proposed rulemaking -- and the agency would have committed itself in advance to doing so. Negotiations that do not result in consensus on a draft rule can still be very useful to the agency by narrowing the issues in dispute, identifying information necessary to resolve issues, ranking priorities, and finding potentially acceptable solutions.

The Administrative Conference has recommended that at the conclusion of the negotiations the committee should formally report the outcome to the agency. In practice, some agencies have found that a formal report may be unnecessary if committee records contain sufficient documentation of what took place during the

negotiations. The committee records or report should identify the issues addressed, areas of agreement, and areas where there is not consensus. If the committee reaches a consensus on a draft rule, the agency should be given both the text and a concise statement of its basis and purpose. The Negotiated Rulemaking Act specifies that, where consensus is reached, the committee shall transmit to the agency a report containing the proposed rule (5 U.S.C. §566(f)). In other cases, however, the Act gives the committee the freedom to determine what information, recommendations or materials, if any, are appropriate to give to the agency.

Federal Agency Experience

In 1983, the Federal Aviation Administration became the first Federal agency to try using negotiated rulemaking. The FAA assembled a committee to negotiate a revision of flight and rest time requirements for domestic airline pilots. The committee included representatives of airlines, pilot organizations, public interest groups, and other interested parties. The prior rules had been in effect for 30 years, a period of substantial change in the airline industry, during which the FAA had to issue more than 1000 pages of interpretations. On several occasions, the agency had proposed revisions, but withdrew them because of substantial opposition. A final rule based on the committee's negotiations was adopted in 1985, which was not challenged in court. Since then, several agencies within the Department of Transportation have used reg-neg on a variety of issues. These include the National Highway Traffic Safety Administration, the Coast Guard and the Federal Railroad Administration.

The Environmental Protection Agency has been the most consistent and committed user of negotiated rulemaking, accounting for approximately one-third of federal agency reg-negs. Rules based on a negotiated consensus include penalties for manufacturers of vehicles not meeting Clean Air Act standards, emergency exemptions from pesticide regulations, performance standards for woodburning stoves, control of volatile organic chemical equipment leaks, national emission standards for coke ovens, manifests for transporting hazardous wastes, and chemicals used in manufacturing wood furniture. In several additional proceedings, EPA based its rule on substantial agreements reached in the negotiations even though the committees were unable to agree completely on a proposal. (See the appendix for discussion and evaluation of EPA's early experience with reg-neg. A more comprehensive evaluation

of EPA's reg-neg experience, conducted by the Administrative Conference, will be completed in late 1995.)

The Occupational Safety and Health Administration has used reg-neg for proposed standards on worker exposure to benzene and to a chemical known as MDA, an animal carcinogen used in the manufacture of plastics. Although the benzene effort did not result in a negotiated rule, the MDA committee reached consensus on a set of recommendations to OSHA that served as the basis for the agency's rule. OSHA established a committee in 1994 to negotiate safety standards for workers erecting steel structures. In 1992, the Office of the Solicitor of the Department of Labor issued its *Negotiated Rulemaking Handbook* as a guide for departmental use of reg-neg. In 1994, the Department produced a videotape that includes a discussion of the MDA proceeding.

Other agencies that have used negotiated rulemaking procedures include the Nuclear Regulatory Commission, Farm Credit Administration, Federal Communications Commission, Federal Trade Commission, and the Departments of Agriculture, Education, Health and Human Services, Housing and Urban Development, and the Interior. A complete list of federal negotiated rulemaking proceedings as of May 1995 appears in chapter 10.

Appendix

The appendix to chapter 1 includes the two recommendations of the Administrative Conference on negotiated rulemaking and three documents reflecting some of the experience of the Environmental Protection Agency. The flow chart illustrates the steps in the procedure followed by EPA. An article by former Administrator Lee Thomas sets forth the reasons for EPA's active use of reg-neg. "*An Assessment of EPA's Negotiated Rulemaking Activities*" contains the findings of a study by the Program Evaluation Division of EPA.

Recommendation 82-4, 1 CFR §305.82-4

§ 305.82-4 Procedures for Negotiating Proposed Regulations (Recommendation No. 82-4).

