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Negotiated Rulemaking: In Brief

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Negotiated Rulemaking: In Brief

Negotiated rulemaking is a process sometimes used by federal agencies to develop proposed rules. In negotiated rulemaking, an agency convenes a committee of stakeholders with the goal of reaching a consensus outcome on the text of a proposed rule. If the committee is able to reach a consensus outcome, thus achieving buy-in from stakeholders, the rule may be easier to implement and less likely to be subject to litigation.

Congress passed the Negotiated Rulemaking Act (NRA) in 1990 to endorse the use of negotiated rulemaking and establish a procedural framework. The NRA was intended in part to clarify that agencies had the authority to use negotiated rulemaking voluntarily, encourage agencies to use it, and make clear that it was meant to be a supplement—not substitute—for the notice-and-comment rulemaking procedures in the Administrative Procedure Act (APA). Generally, when agencies undertake negotiated rulemaking, whether voluntarily or pursuant to a statutory mandate, they are to follow the procedures established in the NRA.

Congress contemplated that negotiated rulemaking would be appropriate for some, but not all, regulations. Accordingly, the NRA lists several factors an agency head shall take into consideration when determining whether to use negotiated rulemaking, including whether a limited number of interests that will be significantly affected by the rule can be identified, whether a committee with balanced representation could be convened, and whether there is a “reasonable likelihood” that a committee would be able to reach a consensus on the proposed rule within a fixed period of time.

In addition, at times, Congress has enacted specific requirements for agencies to use negotiated rulemaking, sometimes with additional considerations or procedures. For example, Section 492 of the Higher Education Act requires the Secretary of Education to conduct negotiated rulemaking in certain circumstances and obtain advice and recommendations from specified individuals and groups.

Under the NRA, if an agency decides or is required to engage in negotiated rulemaking, the agency must announce in the *Federal Register* its intention to establish a negotiated rulemaking committee, and the committee is generally subject to the requirements of the Federal Advisory Committee Act (FACA). The goal of the committee is to develop and reach consensus on the text of a proposed rule. If the committee reaches consensus, it is to transmit to the agency a report containing the proposed rule, as well as certain records required under the NRA and FACA. If the committee does not reach consensus, it may transmit to the agency a report specifying areas where it reached partial consensus as well as other relevant information, recommendations, or materials. Individual committee members may also transmit materials to the agency as desired. Even if a committee does not reach full consensus on a proposed rule, consensus on some elements of a proposed rule or other information and materials may still be useful to the agency. The committee’s consensus proposal is not binding on the agency, and the agency is still required to go through the notice-and-comment procedures of the APA. However, if the committee does reach consensus, it may be unlikely that an agency would propose a different rule than the rule developed by the committee.

For a variety of reasons, the practice of negotiated rulemaking has waned in recent years. A number of factors that have been identified include the resource-intensiveness of the process for agencies and participating stakeholders as well as a perceived lack of buy-in for negotiated rulemaking from the Office of Information and Regulatory Affairs, the entity within the Office of Management and Budget (OMB) that plays a key role in agency rulemaking.

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When issuing federal regulations, agencies sometimes engage in a practice called negotiated rulemaking. Negotiated rulemaking is intended to encourage agencies to involve stakeholders early in the rulemaking process—specifically, in the drafting of proposed rule text. If used successfully, negotiated rulemaking can lead to buy-in from stakeholders, potentially leading to easier implementation and less litigation once the rules are finalized. To encourage and structure agencies’ use of negotiated rulemaking, Congress passed the Negotiated Rulemaking Act (NRA) in 1990, endorsing the use of negotiated rulemaking and establishing a set of procedures for agencies to follow.

This report provides a brief overview of negotiated rulemaking by offering (1) a background and overview of negotiated rulemaking, including a discussion of the NRA and its procedures; (2) examples of statutory provisions requiring negotiated rulemaking; and (3) examples of recently issued final rules in which agencies used negotiated rulemaking.

