

Negotiated Rulemaking Fact Sheet

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 in the government's Code of Federal Regulations, which lists all 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 DOES THE PROCESS WORK?

The federal agency establishes a formal advisory committee under the Federal Advisory Committee Act. A balanced mix of people is invited by the agency to participate and represent some identified interest or set of interests. 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 convene the committee and to manage its meetings.

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.

Decisions are 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 NEGOTIATED RULEMAKING:

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)

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