ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Negotiated Rulemaking

Commented [CMA1]: Consideration of title change

Commented [CLB2R1]: Perhaps add a byline such as:

Negotiated Rulemaking: *Considering a Spectrum of Public Engagement Options*
-Or-
Negotiated Rulemaking:*Public Engagement Options in Context*

Note, procedurally, the project title requires Council approval. The committee may vote to recommend an alternative title, which would then be considered as an amendment at the Plenary Session.

Committee on Rulemaking

Proposed Recommendation for Committee | April 13, 2017

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

Starting in the late 1970s, as legal reform advocates sought to expand the use of alternative dispute resolution (ADR) to reduce the incidence of litigation in the civil courts, administrative law scholars began to consider whether importing ADR norms into the rulemaking process might promote a more constructive, collaborative dynamic between agencies and those persons interested in or affected by agency rules. Eventually, several administrative law scholars and practitioners proposed an alternative procedure that came to be known as "negotiated rulemaking." Negotiated rulemaking brings together an advisory committee[2]

[1] Administrative Conference of the United States, Recommendation 85-5, Procedures for Negotiating Proposed Regulations, 50 Fed. Reg. 52,893 (Dec. 27, 1985).

[2] Negotiated rulemaking committees are advisory committees that must comply with the Federal Advisory Committee Act (FACA), unless otherwise provided by statute. 5 U.S.C § 565(a).

composed of representatives of identifiable affected interests,[3] agency officials, and a "neutral"[4] trained in mediation and facilitation techniques who would meet to try to reach consensus on a proposed rule.[5] The Administrative Conference twice issued recommendations to support the use of negotiated rulemaking in appropriate circumstances. The first, Recommendation 82-4, *Procedures for Negotiating Proposed Regulations*, represented an early effort to articulate the steps agencies should take to use the process successfully.[6] The second, Recommendation 85-5, *Procedures for Negotiating Proposed Regulations*, identified suggested practices based on agency experience with negotiated rulemaking in the preceding years.[7]

Congress formally authorized the use of regulatory negotiation where it would enhance rulemaking by enacting the Negotiated Rulemaking Act of 1990.[8] Congress had found that

[3] The Negotiated Rulemaking Act provides that an agency, when determining the need for negotiated rulemaking, should among other factors consider whether "there are a limited number of identifiable interests that will be significantly affected by the rule." *Id.* § 563(a)(2). The Act further defines an "interest" to mean "with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner." *Id.* § 562(5).

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

[5] In practice, negotiated rulemaking committees may work to reach consensus on the text of a proposed rule or may instead seek consensus on a term sheet or other document covering the major issues of the rulemaking. Although negotiated rulemaking committees meet to seek consensus on proposed rules, they may remain constituted until the promulgation of the final rule. *Id.* § 567. Some agencies have used committee meetings to obtain further feedback during the development of the final rule.

[6] Administrative Conference of the United States, Recommendation 82-4, Procedures for Negotiating Proposed Regulations, 47 Fed. Reg. 30,701 (July 15, 1982). These recommendations were based on Professor Philip Harter's report to the Administrative Conference (Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982)). The procedural steps proposed in Recommendation 82-4 formed the basis of the Negotiated Rulemaking Act.

[7] Recommendation 85-5, *supra* note 1. The present recommendation is intended to supplement, rather than override, the Conference's prior recommendations on negotiated rulemaking.

[8] Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified as amended by Pub. L. No. 104-320, 110 Stat. 3870 (1996) at 5 U.S.C §§ 561–70).

traditional informal rulemaking "may discourage the affected parties from meeting and communicating with each other, and may cause parties with different interests to assume conflicting and antagonistic positions and to engage in expensive and time-consuming litigation."[9] Congress found that negotiated rulemaking could "increase the acceptability and improve the substance of rules, making it less likely that the affected parties will resist enforcement or challenge such rules in court" and that negotiation could "shorten the amount of time needed to issue final rules."[10]

Executive Order 12,866, signed by President William J. Clinton and retained by subsequent presidents, directs agencies to "explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking."[11] In addition, Congress has occasionally mandated the use of negotiated rulemaking when passing new legislation that directs agencies to address certain problems.[12]

[9] 5 U.S.C § 561.