Negotiated Rulemaking: Background and Overview

History of Negotiated Rulemaking

The negotiated rulemaking process was developed primarily in the 1980s and fleshed out in recommendations by the Administrative Conference of the United States (ACUS).¹ In the early 1980s, observers identified a number of perceived flaws in the federal rulemaking process that, in their view, negotiated rulemaking could assist with—primarily the adversarial nature of the relationships between agencies and stakeholders.² For example, one administrative law scholar suggested an approach to rulemaking in which differences were acknowledged and resolved through face-to-face negotiations, and he laid out a series of principles that could make those negotiations successful.³ In 1982, ACUS also suggested, “Experience indicates that if the parties in interest were to work together to negotiate the text of a proposed rule, they might be able in some circumstances to identify the major issues, gauge their importance to the respective parties, identify the information and data necessary to resolve the issues, and develop a rule that is acceptable to the respective interests, all within the contours of the substantive statute.”⁴ ACUS issued recommendations as to what a “regulatory negotiation” or “reg-neg” could look like, and a small number of agencies began to engage in negotiated rulemaking.⁵ In 1985, ACUS published a supplemental set of recommendations after three agencies used negotiated rulemaking in four

¹ See ACUS, “Procedures for Negotiating Proposed Regulations (Recommendation 82-4),” 47 *Federal Register* 30708, July 15, 1982; and ACUS, “Procedures for Negotiating Proposed Regulations (Recommendation 85-5),” 50 *Federal Register* 52895, December 27, 1985. ACUS is an independent federal agency charged with convening experts from the public and private sectors to study and make recommendations for the improvement of government processes, including administrative processes such as rulemaking. See <https://www.acus.gov/>.

² The basic structure of the federal rulemaking process, sometimes referred to as notice-and-comment rulemaking, was established in the Administrative Procedure Act (APA) of 1946. Over time, Congress and Presidents have created various additional procedures, including the NRA and others, but the fundamental steps of the APA’s notice-and-comment rulemaking have remained largely consistent over time. Thus, in the 1980s, when such conversations were occurring about the promise of negotiated rulemaking, the backdrop was largely notice-and-comment rulemaking.

³ Philip J. Harter, “Negotiating Regulations: A Cure for Malaise,” *Georgetown Law Journal*, vol. 71 (1982), pp. 1-118.

⁴ 47 *Federal Register* 30708.

⁵ 47 *Federal Register* 30709.

instances, addressing some of the concerns that had been raised by the agencies based upon these early experiences.⁶

Congress demonstrated some interest in the topic of negotiated rulemaking during the 1980s as well. In 1980, the Senate Select Committee on Small Business and the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs held a joint hearing on negotiated rulemaking.⁷ Negotiated rulemaking was seen primarily as a process that could potentially reduce regulatory delays and decrease the incidence of judicial challenges to regulations.⁸ Through the 1980s, as interest increased in negotiated rulemaking, Congress enacted a handful of requirements for agencies to conduct negotiated rulemaking in specific instances, such as in the Elementary and Secondary School Improvement Act of 1988 and others. S. 303⁹

After having observed the experiences of some agencies pursuant to these ad hoc requirements, Congress decided to avoid the “confusing multiplicity of procedures with uneven results” through “passage of a negotiated rulemaking statute.”¹⁰ In 1990, Congress passed the NRA, endorsing the use of the process and creating a voluntary negotiated rulemaking framework.¹¹

Objectives of Negotiated Rulemaking

Negotiated rulemaking is intended to provide a means through which agencies and stakeholders can reach a consensus outcome prior to issuing a notice of proposed rulemaking. By enacting the NRA, Congress intended to endorse agencies’ use of negotiated rulemaking, make clear that agencies had the authority to engage in it voluntarily, and establish a common set of procedures for agencies to use.¹² As the Senate report to accompany the NRA stated, “An authorizing statute would remove any doubt agencies may have about their authority, and also would serve as Congress’ endorsement of the process. The bill would further encourage agency use of the process by presenting key [regulatory negotiation] information in one, easily accessible statute, with the major procedural issues resolved.”¹³ The Senate report also made it clear that Congress intended for the statute to be flexible, recognizing that “negotiated rulemaking is not appropriate in every or even most rulemaking situations” and that “one of the key strengths of negotiated rulemaking is its flexibility and adaptability to the exigencies of particular rulemakings.”¹⁴

⁶ 50 *Federal Register* 52895.

⁷ U.S. Congress, Joint Hearings Before the Senate Select Committee on Small Business and the Senate Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, *Regulatory Negotiation*, 96th Cong., 2nd sess., July 29, 1980 (Washington: GPO, 1980).

⁸ *Ibid.*

⁹ P.L. 100-297. Also in 1988, the Committee on Governmental Affairs held a hearing on a predecessor to the NRA. See U.S. Congress, Senate Committee on Governmental Affairs, *Negotiated Rulemaking Act of 1989*, report to accompany, 101st Cong., 1st sess., August 1, 1989, S.Rept. 101-97 (Washington: GPO, 1989), pp. 5-8. For an examination of the legislative history of the NRA and other legislation related to negotiated rulemaking, see Cary Coglianese, “Assessing Consensus: The Promise and Performance of Negotiated Rulemaking,” *Duke Law Journal*, vol. 46, no. 6 (April 1997).

