

OVERVIEW OF NEGOTIATED RULEMAKING PROCESS

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Office of Regulatory Affairs and Collaborative Action (RACA)

U.S. Department of the Interior



What is a Rule or Regulation?

- Regulation are standard laws or statutes that concern a certain law.
- Equivalent of an operating or implementation manual for part of a statute or act of Congress.
- Gives those subject to its requirements more detailed instructions or prohibitions regarding activities that are addressed by the statute.



How Rules/Regulations are Usually Written

1. Federal agency staff draft a proposed rule and circulate it for comment within the agency.
2. The rule is printed in Federal Register as a **proposed rule** for public comment.
3. Agency reads and analyzes the public's comments.
4. The agency may revise the rule to incorporate suggestions or eliminate problems identified as the result of the analysis.
5. The rule is published in final form in Federal Register and becomes effective on the date listed in the notice.
6. Final rule is incorporated into the Code of Federal Regulations.



What is Negotiated Rulemaking?

- A consensus-based process on the text of a proposed rule.
- An alternative to the traditional process of developing regulations.
- Agency involves interested parties who will be impacted by the rule in a negotiation process to develop a draft rule.
- An administrative procedure sanctioned by the Negotiated Rulemaking Act.



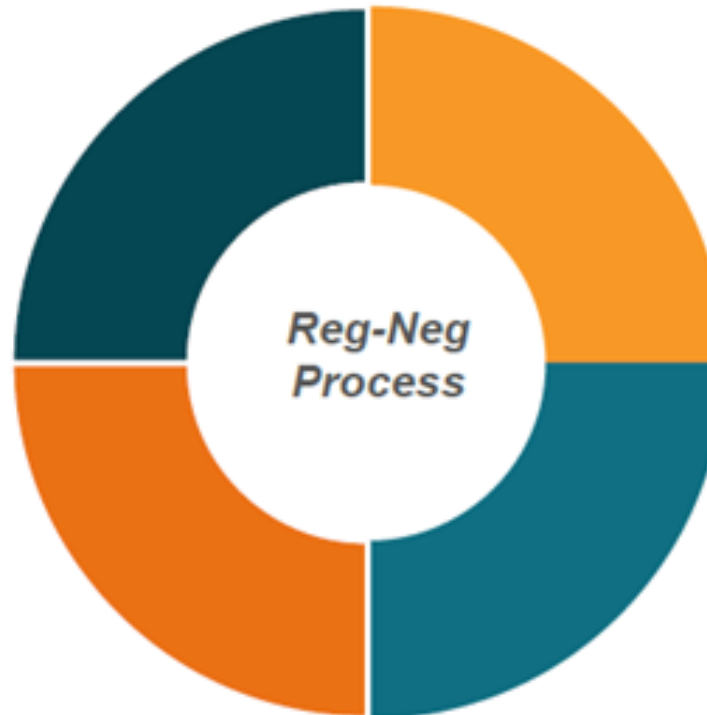
Negotiated Rulemaking Process

Phase 1 - Establishment of Committee

- Secretariat
- FRN of Intent
- FRN of Extension, if needed
- Review nominations
- White House vetting
- FRN of Membership
- FRN of Establishment
- Filing of Charter

Phase 4 - IA Rulemaking Process

- Draft proposed rule
- Publication of proposed rule and consultation
- Review of comments
- Draft final rule
- Publication of final rule
- Final rule effective



Phase 2 - Committee Meetings

- FRN of Meetings
- Meetings open to the public (in-person, virtual, or combo)
- Timeline of number of meetings with goals for each meeting
- Break out the work by subcommittees, if needed

Phase 3 - Committee Recommendations

- Facilitator assists members with discussions and negotiations
- Reach consensus on the text of a proposed rule or main features of a rule
- Committee report with recommendations for the proposed rule



Advantages of Negotiated Rulemaking

When used appropriately long-term benefits include:

- **Interested, affected parties have 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.
- A committee can **draw on the diverse experience and creative skills** of the members to address problems encountered in drafting a regulation.
- Often **the group together can propose solutions to difficult problems** that no one member could have thought of or believed would work.
- **A better rule** than the agency could develop on its own,
- **Reduced potential for litigation** over the rule,
- **Greater understanding** of the rule and its impacts, and
- **Greater trust** in the agency and **more cooperative relationships** between the agency and affected parties.