The complexity of government regulation has increased greatly compared to that which existed when the Administrative Procedure Act was enacted, and this complexity has been accompanied by a formalization of the rulemaking process beyond the brief, expeditious notice and comment procedures envisioned by section 553 of the APA. Procedures in addition to notice and comment may, in some instances, provide important safeguards against arbitrary or capricious decisions by agencies and help ensure that agencies develop sound factual bases for the exercise of the discretion entrusted them by Congress, but the increased formalization of the rulemaking process has also had adverse consequences. The participants, including the agency, tend to develop adversarial relationships with each other causing them to take extreme positions, to withhold information from one another, and to attack the legitimacy of opposing positions. Because of the adversarial relationships, participants often do not focus on creative solutions to problems, ranking of the issues involved in a rulemaking, or the important details involved in a rule. Extensive factual records are often developed beyond what is necessary. Long periods of delay result, and participation in rulemaking proceedings can become needlessly expensive. Moreover, many participants perceive their roles in the rulemaking proceeding more as positioning themselves for the subsequent judicial review than as contributing to a solution on the merits at the administrative level. Finally, many participants remain dissatisfied with the policy judgments made at the outcome of rulemaking proceedings.

Participants in rulemaking rarely meet as a group with each other and with the agency to communicate their respective views so that each can react directly to the concerns and positions of the others in an effort to resolve conflicts. Experience indicates that if the parties in interest were to work together to negotiate the text of a proposed rule, they might be able in some circumstances to identify the major issues, gauge their importance to the respective parties, identify the information and data necessary to resolve the issues, and develop a rule that is acceptable to the respective interests, all within the contours of the substantive statute. For example, highly technical standards are negotiated that have extensive health, safety, and economic effects; lawsuits challenging rules are regularly settled by agreement on a negotiated rule; public law litigation involves sensitive nego-

tiation over rule-like issues; and many environmental disputes and policies have been successfully negotiated. These experiences can be drawn upon in certain rulemaking contexts to provide procedures by which affected interests and the agency might participate directly in the development of the text of a proposed rule through negotiation and mediation.

The Federal Advisory Committee Act (FACA) has, however, dampened administrative enthusiasm for attempts to build on experience with successful negotiations. Without proposing a general revision of FACA, the Administrative Conference urges that Congress amend the Act to facilitate the use of the negotiating procedures contemplated in this recommendation.

The suggested procedures provide a mechanism by which the benefits of negotiation could be achieved while providing appropriate safeguards to ensure that affected interests have the opportunity to participate, that the resulting rule is within the discretion delegated by Congress, and that it is not arbitrary or capricious. The premise of the recommendation is that provision of opportunities and incentives to resolve issues during rulemaking, through negotiations, will result in an improved process and better rules. Such rules would likely be more acceptable to affected interests because of their participation in the negotiations. The purpose of this recommendation is to establish a supplemental rulemaking procedure that can be used in appropriate circumstances to permit the direct participation of affected interests in the development of proposed rules. This procedure should be viewed as experimental, and should be reviewed after it has been used a reasonable number of times.

RECOMMENDATION

1. Agencies should consider using regulatory negotiation, as described in this recommendation, as a means of drafting for agency consideration the text of a proposed regulation. A proposal to establish a regulatory negotiating group could be made either by the agency (for example, in an advance notice of proposed rulemaking) or by the suggestion of any interested person.

2. Congress should facilitate the regulatory negotiation process by passing legislation explicitly authorizing agencies to conduct rulemaking proceedings in the manner described in this

recommendation. This authority, to the extent that it enlarges existing agency rulemaking authority, should be viewed as an experiment in improving rulemaking procedures. Accordingly, the legislation should contain a sunset provision. The legislation should provide substantial flexibility for agencies to adapt negotiation techniques to the circumstances of individual proceedings, as contemplated in this recommendation, free of the restrictions of the Federal Advisory Committee Act and any *ex parte* limitations. Legislation should provide that information tendered to such groups, operating in the manner proposed, should not be considered an agency record under the Freedom of Information Act.

3. In legislation authorizing regulatory negotiation, Congress should authorize agencies to designate a "convenor" to organize the negotiations in a particular proceeding. The convenor should be an individual, government agency, or private organization, neutral with respect to the regulatory policy issues under consideration. If the agency chooses an individual who is an employee of the agency itself, that person should not be associated with either the rulemaking or enforcement staff. The convenor would be responsible for (i) advising the agency as to whether, in a given proceeding, regulatory negotiation is feasible and is likely to be conducive to the fairer and more efficient conduct of the agency's regulatory program, and (ii) determining, in consultation with the agency, who should participate in the negotiations.

4. An agency considering use of regulatory negotiation should select and consult with a convenor at the earliest practicable time about the feasibility of its use. The convenor should conduct a preliminary inquiry to determine whether a regulatory negotiating group should be empanelled to develop a proposed rule relating to the particular topic. The convenor should consider the risks that negotiation procedures would increase the likelihood of a consensus proposal that would limit output, raise prices, restrict entry, or otherwise establish or support unreasonable restraints on competition. Other factors bearing on

this decision include the following:

(a) The issues to be raised in the proceeding should be mature and ripe for decision. Ideally, there should be some deadline for issuing the rule, so that a decision on a rule is inevitable within a relatively fixed time frame. The agency may also impose a deadline on the negotiations.