¹⁰ U.S. Congress, Senate Committee on Governmental Affairs, *Negotiated Rulemaking Act of 1989*, report to accompany S. 303, 101st Cong., 1st sess., August 1, 1989, S.Rept. 101-97 (Washington: GPO, 1989), p. 5.

¹¹ P.L. 101-648; 5 U.S.C. §§561-570.

¹² U.S. Congress, Senate Committee on Governmental Affairs, *Negotiated Rulemaking Act of 1989*, report to accompany S. 303, 101st Cong., 1st sess., August 1, 1989, S.Rept. 101-97 (Washington: GPO, 1989), p. 7.

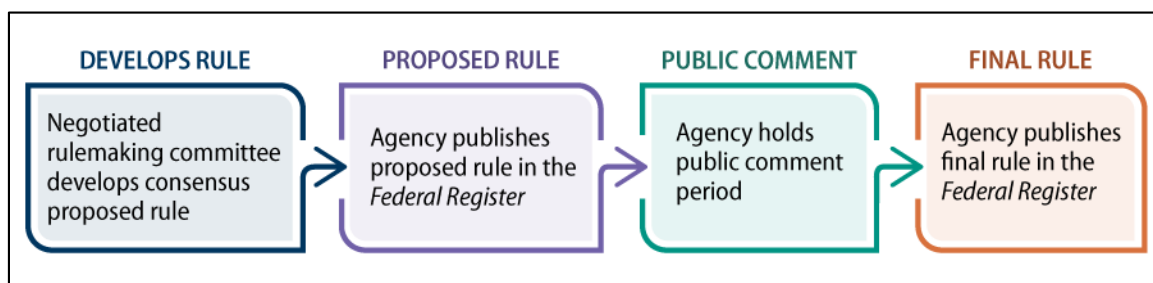
¹³ *Ibid.*

¹⁴ *Ibid.*, p. 9.

At its core, the negotiated rulemaking process involves convening a committee of balanced and representational interests that strives to reach consensus on the content of the rule.¹⁵ The ultimate goal of negotiated rulemaking is to make the rulemaking process more efficient and less adversarial, as subsequent litigation on the rule may be less likely, and to create “objectively better rules.”¹⁶

The NRA was intended in part to clarify for agencies that negotiated rulemaking was meant to *supplement* the notice-and-comment procedures in the Administrative Procedure Act (APA)—not substitute for those procedures.¹⁷ The APA generally requires agencies to publish a proposed rule in the *Federal Register*, provide an opportunity for public comment on the proposed rule, and issue a final rule after considering the comments received.¹⁸ Under regular notice-and-comment rulemaking procedures, the agency writes the proposed rule and has discretion over whether and how much to involve interested parties at this key initial phase. If the agency does involve outside parties at this first stage, those interactions are often informal and unstructured.¹⁹ When engaging in negotiated rulemaking, however, the agency involves stakeholders in the initial drafting of the proposed rule and then proceeds with the usual APA procedures. This process is represented below in **Figure 1**.

Figure 1. Negotiated Rulemaking in the Federal Rulemaking Process



Source: CRS.

Notes: The Negotiated Rulemaking Act is Title 5, Sections 561-570, of the U.S. Code. In negotiated rulemaking, the goal is to reach consensus on proposed rule text through negotiations of a committee of representational and balanced interests. This process is to be conducted in addition to the notice-and-comment procedures of the Administrative Procedure Act (APA)—once the committee reaches consensus, the agency would likely (but

¹⁵ For an overview and discussion of negotiated rulemaking, see David M. Pritzker and Deborah S. Dalton, *Negotiated Rulemaking Sourcebook*, ACUS, September 1995, <https://www.acus.gov/publication/negotiated-rulemaking-sourcebook>; and Cheryl Blake and Reeve T. Bull, *Negotiated Rulemaking*, report written for ACUS, June 5, 2017, https://www.acus.gov/sites/default/files/documents/Negotiated%20Rulemaking_Final%20Report_June%205%202017.pdf. Following consideration of this report and its recommendations in 2017, ACUS adopted a number of updated recommendations on negotiated rulemaking. See ACUS, “Adoption of Recommendations,” 82 *Federal Register* 31039-31042, July 5, 2017.

¹⁶ Pritzker and Dalton, *Negotiated Rulemaking Sourcebook*, p. xiii.