[10] *Id.*

[11] Exec. Order 12,866, § 6(a)(1), 58 Fed. Reg. 51,735 (Oct. 4, 1993). In addition, President Clinton directed each agency to identify at least one rulemaking to develop through negotiated rulemaking or to explain why negotiated rulemaking would not be feasible. *See* 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.

[12] Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1256, 1268 (1997). Over a dozen such statutes were passed before 1997, including the Student Loan Reform Act of 1993 (Pub. L. No. 103-66, § 4021, 107 Stat. 341, 353) and the Native American Housing Assistance and Self-Determination Act of 1996 (Pub. L. No. 104–330, § 106(b), 110 Stat. 4016, 4029). Congress has continued to mandate that agencies use negotiated rulemaking under some programs. For a list of statutes mandating or strongly encouraging negotiated rulemaking, see Cary Coglianese, *Is Consensus an Appropriate Basis for Regulatory Policy?*, *in* ENVIRONMENTAL CONTRACTS: COMPARATIVE APPROACHES TO REGULATORY INNOVATION IN THE UNITED STATES AND EUROPE 93–113 (Eric Orts & Kurt Deketeaere eds., 2001). More recent examples include the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. No. 108-458, § 7212, 118 Stat. 3638, 2829) and the Patient Protection and Affordable Care Act (Pub. L. No. 111-148, § 5602, 124 Stat. 119, 677). For a case study of the congressionally mandated use of negotiated rulemaking by the U.S. Department of Education, see Jeffrey S. Lubbers, *Enhancing the Use of Negotiated Rulemaking by the U.S. Department of Education* (Dec. 5, 2014), *in* RECALIBRATING REGULATION OF COLLEGES AND UNIVERSITIES, REPORT OF THE TASK FORCE ON FEDERAL REGULATION OF HIGHER EDUCATION 90 (2015), *available at* http://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf.

By the early 2000s, however, negotiated rulemaking, which had never been used with great frequency,[13] apparently fell into relative decline.[14] Over the past few years, the process appears to be receiving a modest increase in attention and use by some agencies. In part, the infrequent use of negotiated rulemaking may be due to the availability of alternative public engagement options such as technical workshops, listening sessions, and other forums that allow agencies to gain many of the benefits of direct feedback early in the policymaking process while retaining greater procedural flexibility. Nevertheless, where an agency concludes that its goals would best be served by developing a consensus-based proposed rule—or where the relevant policy issues, or relationships with interested persons or groups, are suitably complex—negotiated rulemaking may very well be a worthwhile procedural option to consider.

To guide agencies in choosing among the various kinds of public engagement methods they may use to meet their goals, and to offer suggestions on how agencies might enhance the probability of success when choosing to undertake negotiated rulemaking, the Administrative Conference recommends the considerations and practices outlined below. These recommendations begin with the initial choice agencies confront—namely selecting from among various public engagement options and deciding when to use negotiated rulemaking—before turning to recommendations for those occasions when agencies use negotiated rulemaking.

[13] Coglianese reported in 1997 that the use of negotiated rulemaking up to that point was confined to "less than one-tenth of one percent" of federal rules. Coglianese, *supra* note 12, at 1276.