(b) The resolution of issues should not be such as to require participants in negotiations to compromise their fundamental tenets, since it is unlikely that agreement will be reached in such circumstances. Rather, issues involving such fundamental tenets should already have been determined, or not be crucial to the resolution of the issues involved in writing the proposed regulation.

(c) The interests significantly affected should be such that individuals can be selected who will adequately represent those interests. Since negotiations cannot generally be conducted with a large number of participants, there should be a limited number of interests that will be significantly affected by the rule and therefore represented in the negotiations. A rule of thumb might be that negotiations should ordinarily involve no more than 15 participants.

(d) There should be a number of diverse issues that the participants can rank according to their own priorities and on which they might reach agreement by attempting to optimize the return to all the participants.

(e) No single interest should be able to dominate the negotiations. The agency's representative in the negotiations will not be deemed to possess this power solely by virtue of the agency's ultimate power to promulgate the final rule.

(f) The participants in the negotiations should be willing to negotiate in good faith to draft a proposed rule.

(g) The agency should be willing to designate an appropriate staff member to participate as the agency's representative, but the representative should make clear to the other participants that he or she cannot bind the agency.

5. If the convenor determines that regulatory negotiation would be appropriate, it would recommend this

procedure to the agency. If the agency and the convener agree that regulatory negotiation is appropriate, the convener should be responsible for determining preliminarily the interests that will likely be substantially affected by a proposed rule, the individuals that will represent those interests in negotiations, the scope of issues to be addressed, and a schedule for completing the work. It will be important for potential participants to agree among themselves as to these matters, and their agreement can be facilitated by either the convener or a possible participant conducting a preliminary inquiry among identified interests. Reasonable efforts should be made to secure a balanced group in which no interest has more than a third of the members and each representative is technically qualified to address the issues presented, or has access to qualified individuals.

6. The subject matter of the proposed regulation may be within the jurisdiction of an existing committee of a non-governmental standards writing organization that has procedures to ensure the fair representation of the respective interests and a process for determining whether the decision actually reflects a consensus among them. If such a committee exists and appears to enjoy the support and confidence of the affected interests, the convener should consider recommending that negotiations be conducted under that committee's auspices instead of establishing an entirely new framework for negotiations. In such a case, the existing committee could be regarded as a regulatory negotiation group for purposes of this recommendation. (Alternatively, the product of the committee could be used as the basis of a proposed regulation pursuant to Administrative Conference Recommendation 78-4.³)

7. To ensure that the appropriate interests have been identified and have had the opportunity to be represented in the negotiating group, the agency

should publish in the FEDERAL REGISTER a notice that it is contemplating developing a rule by negotiation and indicate in the notice the issues involved and the participants and interests already identified. If an additional person or interest petitions for membership or representation in the negotiating group, the convener, in consultation with the agency, should determine (i) whether that interest would be substantially affected by the rule, (ii) if so, whether it would be represented by an individual already in the negotiating group, and (iii) whether, in any event, the petitioner should be added to the negotiating group, or whether interests can be consolidated and still provide adequate representation.

8. The agency should designate a senior official to represent it in the negotiations and should identify that official in the FEDERAL REGISTER notice.

9. It may be that, in particular proceedings, certain affected interests will require reimbursement for direct expenses to be able to participate at a level that will foster broadly-based, successful negotiations. Unlike intervenors, the negotiating group will be performing a function normally performed within the agency, and the agency should consider reimbursing the direct expenses of such participants. The agency should also provide financial or other support for the convener and the negotiating group. Congress should clarify the authority of agencies to provide such financial resources.

10. The convener and the agency might consider whether selection of a mediator is likely to facilitate the negotiation process. Where participants lack relevant negotiating experience, a mediator may be of significant help in making them comfortable with the process and in resolving impasses.

11. The goal of the negotiating group should be to arrive at a consensus on a proposed rule. Consensus in this context means that each interest represented in the negotiating group concurs in the result, unless all members of the group agree at the outset on another definition. Following consensus, the negotiating group should prepare a report to the agency con-

³ Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation, 1978 ACUS Recommendations and Reports 13, 1 CFR 305.78-4.

taining its proposed rule and a concise general statement of its basis and purpose. The report should also describe the factual material on which the group relied in preparing its proposed regulation, for inclusion in the agency's record of the proceeding. The participants may, of course, be unable to reach a consensus on a proposed rule, and, in that event, they should identify in the report both the areas in which they are agreed and the areas in which consensus could not be achieved. This could serve to narrow the issues in dispute, identify information necessary to resolve issues, rank priorities, and identify potentially acceptable solutions.

