

Negotiated Rulemaking & FACA

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Negotiated Rulemaking-Background

- Most rules are issued through Informal Rulemaking
- Informal Rulemaking is governed by the Administrative Procedure Act (5 U.S.C. 553)
- Typical process:
 - (1) publishing an NPRM in the Federal Register;
 - (2) inviting public comment;
 - (3) considering the public comment; and
 - (4) publishing a final rule in the Federal Register.

Negotiated Rulemaking-Background

- Congressional Concern with Informal Rulemaking:
 - may discourage 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 over agency rules.
 - Deprives parties and public of:
 - benefit of face-to-face negotiations and cooperation
 - benefits of shared information, knowledge, expertise, and technical abilities possessed by the affected parties
- So, Congress thought:
 - Negotiated rulemaking, in which the parties who will be significantly affected by a rule participate in the development of the rule, may be better than adversarial rulemaking
 - Negotiated rulemaking can:
 - increase the acceptability and improve the substance of rules
 - decrease resistance to enforcement or challenges of such rules in court
 - may shorten the amount of time needed to issue final rules

Negotiated Rulemaking - Background

- So, Congress enacted the Negotiated Rulemaking Act (5 U.S.C. 561-570a) to establish a framework for negotiated rulemaking, consistent with APA section 553, and to encourage agencies to use the process when it enhances the informal rulemaking process
- Instead of agency developing the rule on its own, it does so through the NegReg Committee

Negotiated Rulemaking - Process

- First, agency head needs to determine NegReg is in the public interest; may use a “convener” to help gather information
- Factors include whether there:
 - is a need for a rule
 - are a limited number of identifiable interests significantly affected
 - are a balanced representation of persons who (1) can adequately represent the affected interests and (B) are willing to negotiate in good faith to reach a consensus on the proposed rule
 - is a likelihood of consensus within a fixed period of time;
 - will not be unreasonable delay in the notice of proposed rulemaking and the issuance of the final rule
 - are adequate resources for the committee; and
 - is a commitment by the agency, to the maximum extent possible consistent its legal obligations, to use the consensus rule as the basis for the rule proposed by the agency for notice and comment

Negotiated Rulemaking - Process

- Next, the agency must publish a notice:
 - announcing its intent to establish a Negotiated rulemaking committee
 - describing the subject and scope of the rule and the issues
 - listing interests likely to be significantly affected by the rule
 - listing the persons proposed to represent such interests and the person or persons proposed to represent the agency
 - setting out a proposed agenda and schedule for the committee, including a target date proposed rule for notice and comment;
 - describing of administrative support for the committee
 - soliciting comments on proposed committee and membership
 - explaining how a person may apply or nominate another person for membership on the committee (basically, give reasons why they are better for the committee)
- Wait 30 days, at least

Negotiated Rulemaking - Process

- Then, the agency establishes the committee, if it determines that the committee
 - can adequately represents the significantly affected interests
 - is feasible and appropriate
- The agency must follow the FACA in operating the committee, except as otherwise provided in the NegReg act
- Committees are to “consider the matter proposed by the agency for consideration and shall attempt to reach a consensus concerning a proposed rule with respect to such matter and any other matter the committee determines is relevant to the proposed rule.”

FACA Background

- Passed by Congress in 1972 to regulate numerous groups providing advice to the Federal Government
- FACA:
 - Is a procedural statute
 - Allows Congressional oversight (file charters, file reports, appropriations)
 - Provides for public participation
- Codified at 5 U.S.C. App. 2; 41 C.F.R. Part 102-3

Applicability

- Groups established or utilized by the Executive branch for the purpose of obtaining advice or recommendations (and in NegRegs)
- “Utilized” means ‘actual management and control’
- Does not apply to:
 - individual advice
 - operational committees
 - inter/intra-governmental committees
 - Exchanges of facts or information

Consequences of a FACA violation

- Good news:
 - No criminal penalties, no fines
- Bad news:
 - Litigation
 - time-consuming
 - future meetings could be prohibited
 - use of the group's past recommendations and/or supporting documents could be prohibited

Requirements

- Advisory functions only
- Establish by law, Presidential authority, or discretionary
- File a Charter containing authority, mission, goals, objectives, and logistics
- Maintain a balanced membership
- Maintain all committee documents for public inspection

Requirements, cont.

- Hold open public meetings
- Allow public to speak or file written statements
- Announce all meetings in the Federal Register – 15 days in advance
- Create and certify detailed public minutes
- Designate Federal employee (DFO) who:
 - Approves and calls meetings
 - Approves agenda
 - Attends meetings and adjourns if in the public interest
- Terminate according to statute, when purpose completed, or after 2 years (unless renewed)

Negotiated Rulemaking/FACA Interface

- Membership limited to 25 members
- Membership selection process is modified as discussed above
- NegReg allows a facilitator to be appointed, subject committee consensus approval, to 1) impartially chair meetings; 2) impartially assist members in discussions/negotiations; and 3) manage the minutes and records
- At conclusion of negotiations, committee gives agency a report with the consensus proposed rule or, if no consensus on full rule, report any areas of consensus.
- Terminate on promulgation of final rule, unless charter, the agency, or committee itself specifies earlier termination date

Subcommittees

- Defined as groups reporting to full advisory committee; may include non-committee members
- Do not directly advise the president or any federal agency
- Analogous to staff
- FACA notice and open meeting requirements do not apply
 - Permissible *only* when subcommittee reporting to full committee for its consideration and deliberation

Miscellaneous

- Public availability of FACA Committee records
- Conflict of interest considerations
- Questions?
- Answers?