[14] By design, negotiated rulemaking was never intended to be used in the vast majority of agency rulemaking. Further documentation of the early use, decline, and recent uptick in the use of negotiated rulemaking can be found in Cheryl Blake & Reeve T. Bull, Negotiated Rulemaking (March 13, 2017), Part II, *available at* https://www.acus.gov/sites/default/files/documents/Negotiated_Rulemaking_Draft_Report_March%2013%202017.pdf. *See also* Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 1001 (2008); Peter H. Schuck & Steven Kochevar, *Reg Neg Redux: The Career of a Procedural Reform*, 15 THEORETICAL INQUIRIES IN LAW 417, 439 (2014); Reeve T. Bull, *The Federal Advisory Committee Act: Issues and Proposed Reforms* 52 & app. A (Sept. 12, 2011), *available at* https://www.acus.gov/sites/default/files/documents/COCG-Reeve-Bull-Draft-FACA-Report-9-12-11.pdf.

RECOMMENDATION

Selecting the Optimal Approach to Agency Engagement with Interested Persons

1. Negotiated rulemaking is one option of several that agencies should consider when seeking input from interested persons on a contemplated rule. The following alternatives to negotiated rulemaking are likely to prove preferable under many circumstances:
    a. Notice-and-comment rulemaking is likely adequate when the goal is simply to obtain documentary information from a wide array of interested persons.
    b. When seeking to facilitate a two-way exchange of information or ideas, agencies should consider holding a meeting or dialogue session with an array of interested persons.
    c. In situations in which the agency is interested in determining the views of various interested persons or groups in connection with a contemplated rule but is not seeking advice and does not consider it worthwhile to push for a consensus position on a proposed rule, the agency should consider convening an ad hoc group of interested persons to provide input over the course of more than one meeting or dialogue session.
    d. Where the agency seeks group-based recommendations on proposed policy (whether or not connected with a contemplated rule), the agency should convene an advisory committee, observing all requirements prescribed by the Federal Advisory Committee Act (FACA).

Deciding When to Use Negotiated Rulemaking

2. An agency should consider using negotiated rulemaking only when it determines that the procedure is in the public interest and will advance the agency's statutory objectives consistent with the factors outlined in the Negotiated Rulemaking Act. Specifically, such factors include whether:

- "there are a limited number of identifiable interests that will be significantly affected by the rule;"[15]
- "there 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;"[16]
- there is adequate time to complete negotiated rulemaking and the agency possesses the necessary resources to support the process;[17] and
- "the 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."[18]

3. In light of the broad range of highly specific factors that need to be considered when deciding to use the process, Congress generally should not direct agencies to use negotiated rulemaking unless it determines that each of the factors specified in the Negotiated Rulemaking Act apply.[19] It should also generally avoid constraining agency choices about committee membership and the discrete issues to be resolved by the committee. Just as agencies should consider a variety of options for public engagement beyond negotiated rulemaking, Congress may at times consider requiring the use of other

[15] 5 U.S.C. § 563(a)(2).

[16] *Id.* § 563(a)(3).

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

[18] *Id.* § 563(a)(7).

[19] A 1995 report of the ACUS Chairman on the implementation of the Negotiated Rulemaking Act (the recommendations of which were never formally adopted by the Conference) offered the recommendation that Congress generally not mandate that agencies use negotiated rulemaking, but rather provide incentives (such as reducing procedural burdens) to promote its use where appropriate. *Building Consensus in Agency Rulemaking: Implementing the Negotiated Rulemaking Act* (Oct. 1995), at 31.

options to enhance public input, such as the use of advance notices of proposed rulemaking or the convening of advisory committees.

Commented [CLB3]: It was unclear whether the committee wished to retain or delete this.

Suggest revisiting during April 13th meeting.

Structuring a Negotiated Rulemaking Committee to Maximize the Probability of Success

4. As a general matter, 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 any legal prohibitions or fixed policy positions of the agency. Agency officials should inform the committee of the use to which the information they provide will be put and should notify them that negotiated rulemaking committee meetings and documents submitted in connection therewith are generally available to the public.
5. Agencies should appoint an official with sufficient authority to speak on behalf of the agency to attend, and participate to the extent the agency deems suitable, in all negotiated rulemaking committee meetings. This official (who may or may not be the designated federal officer for FACA purposes) should actively manage participant expectations, informing participants of any legal or other constraints that would limit the range of options available to the committee members.[20]
6. Agencies should clearly define the roles to be played by a convenor and/or facilitator in a negotiated rulemaking.[21] Generally, agencies should draw upon the convenor's expertise in selecting committee members, defining the issues the committee will address, and setting the goals for the committee's work. Similarly, agencies should generally use a facilitator to impartially assist the negotiation process. The specific roles to be played by

[20] Even in cases where the agency official does not participate in the conduct of the negotiations, it is nevertheless important for that individual to serve the function of informing participants of legal and other constraints on the negotiation.