¹⁷ See Pritzker and Dalton, *Negotiated Rulemaking Sourcebook*, p. 69: “So long as the agency complies with the APA’s basic notice and comment requirements and the agency retains discretion to determine the content of the final rule, there should be no conflict with the requirements of the APA.”

¹⁸ The APA also provides several exceptions to these requirements. For more information on APA rulemaking procedures, see CRS In Focus IF10003, *An Overview of Federal Regulations and the Rulemaking Process*, by Maeve P. Carey; CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey; CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Todd Garvey; and CRS Report R46673, *Agency Rescissions of Legislative Rules*, by Kate R. Bowers and Daniel J. Sheffner.

¹⁹ Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, 6th ed. (Chicago: American Bar Association Section of Administrative Law and Regulatory Practice, 2018), p. 218.

is not required to) proceed with the consensus rule as the proposed rule under the APA. Other APA requirements, including the requirements for public comment, still apply.

As mentioned, the goal of negotiated rulemaking is to reach consensus on regulatory text for the proposed rule. Even if a committee does not reach consensus on the precise text, however, consensus on some elements of a proposed rule or other information and materials provided by the committee members could still be useful to the agency in developing the proposed rule.

Negotiated Rulemaking Act Overview

When an agency engages in negotiated rulemaking, whether voluntarily or pursuant to a statutory mandate, the agency is to follow the procedures established in the NRA.

When to Initiate

Congress contemplated that negotiated rulemaking would be appropriate for some, but not all, regulations—particularly those in which the nature of the proposed rulemaking could lend itself to a successful negotiation.²⁰ The NRA lists several factors an agency head shall take into consideration when determining whether to use negotiated rulemaking, including whether

- a limited number of interests that will be significantly affected by the rule can be identified,
- a committee with balanced representation would be able to be convened,
- there is a “reasonable likelihood” that a committee would be able to reach a consensus on the proposed rule within a fixed period of time,
- using negotiated rulemaking would not unreasonably delay the issuance of a proposed rule, and
- the agency can commit to using the consensus of the committee as the proposed rule.²¹

Establishing the Committee

If the agency decides or is required to engage in negotiated rulemaking, the NRA provides that the agency must announce in the *Federal Register* its intention to establish a negotiated rulemaking committee.²² The notice must contain certain information about the intended proceedings, including the subject and scope of the rule to be developed, a proposed agenda and schedule for the committee to complete its work, a solicitation for comments on the proposal to establish the committee, and an explanation of how a person may apply or nominate another individual to serve on the committee.²³ Interested persons may then apply to serve on the

²⁰ Task Force on Federal Regulation of Higher Education, *Recalibrating Regulation of Colleges and Universities*, 2015, p. 90, https://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf.

²¹ 5 U.S.C. §563(a). In instances where negotiated rulemaking is required by statute, these considerations would likely not apply.

²² 5 U.S.C. §564(a). See, for example, Department of the Interior, Bureau of Indian Affairs, “Bureau of Indian Education Standards, Assessments, and Accountability System Negotiated Rulemaking Committee Establishment; Nominations,” 82 *Federal Register* 43199, September 14, 2017.

²³ 5 U.S.C. §564(a).

committee or nominate another person to serve.²⁴ The period during which applications and comments may be submitted must be at least 30 days.²⁵

The NRA also authorizes, but does not require, the agency to use a convener to assist the agency in identifying persons who would be significantly affected by the proposed rule and ascertain whether the establishment of a negotiated rulemaking committee is feasible and appropriate.²⁶ The convener would report findings from any exploratory work, including any discussions with persons who are expected to be significantly affected by a rule, and may make recommendations to the agency pertaining to matters such as what persons are willing and qualified to serve on the committee.²⁷

The NRA states that a negotiated rulemaking committee will generally be subject to the requirements of the Federal Advisory Committee Act (FACA), unless otherwise specified, and limits committees to 25 members unless a greater number is necessary.²⁸ The committee may choose to have a facilitator, either from the agency or outside the agency, to chair the meetings.²⁹ The facilitator is to chair the meetings in an impartial manner, ensuring that all parties have the opportunity to share their viewpoints and relevant information.³⁰

The committee may adopt its own procedures for operation, such as general rules of conduct, attendance, participation, and establishing a target deadline for the committee's work.³¹

Reaching Consensus

The goal of the committee is to reach consensus on a proposed rule. *Consensus* under the NRA means “unanimous concurrence among the interests represented on a negotiated rulemaking committee,” unless the committee agrees on another definition.³² Negotiated rulemaking committees have sometimes used other definitions. For example, in a 1995 rule issued by the Health Care Financing Administration in the Department of Health and Human Services (now the Centers for Medicare and Medicaid Services), the committee defined *consensus* as “even if elements of the agreement were not the choice of individual committee members, all committee members could live with the agreement, considered as a whole.”³³ In January 2020, the Department of Transportation published a proposed rule in which the negotiated rulemaking committee agreed to define *consensus* as “no more than two negative votes in each issue area.”³⁴

²⁴ 5 U.S.C. §564(b).