12. The negotiating group should be authorized to close its meeting to the public only when necessary to protect confidential data or when, in the judgment of the participants, the likelihood of achieving consensus would be significantly enhanced.

13. The agency should publish the negotiated text of the proposed rule in its notice of proposed rulemaking. If the agency does not publish the negotiated text as a proposed rule, it should explain its reasons. The agency may wish to propose amendments or modifications to the negotiated proposed rule, but it should do so in such a manner that the public at large can identify the work of the agency and of the negotiating group.

14. The negotiating group should be afforded an opportunity to review any comments that are received in response to the notice of proposed rulemaking so that the participants can determine whether their recommendations should be modified. The final responsibility for issuing the rule would remain with the agency.

[47 FR 30708, July 15, 1982]

Recommendation 85-5, 1 CFR §305.85-5

§ 305.85-5 Procedures for Negotiating Proposed Regulations (Recommendation No. 85-5).

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

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

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

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

It is important to view Recommendation 82-4 and the present recommendation, taken together, as a guide to issues to be considered rather than a formula to be followed. Negotiation is intrinsically a fluid process that cannot be delineated in advance. Accordingly, what will "work" in a particular case depends on the substantive issues, the perception of the agency's position by interested parties, past and current relationships among the parties, the authority of party representatives in the negotiations, the negotiating style of the representatives, the number and divergence of views within each constituency represented, and the skill of the participants and mediators. These factors are mostly dynamic and their character is likely to change during the negotiating process. Proponents of negotiated rulemaking must recognize the unavailability of neat formal solutions to questions of who should participate, how the negotiations should be conducted, or even the definition of "successful" negotiations.

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

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

Another concern expressed by some agencies has been the potential costs associated with negotiated rulemaking. While aspects of the recommended process may entail some short-term additional costs, the Conference believe that potential long-range savings will more than offset the costs.

Moreover, agencies should be aware of opportunities for assistance from within the government, for example, training provided by the Legal Education Institute of the Department of Justice, and mediation assistance by the Federal Mediation and Conciliation Service and the Community, Relations Service.

RECOMMENDATION

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

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

3. The agency should recognize that negotiations can be useful at several stages of rulemaking proceedings. For example, negotiating the terms of a final rule could be a useful procedure even after publication of a proposed rule. Usually, however, negotiations should be used to help develop a notice of proposed rulemaking, with negotiations to be resumed after com-

ments on the notice are received, as contemplated by paragraphs 13 and 14 of Recommendation 82-4.

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

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

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

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

8. Where appropriate, the agency, the mediator or facilitator, or the negotiating group should consider ap-

pointing a neutral outside individual who could receive confidential data, evaluate it, and report to the negotiators. The parties would need to agree upon the protection to be given confidential data. A similar procedure may also be desirable in order to permit neutral technical advice to be given in connection with complex data.

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

[50 FR 52895, Dec. 27, 1985]

NEGOTIATED RULEMAKING AT EPA

EVALUATION

- Identify issues and deadlines
- Identify interested parties
- Compare to selection criteria
- Confirm management interest
- Select convenor



CONVENING—PHASE 1

- Identify additional parties
- Discuss RegNeg with parties
- Discuss issues with parties
- Determine willingness of parties to negotiate
- Report to agency
- Obtain agency management commitment
- Preliminary selection of 15-25 participants



CONVENING—PHASE 2

- Obtain parties commitment to negotiate
- Publish "notice of intent to negotiate"
- Process FACA charter
- Select facilitator/mediator
- Respond to public comments on "notice"
- Adjust committee membership if necessary
- Arrange organizational meeting
- Arrange committee orientation/training





NEGOTIATIONS

- Establish groundrules/protocols
- Define "consensus"
- Set meeting schedule
- Publish notices of meetings
- Review available information and issues
- Review draft rule or proposals if available
- Establish work groups or subcommittees as necessary
- Negotiate text or outline of proposed rule



RULEMAKING

- Negotiations concluded
- If consensus is reached on language of rule:
 - Agency circulates draft for internal/external review
 - Agency publishes consensus as draft rule
- If consensus is reached only on issues or outline:
 - Agency drafts proposed rule
 - Agency circulates draft for internal/external review
 - Agency publishes NPRM
- If consensus is not reached:
 - Agency proceeds with rulemaking using discussions as a guide
 - Agency drafts and publishes NPRM
- Draft rule is subject to public comment
- Committee notified of public comments
- Agency revises rule if necessary
- Agency publishes final rule