[21] Notably, while such neutral experts may be hired by an agency, they support the overall process impartially (rather than on behalf of, or in favor of, the agency). For more details on the roles of convenors and facilitators, see Recommendation 85-5, *supra* note 1, at recommendations 5–8 and the discussion in note 4, *supra*. The roles may be filled by the same person or by two different individuals, who may be agency employees or external experts.

any such neutral individuals will depend on the agency's needs and the particular circumstances of the negotiated rulemaking.

7. Agencies should consider OIRA's role in the rulemaking process when conducting negotiated rulemaking and inform committee members of that role. An agency should notify its OIRA desk officer of the opportunity to observe the committee meetings and, upon request, provide him or her with briefings on the meetings. An agency should also discuss whether or how the committee process might be used to support the development of the elements needed to comply with relevant analytical requirements, including the rule's regulatory impact analysis.

Considerations Associated with FACA

8. Congress should amend the Negotiated Rulemaking Act to exempt negotiated rulemaking committees from FACA, or at least from FACA's chartering and reporting requirements.[22] If Congress exempts negotiated rulemaking committees from FACA entirely, it should amend the Negotiated Rulemaking Act to require that negotiated rulemaking committee meetings be noticed in advance and open to the public.
9. For greater flexibility within the framework of FACA, agencies should consider maintaining standing committees[23] from which a negotiated rulemaking subcommittee or working group can be formed on an as-needed basis, rather than needing to charter a new

[22] Administrative Conference of the United States, Recommendation 2011-7, The Federal Advisory Committee Act – Issues and Proposed Reforms, 77 Fed. Reg. 2257 (Jan. 17, 2012). Recommendation #7 proposed that Congress amend FACA to exempt negotiated rulemaking committees from the Act's requirements, but require such committees to announce meetings in advance and be open to the public. The Recommendation further encouraged Congress to "codify existing procedures that allow caucuses or other sub-groups of committee members to meet privately, provided that such caucuses or sub-groups make no final decisions on behalf of the full committee."

[23] Both the Department of Energy and Federal Aviation Administration have standing committees that at times have been used to support negotiated rulemaking. When seeking to negotiate a proposed rule, these agencies will form subcommittees or working groups (sometimes wholly comprising standing committee members, while other times comprising both standing committee and new members). For more details on the structure of these arrangements and their potential benefits, see Blake & Bull, *supra* note 14, at 29–30. Note, however, that many components in the Department of Transportation other than the FAA do prepare FACA charters for each new negotiated rulemaking committee, rather than using the standing committee/subcommittee model just described.

committee each time the agency undertakes a negotiated rulemaking.[24] Regardless of whether Congress amends FACA to limit its applicability to negotiated rulemaking, agencies should strive to minimize procedural burdens associated with the advisory committee process.[25]

[24] A recent legislative proposal would eliminate the subcommittee exemption to FACA. H.R. 70, 115th Cong. § 3(b) (2017). We reaffirm the recommendation in 2011-7 that the subcommittee exemption not be eliminated absent some carve out for preparatory work (*supra* note 22, at ¶ 5). If Congress does proceed with eliminating that exemption, it should consider retaining a carveout for caucuses that occur in negotiated rulemaking committees, as these are critical to the effective functioning of said committees.

[25] For example, internal conflict of interest reviews often prepared for advisory committee members may not be necessary in the negotiated rulemaking context, and could be eliminated or reduced in scope.