²⁵ 5 U.S.C. §564(c).

²⁶ 5 U.S.C. §563(b)(1).

²⁷ 5 U.S.C. §563(b)(2).

²⁸ 5 U.S.C. §565. For an overview of FACA, see CRS Report R44253, *Federal Advisory Committees: An Introduction and Overview*, by Meghan M. Stuessy. In specific instances where Congress has mandated the use of negotiated rulemaking, it has waived the applicability of FACA. See, for example, 20 U.S.C. §1098a(c).

²⁹ 5 U.S.C. §566(c).

³⁰ 5 U.S.C. §566(d).

³¹ 5 U.S.C. §566(e).

³² 5 U.S.C. §562(2).

³³ Department of Health and Human Services, Health Care Financing Administration, “Medicare Program; Notice Containing the Statement Drafted by the Committee Established to Negotiate the Wage Index to be Used to Adjust Hospice Payment Rates Under Medicare,” 60 *Federal Register* 61264, November 29, 1995.

³⁴ Department of Transportation, Office of the Secretary, “Accessible Lavatories on Single-Aisle Aircraft: Part 1,” 85 *Federal Register* 27, January 2, 2020. See also Department of Transportation, “ACCESS Committee Ground Rules,” <https://www.transportation.gov/office-general-counsel/negotiated-regulations/access-committee-ground-rules>.

If the committee reaches consensus, it is to transmit to the agency a report containing the proposed rule as well as certain records required under the NRA and FACA.³⁵ If the committee does not reach consensus, it may transmit to the agency a report specifying any areas where it reached partial consensus as well as any other information, recommendations, or materials that the committee would like to share with the agency. Individual committee members may also transmit materials to the agency as desired.³⁶

The committee's consensus proposal, if one is reached, is not binding on the agency, and the agency is still required to go through the notice-and-comment procedures of the APA.³⁷ The agency retains discretion over what is in the final version of the rule: It may propose the consensus rule in its entirety, only choose to use part of it, or publish its own version of the rule.³⁸ However, if the committee reached consensus, it may be unlikely that an agency would propose a different version of the rule than the consensus outcome, as such a choice could open the agency up to criticism from committee members and possible litigation.

Negotiated Rulemaking in Practice

Negotiated rulemaking was somewhat popular among agencies in the 1990s, but its use has waned since then.³⁹ That agencies have chosen not to use negotiated rulemaking as much as its advocates had initially hoped is likely due to a variety of factors.⁴⁰

One issue that is often identified as a limiting factor for the use of negotiated rulemaking is its resource-intensiveness. This resource strain is arguably short-term, as negotiated rulemaking is intended to be an up-front investment that can conserve resources over the more long-term development and post-finalization phases of a rule. However, agencies may see the up-front cost of negotiated rulemaking as prohibitive, even though long-term costs may be lower.⁴¹ Relatedly, some have suggested that the transparency and procedural requirements associated with FACA may discourage some agencies from using negotiated rulemaking.⁴²

A setback for agencies' use of negotiated rulemaking occurred when ACUS was defunded in 1995. ACUS had been a major influence in the adoption of negotiated rulemaking and the NRA, and Congress gave ACUS a number of responsibilities pertaining to negotiated rulemaking in the act: compiling data, serving as a clearinghouse of information, reporting to Congress, and even paying some expenses for agencies.⁴³ ACUS was re-established in 2010, but by that point, the use

³⁵ 5 U.S.C. §566(f) and §566(g).

³⁶ 5 U.S.C. §566(f).

³⁷ 5 U.S.C. §553.

³⁸ See Pritzker and Dalton, *Negotiated Rulemaking Sourcebook*, p. 69.

³⁹ The practice appears to have been used increasingly in state governments. See Lubbers, *A Guide to Federal Agency Rulemaking*, p. 222.

⁴⁰ See Jeffrey S. Lubbers, "Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking," *South Texas Law Review*, vol. 49, no. 4 (Summer 2008), pp. 987-1017.

