

NEGOTIATED RULEMAKING

(also called regulatory negotiation or "reg-neg")

The idea of negotiated rulemaking, or reg-neg for short, is simple. In some cases, it is valuable to bring together representatives of a rulemaking agency and stakeholders to jointly prepare the text of a proposed rule in a consensus seeking negotiation before the agency formally submits the rule to the formal rulemaking process.

Reg-Negs versus More Conventional Approaches to Rulemaking

Traditionally rulemaking processes often do not have the agency making the rules include stakeholders in an effective and meaningful way early in the process of rulemaking. Agencies may draft the comments in-house with little or no public consultation. Public hearings and meetings held to gather comments on draft regulations typically do not encourage detailed, sophisticated, and on-going dialogue about the issues that results in broad consensus. Consequently, traditional rulemaking processes can produce rules that are difficult to understand, difficult to implement, and difficult to enforce. Traditional rulemaking may result in rules that do not have broad support from the citizens and organizations concerned with the issues and are later challenged in court.

Re-negs allow the agency and stakeholders who care about the resources under regulation to work closely together to design rules that carefully balance the interests of diverse parties. Together, agencies and stakeholders jointly frame issues, surface underlying assumptions, explore interests, consider options for how the rules might be structured, and package overall rules that take into account diverse parties' concerns and interests. At its best, negotiated rulemaking increases citizen participation, results in more creative solutions, shortens the ultimate length of time necessary to produce a rule, eases implementation, increases compliance, and reduce future conflict and litigation.

A Short History of Reg-Neg

Negotiated rulemaking is not new. The first negotiated rulemaking occurred in 1983 under the Federal Aviation Administration. After intensive consensus-based negotiations about revising the rules governing flight and rest time for domestic pilots, the agency issued a final rule in 1985. After that success, 66 other federal regulatory negotiations were convened through 1996. The U.S. Department of Transportation, the U.S. Environmental Protection Agency, the U.S. Department of Agriculture, and the U.S. Department of Interior have used regulatory negotiations. Congress formalized this regulatory process in 1990 with the Negotiated Rulemaking Act (Public Law 101-648, the Negotiated Rulemaking Act, enacted by the 101st Congress 23 January 1990). In addition to federal actions, such states as New York, Massachusetts, Montana, and Delaware have used regulatory negotiations to resolve such issues as air emissions by power plants, management of state game farms, and coastal zone regulations.

Key Steps in Reg-Neg

Regulatory negotiations typically involve several steps.

The **conflict assessment phase** helps the agency to identify the key stakeholders who are concerned about the regulations and the resources under regulation and to identify key issues and disagreements, as well as how the parties might best work together. Public agencies often retain professional mediators to carry out this work to ensure that the assessment takes into account the interests and concerns of a diverse group of stakeholders from a neutral perspective. In conflict assessments, the mediators, through

extensive interviews with stakeholders, evaluate the willingness and capacity of the interested parties to participate effectively in a reg-neg.

The **convening phase** helps the parties to form a group with specific members, groundrules, and a work plan.

In the **negotiation phase**, the parties educate one another, gather additional financial and technical information, consider options for how the rules might be written, consider trade-offs among the options, and seek to reach agreement by consensus on how the rules should be structured. Because specific rules and regulations must be prepared according to certain legal and administrative conventions, the stakeholders often negotiate a broad set of agreements to guide the agency in drafting the specific regulatory language.

In the **drafting stage**, the regulatory agency drafts the specific rules and regulations and confer with the stakeholders to ensure the rules meet the intent set forth by the negotiating committee.

Finally, in the **formal rulemaking stage**, the regulatory agencies submits the proposed rules to a formal process that includes listing in the Federal Register, a formal public hearing and comment period, and final printing in the Federal Register.

Using Reg-Neg Appropriately

Are regulatory negotiations always successful? Reg-neg, like any other tool used by citizens and their government to design policies, procedures, and rules, is only a tool. It can succeed or fail. Two advocates of regulatory have suggested the following criteria for ensuring the effective use of reg-neg:

- Reg-negs should be used for complex, politicized rules whose promulgation under standard processes would likely be stalled by political action and legal challenges.
- Reg-negs should be voluntary, inclusive, and participant designed.
- Reg-negs should include education and joint fact-finding as well as negotiation.
- Reg-negs should ensure that participants are accountable to groundrules, their fellow negotiators, and their constituents.
- In complex cases where significant differences of view are expected, an impartial facilitator can be instrumental in ensuring a successful process.

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