Negotiated Rulemaking Process

1. Responsible federal agency establishes a formal advisory committee under the Federal Advisory Committee Act (FACA).
2. Committee members selected through a fair and balanced process and noticed in the Federal Register. Also prepared are:
 - a charter,
 - a statement of need, and
 - a set of meeting guidelines that describe how the group will make decisions, the roles and responsibilities of the federal agency and non-federal committee members, and how the process relates to formal, final rulemaking.
3. Committee negotiates the text, outline, or concept of a rule.
4. If the Committee reaches **consensus agreement** the agency can use this consensus as a basis for its proposed rule.
 - If consensus is not reached the agency, then proceeds with its normal rulemaking activities.



Negotiated Rulemaking Process (cont.)

5. The **proposed rule** must be published in the Federal Register for public comment. AND Indian Affairs will engage in government- to-government consultation during the comment period.
6. After reading and analyzing the public and consultation comments Indian Affairs may revise the rule as the result of the analysis.
7. The rule is published in final form in Federal Register and becomes effective on the date listed in the notice.
8. The final rule is incorporated into the Code of Federal Regulations at Title 25 - Indians.



Relevant Federal Requirements...

Negotiated rulemaking committees must adhere to such federal guidelines as:

- Negotiated Rulemaking Procedure
 - [5 U.S.C. 561 – 570a](#)
- Administrative Procedure Act (APA)
 - [5 U.S.C. 551 - 559](#)
- Federal Advisory Committee Act (FACA)
 - [5 U.S.C., App. As amended by 5 U.S.C. 1001 *et seq.*](#)



How are Meetings Structured

- Meetings (virtual, in-person, or a combination of both) are announced in the Federal Register and are open to observation by the public.
- Generally, only the committee members speak during the meetings, provisions are made for public comment.
- Committee meetings may be a combination of plenary and sub-committee sessions.
- Caucuses can be called by committee members to speak with their constituency or with other members of the committee; caucuses are not open to public observers.
- The Committee may form an Executive Committee/Leadership Team (of federal and non-federal members) to work with the facilitator and Designated Federal Officer (DFO) between meetings.



How the Committee Makes Decisions

- The committee approves its Bylaws/Operating Procedures as a guide on how the committee will vote on work products, establishment of leadership, subcommittees, replace vacant seats, etc.
 - The Committee discusses and decides upon its definition of consensus at its first meeting.
- Consensus is generally defined as: as a set of agreements that *all group members can support*.
 - At a minimum, a consensus agreement may be a compromise that *all group members can accept*, “live with” **and at a minimum will not oppose**.



Negotiated Rulemaking Participants

- Through a public nomination process the agency identifies and appoints a limited number of individuals who can represent the views of stakeholders on the negotiating committee.
- Participants generally consist of a balanced mix of governmental and non-governmental stakeholders.
- Generally, 15 to 25 members
 - Additional participation may include appointment of alternates.
- All nominations appointed to an advisory committee must be vetted by the White House prior to official appointment by the Secretary of the Interior.
- A neutral facilitator is used to convene the committee and to manage its meetings.



Committee Membership Designations

Non-Federal Members

- Extensive knowledge of issues under discussion.
- Speak with authority for their constituents and/or organizations.
- Have access to organizational information resources that may contribute to the development of regulations.

Federal Members

- Senior Manager(s) with knowledge, experience in subject area.
- Bureau operated school representative(s).
- Legal advisor(s).

Committee Membership Designations

Designated Federal Official (DFO)

- Ex Officio member of Committee.
- Approve or call all plenary and/or subcommittee(s) meetings.
- Approve the agenda.
- Attend the meetings.
- Adjourn any meetings when in the public's interest.
- Chair the meeting when so directed by the agency head.
- No advisory committee may conduct any meetings (plenary or subcommittee) in the absence of the DFO.



Committee Membership Designations

Professional Facilitator:

- An impartial professional Facilitator serves:
 - at the pleasure of the collective membership of the Committee,
 - as independent process designer and facilitator of the meetings.
- To the greatest extent possible, the Facilitator will assist Committee Members to reach and record consensus agreements.
- If and when consensus agreements are not possible, the Facilitator will help the Committee determine an appropriate way to respond to impasses and inform BIE, without attribution, about the range and diversity of views in order to develop mutually acceptable solutions that meet all parties' interests to the greatest extent possible.
- The Facilitator will enforce Meeting Guidelines approved by the Committee.



Indian Affairs Guideline on Negotiated Rulemaking

The Office of Regulatory Affairs and Collaborative Action (RACA) has guidelines on the process from creation of an advisory committee to the final rule.

- Guideline is located on RACA webpage
<https://www.bia.gov/as-ia/raca/negotiated-rulemaking>



Contact Information

Please contact the Office of Regulatory Affairs and Collaborative Action for more information at:

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