⁴¹ Pritzker and Dalton, *Negotiated Rulemaking Sourcebook*, p. 5.

⁴² Lubbers, "Achieving Policymaking Consensus," p. 1001; and Coglianese, "Assessing Consensus," p. 1277.

For an overview of these FACA requirements, see CRS Report R44253, *Federal Advisory Committees: An Introduction and Overview*, by Meghan M. Stuessy.

⁴³ Lubbers, "Achieving Policymaking Consensus," pp. 996-997.

of negotiated rulemaking had waned, Congress had amended the act to assign these duties elsewhere, and no other entity had been fully empowered to take on a similar role.⁴⁴

Some have suggested a lack of buy-in for negotiated rulemaking from the Office of Information and Regulatory Affairs (OIRA), the entity within the White House that plays a key role in agency rulemaking.⁴⁵ OIRA exercises a potentially significant amount of influence over agency regulations by reviewing regulations prior to when they are issued as proposed and final rules, seeking to ensure that regulations are consistent with the President’s priorities.⁴⁶ The development of a consensus rule by a negotiated rulemaking committee may make it harder for OIRA to seek changes to an agency’s rule, provided the committee has already agreed upon the text of a rule and the agency is expected to move forward with that agreed-upon text. Furthermore, negotiated rulemaking could potentially result in a loss of control for OIRA and, by extension, the President.⁴⁷ As one scholar noted, “Rulemaking is one means by which the executive branch implements not only statutory mandates, but also presidential policy; any sitting President would be loathe to delegate his authority to a collaborative panel.”⁴⁸ Nevertheless, President Clinton encouraged agencies to use “consensual mechanisms for developing regulations, including negotiated rulemaking” in his executive order on centralized regulatory review, which is still in effect.⁴⁹

Additionally, some have suggested that the two primary goals of negotiated rulemaking—reducing the time it takes to issue a rule and cutting down on litigation over the rule—have not come to fruition to the degree that had been hoped for initially.⁵⁰ Agencies may not be so interested in engaging in a practice that is not likely to result in the purported benefits, particularly if the process may be resource and time intensive.

For these and possibly other reasons, under current practice, few agencies appear to engage in negotiated rulemaking voluntarily. Some, however, are required to engage in it and still do.

Examples of Statutory Requirements for Negotiated Rulemaking

Although the NRA itself does not require agencies to conduct negotiated rulemaking, Congress has enacted various statutory requirements for agencies to conduct negotiated rulemaking in specific instances. Perhaps most prominently, Congress has required the Department of Education

⁴⁴ Lubbers, “Achieving Policymaking Consensus,” pp. 996-997; Blake and Bull, *Negotiated Rulemaking*, p. 7.

⁴⁵ See Donald R. Arbuckle, “Collaborative Governance Meets Presidential Regulatory Review,” *Journal of Dispute Resolution*, vol. 2009, no. 2 (2009), pp. 343-359.

⁴⁶ For a more detailed discussion of the role of OIRA in agency rulemaking, see CRS Report RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, coordinated by Maeve P. Carey; and CRS Report RS21665, *Office of Management and Budget (OMB): An Overview*, coordinated by Taylor N. Riccard.

⁴⁷ Arbuckle, “Collaborative Governance Meets Presidential Regulatory Review.”

⁴⁸ Arbuckle, “Collaborative Governance Meets Presidential Regulatory Review,” p. 344.

⁴⁹ Executive Order 12866, “Regulatory Planning and Review,” 58 *Federal Register* 51735 (October 4, 1993).

⁵⁰ See Coglianese, “Assessing Consensus,” p. 1309: “In light of the two outcomes negotiated rulemaking has achieved in terms of its two main goals, such infrequent reliance on negotiated rulemaking would seem to make sense. Negotiated rulemaking saves no appreciable amount of time nor reduces the rate of litigation.” But see also Philip J. Harter, “Assessing the Assessors: The Actual Performance of Negotiated Rulemaking,” *New York University Environmental Law Journal*, vol. 9, no. 1 (2000), pp. 32-59, arguing that negotiated rulemaking was more successful than Coglianese’s research concluded.

to conduct negotiated rulemaking in several policy areas—but a number of other agencies have been required to use it as well.⁵¹ Examples include the following:

- Various sections of the Higher Education Act require the Secretary of Education to conduct negotiated rulemaking on rules related to teacher quality enhancement and student financial assistance programs (e.g., federal student loans).⁵²
- For purposes of the Title I-A program authorized by the Elementary and Secondary Education Act, the Secretary of Education is required to conduct negotiated rulemaking on standards, assessments, and federal funds to be used “to supplement, and not supplant, State and local funds.”⁵³ In addition, the Secretary of the Interior is required to use negotiated rulemaking to develop regulations that define the standards, assessments, and accountability system, consistent with Section 1111 of Title I-A, for schools funded by the Bureau of Indian Education.⁵⁴
- The Patient Protection and Affordable Care Act required the Secretary of Health and Human Services (HHS) to use negotiated rulemaking to establish methodology and criteria for designating medically underserved populations and health professions shortage areas.⁵⁵
- The Health Insurance Portability and Accountability Act required the Secretary of HHS to use negotiated rulemaking to develop “standards relating to the exception for risk-sharing arrangements to the anti-kickback penalties described in section 1128B(b)(3)(F) of the Social Security Act.”⁵⁶
- The Mandatory Price Reporting Act of 2010 required the Secretary of Agriculture to use negotiated rulemaking for regulations related to the price reporting of wholesale pork cuts.⁵⁷
- Various sections of the Social Security Act, as amended, required the Secretary of HHS to use negotiated rulemaking in developing a fee schedule for payment for

⁵¹ See Task Force on Federal Regulation of Higher Education, *Recalibrating Regulation of Colleges and Universities*, February 2015, Appendix IV, https://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf.

⁵² 20 U.S.C. §1022f; 20 U.S.C. §1098a. Under Title 20, Section 1098a, of the *U.S. Code*, the Secretary is authorized to waive the requirement for negotiated rulemaking if he or she “determines that applying such a requirement with respect to given regulations is impracticable, unnecessary, or contrary to the public interest (within the meaning of section 553(b)(3)(B) of [the APA]), and publishes the basis for such determination in the Federal Register at the same time as the proposed regulations in question are first published.” 20 U.S.C. §1098a(b)(2).

Information on the Department of Education’s negotiated rulemaking activities is available on the department’s website at <https://www2.ed.gov/policy/highered/reg/hearulemaking/2018/index.html> and <https://www2.ed.gov/policy/highered/reg/hearulemaking/hea08/neg-reg-faq.html>.

⁵³ 20 U.S.C. §6571. This provision allows the Secretary to waive the negotiated rulemaking requirement, however, and instead provide notice directly to Congress of a proposed rule at least 15 days prior to its publication in the *Federal Register*. The notice must contain a copy of the rule and specified information, such as the anticipated costs and benefits from the rule, and the department must “include and seek to address all comments submitted by Congress in the public rulemaking record.” See 20 U.S.C. §6571(c).

⁵⁴ 20 U.S.C. §7824(c).

⁵⁵ 42 U.S.C. §254b note.

⁵⁶ 42 U.S.C. §1320a-7b note.

⁵⁷ 7 U.S.C. §1635k note.

ambulance services,⁵⁸ national coverage and administrative policies for clinical diagnostic laboratory tests under Part B of Title XVIII of the Social Security Act,⁵⁹ and solvency standards for provider-sponsored organizations.⁶⁰

- The Fixing America’s Surface Transportation (FAST) Act required the Secretary of Transportation to conduct negotiated rulemaking or issue an advanced notice of proposed rulemaking (ANPRM) when issuing a regulation on commercial motor vehicle safety but only if the proposed rule “is likely to lead to the promulgation of a major rule.”⁶¹

Additional Procedural Requirements for Specific Rulemakings

In certain situations, Congress has included considerations or procedural requirements in addition to those contained in the NRA, such as specific consultations or timelines by which agencies have to complete steps in the process. Examples include the following:

- Section 492 of the Higher Education Act requires the Secretary of Education to obtain, prior to conducting negotiated rulemaking,
 - advice of and recommendations from individuals and representatives of the groups involved in student financial assistance programs under this subchapter, such as students, legal assistance organizations that represent students, institutions of higher education, State student grant agencies, guaranty agencies, lenders, secondary markets, loan servicers, guaranty agency servicers, and collection agencies.⁶²

This has generally been interpreted to mean that the department must engage in “pre-reg-neg” public hearings before beginning a negotiated rulemaking process.⁶³
- The Health Insurance Portability and Accountability Act of 1996 required the Secretary of HHS to conduct negotiated rulemaking, and the rest of the rulemaking process, under specified timelines. The statute included a timeline for the selection of the negotiated rulemaking committee, a timeline for completion of the committee’s business, and a “target date” for publication of the rule.⁶⁴
- The Mandatory Price Reporting Act of 2010’s requirement for the Secretary of Agriculture to conduct negotiated rulemaking identified specific categories of interests that were to be given representation on the committee:

Any negotiated rulemaking committee established by the Secretary of Agriculture pursuant to paragraph (2) shall include representatives from - (i) organizations representing swine producers; (ii) organizations representing packers of pork, processors of pork, retailers of pork, and buyers of wholesale pork; (iii) the

⁵⁸ 42 U.S.C. §1395m(l).

