



Negotiated Rulemaking

WHAT IS A RULE?

A rule or regulation is the equivalent of an operating or implementation manual for a part of a statute or act of Congress. A rule gives those subject to its requirements more detailed instructions or prohibitions regarding activities that are addressed by the statute.

HOW ARE RULES USUALLY WRITTEN?

Generally a federal agency's staff drafts the text of a proposed rule. After circulation and comment within the agency, the rule will be printed in the Federal Register as a proposed rule. The public is then invited to comment on the rule. After reading and analyzing the public's comment the agency may revise the rule to incorporate suggestions or eliminate problems identified as a result of the analysis. The rule is then published in final form in the Federal Register and becomes effective on the date listed in the notice. It is then incorporated into the government's Code of Federal Regulations, which lists all currently applicable regulations.

WHAT IS NEGOTIATED RULEMAKING?

Negotiated rulemaking is a process which brings together representatives of various interest groups and a federal agency to negotiate the text of a proposed rule. The goal of a negotiated rulemaking proceeding is for the committee to reach consensus on the text of a proposed rule.

HOW IS NEGOTIATED RULEMAKING DIFFERENT?

In a negotiated rulemaking proceeding, a well-balanced group representing the regulated public, community and public interest groups, state and local governments, joins with a representative of the federal agency in a federally chartered advisory committee to negotiate the text or the outline or concept of a rule before it is published as a proposed rule in the Federal Register. If the committee reaches consensus on the rule then the federal agency can use this consensus as a basis for its proposed rule. The proposed rule is still subject to public comment. If consensus is not reached then the agency proceeds with its normal rulemaking activities.

WHAT ARE THE ADVANTAGES OF NEGOTIATED RULEMAKING?

Federal agencies that have used negotiated rulemaking have identified several advantages to developing a rule by negotiation before notice and comment. The regulatory negotiation process allows the interested, affected parties a more direct input into the drafting of the regulation, thus ensuring that the rule is more sensitive to the needs and limitations of both the parties and the agency. Rules drafted by negotiation have been found to be more pragmatic and more easily implemented at an earlier date, thus providing the public with the benefits of the rule while minimizing the negative impact of a poorly conceived or drafted regulation.

Because the negotiating committee includes representatives of the major groups affected by or interested in the rule, the number of public comments is reduced. The tenor of public comment is more moderate. Fewer substantive changes are required before the rule is made final.

The committee can draw on the diverse experience and creative skills of the members to address problems encountered in writing a regulation. Often the group together can propose solutions to difficult problems that no one member could have thought of or believed would work.

HOW ARE RULES SELECTED FOR NEGOTIATED RULEMAKING?

The Negotiated Rulemaking Act of 1996 suggests a number of criteria (see attachment) that a rule should meet to be a candidate for negotiated rulemaking. Generally, the federal agency conducts an internal assessment to determine its own interest in negotiating a rule. If it determines that a negotiation is a possibility, the agency retains a neutral third party facilitator/mediator to conduct a more rigorous assessment of the feasibility. This assessment involves interviews of agency management and staff and conversations with a wide range of organizations and individuals who might be affected by the rule. The facilitator will analyze the information gained about the issues and the parties and make recommendations to the agency regarding the feasibility of negotiating the rule and

suggestions for designing the negotiation process. The agency considers the results of the feasibility study and makes a decision whether to proceed.

HOW DOES THE PROCESS WORK?

The federal agency establishes a formal advisory committee under the Federal Advisory Committee Act. A balanced mix of people representing the range of affected parties is invited by the agency to participate. Generally committees are composed of between 12 and 25 members representing both the public and private sectors. A neutral facilitator or mediator is used to manage its meetings and assist the parties in discussions and reaching an agreement.

Meetings are announced in the Federal Register (and sometimes in local or trade press) and are open to observation by members of the public. The number of meetings held depends on how complicated the rule is to draft, how much controversy there is amongst the committee members, and what the deadline is for the rule to be published and implemented.

Generally only the committee members speak during the meetings, although provisions are made for input by members of the audience. Caucuses can be called by committee members to speak with their constituency or with other members of the committee, caucuses may or may not be open to the public observers. Workgroups can be formed by committees to work on subsets of the issues posed by the rule.

Decisions are generally made by consensus, not by majority vote. The Committee discusses and decides upon their own definition of consensus prior to the start of its deliberations. Often the consensus is generally defined as an agreement by all parties that they can live with the provisions of the rule when taken as a whole package.

If consensus is reached, the agency will use it as a basis for their proposed rule. Committee members agree to support the rule as proposed if there are no substantive changes from the consensus agreement.

FOR ADDITIONAL INFORMATION ON REGULATORY NEGOTIATION:

Negotiated Rulemaking Sourcebook, 1995, Administrative Conference of the US; written and edited by David Pritzker and Deborah Dalton. Available from Deborah Dalton (dalton.deborah@epa.gov)

SELECTION CRITERIA FOR NEGOTIATED RULEMAKING

It is important to screen potential rulemakings to identify instances where negotiation of the rule has a high probability of success. The Negotiated Rulemaking Act of 1996 and past EPA experience suggest the following criteria to screen and select appropriate items. An item need not meet all of these criteria to be qualified as a candidate.

CRITERIA FOR THE ITEM

- The proposal should require the resolution of a limited number of interdependent or related issues, none of which involve fundamental questions of value, or extremely controversial national policy.
- The policy implications of the issues to be resolved are more-or-less limited programmatically, i.e., the rulemaking will not establish binding precedents in program areas not encompassed by the negotiations.
- There must be a sufficiently well-developed factual base to permit meaningful discussion and resolution of the issues.
- There should be several ways in which the issues can be resolved.
- There should be a firm deadline imposed upon the negotiations by EPA due to some statutory, judicial or programmatic mechanism. The deadline should provide adequate time for negotiation of the issues.
- Any ongoing litigation does not inhibit the parties' willingness or ability to engage in genuine give-and-take.

CRITERIA FOR THE PARTICIPANTS

- Those participants interested in or affected by the outcome of the development process should be readily identifiable and relatively few in number. Participants should be able to represent and reflect the interests of their constituencies.
- The parties should have some common goals. They should be in good faith about wanting to participate in negotiations. They should feel themselves as likely, if not more likely, to achieve their overall goals using negotiations as they would through traditional rulemaking.
- Some of the parties should have common positions on one or more of the issues to be resolved which might serve as a basis for agreement during the course of negotiations.
- The parties should view themselves as having an ongoing relationship with the Agency beyond the item under consideration.