⁵⁹ 42 U.S.C. §1395u note.

⁶⁰ 42 U.S.C. §1395w-26.

⁶¹ 49 U.S.C. §31136(g). An ANPRM is essentially a notice to the public announcing that the agency intends to undertake a rulemaking. This provision in the FAST Act allows the Secretary to either issue an ANPRM or use negotiated rulemaking, and it also includes a “good cause” exception that allows the Secretary to issue a rule without first issuing an ANPRM or using negotiated rulemaking.

⁶² 20 U.S.C. §1098a(a).

⁶³ Task Force on Federal Regulation of Higher Education, *Recalibrating Regulation of Colleges and Universities*, p. 94.

⁶⁴ 42 U.S.C. §1320a-7b note.

Department of Agriculture; and (iv) among interested parties that participate in swine or pork production.⁶⁵

The act also required that “any recommendation for a proposed rule or report” be provided to the Secretary within 180 days of enactment.⁶⁶

Examples of Final Rules in Which Agencies Used Negotiated Rulemaking

The bulleted list below identifies examples of instances in which agencies issued final rules after having used negotiated rulemaking.

- In September 2019, pursuant to a requirement in the Higher Education Act, the Department of Education issued a rule entitled “Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program”—also referred to as the “borrower defense” rule—after conducting negotiated rulemaking.⁶⁷ The 2019 rule replaced a rule that had been issued in 2016 under the Obama Administration.⁶⁸ In the preamble to the 2019 rule, the department stated that the negotiated rulemaking committee did not reach consensus.⁶⁹
- In November 2016, the Department of Housing and Urban Development issued a rule entitled “Native American Housing Assistance and Self-Determination Act; Revisions to the Indian Housing Block Grant Program Formula” after conducting negotiated rulemaking⁷⁰ pursuant to a requirement in the Native American Housing Assistance and Self-Determination Act of 1996.⁷¹ In the preamble to the final rule, the department stated that the negotiated rulemaking process had been successful, and the negotiated rulemaking committee did reach consensus.⁷²
- In August 2012, the Department of Agriculture’s Agricultural Marketing Service issued a rule entitled “Livestock Mandatory Reporting Program; Establishment of the Reporting Regulation for Wholesale Pork” after conducting negotiated rulemaking.⁷³ The department engaged in negotiated rulemaking pursuant to a

⁶⁵ 7 U.S.C. §1635k note.

⁶⁶ 7 U.S.C. §1635k note.

⁶⁷ Department of Education, “Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program,” 84 *Federal Register* 49788, September 23, 2019.

⁶⁸ Department of Education, “Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program,” 81 *Federal Register* 75926, November 1, 2016.

⁶⁹ Department of Education, “Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program,” 84 *Federal Register* 49789, September 23, 2019.

⁷⁰ Department of Housing and Urban Development, “Native American Housing Assistance and Self-Determination Act; Revisions to the Indian Housing Block Grant Program Formula,” 81 *Federal Register* 83674, November 22, 2016.

⁷¹ 25 U.S.C. §4116.

⁷² Department of Housing and Urban Development, “Native American Housing Assistance and Self-Determination Act; Revisions to the Indian Housing Block Grant Program Formula,” 81 *Federal Register* 83678, November 22, 2016.

⁷³ Department of Agriculture, Agricultural Marketing Service, “Livestock Mandatory Reporting Program; Establishment of the Reporting Regulation for Wholesale Pork,” 77 *Federal Register* 50561, August 22, 2012.

- requirement in the Mandatory Price Reporting Act of 2010.⁷⁴ In the preamble to the final rule, the department indicated that the negotiated rulemaking process had been successful, and the final rule text was based upon the consensus reached by the committee.⁷⁵

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⁷⁴ P.L. 111-239, 124 Stat. 2501, 7 U.S.C. §1635k.

⁷⁵ Department of Agriculture, Agricultural Marketing Service, "Livestock Mandatory Reporting Program; Establishment of the Reporting Regulation for Wholesale Pork," 77 *Federal Register* 50561, August 22, 2012.