

### Negotiated Rulemaking Act – Procedural Requirements

1. **DECISION TO DO REGULATORY NEGOTIATION:** Once the agency, after analyzing the factors set forth in § 563, and after consultation with a convener, has determined that the use of reg-neg is in the public interest and is feasible and appropriate, it may establish a negotiated rulemaking committee. 5 U.S.C. § 563.
2. **CONVENER'S OBLIGATIONS:** If the agency has used a convener, as provided for in § 563(b), to assist it in making the determination that reg-neg is appropriate, the convener “shall report findings and make recommendations to the agency,” and the “report and any recommendations of the convener shall be made available to the public upon request.” 5 U.S.C. § 563(b)(2).
3. **NOTICE OF INTENT TO ESTABLISH A REG-NEG COMMITTEE:** Section 564 provides that “[i]f, after considering the report of a convener or conducting its own assessment, an agency decides to establish a negotiated rulemaking committee, *the agency shall publish in the Federal Register and, as appropriate, in trade or other specialized publications, a notice.*” 5 U.S.C. § 564. In this notice, the agency must:
  - *announce its intent to establish a reg-neg committee* – this is the “notice of intent”
  - describe the subject and scope of the rule to be developed and the issues to be considered
  - provide a list of the interests which are likely to be significantly affected by the rule
  - provide a list of the persons proposed to represent such interests and the person or persons proposed to represent the agency
  - propose an agenda and schedule for completing the work of the committee, including a target date for publication by the agency of a proposed rule for notice and comment
  - describe administrative support for the committee to be provided by the agency, including technical assistance
  - solicit comments on the proposal to establish the committee, and provide the proposed membership of the reg-neg committee
  - explain how a person may apply or nominate another person for membership on the committee, as provided for in § 564(b)

Examples:

**60 FR 26857 (May 19, 1995)** – NPS, after determining that the establishment of the committee was in the public interest, issued a notice of intent to establish a reg-neg committee to negotiate and develop a proposed rule revising ORV use regulations at Cape Cod National Seashore.

**65 FR 70674 (November 27, 2000)** – NPS notice of intent to establish a reg-neg committee for ORV driving regulations and for developing a proposed rule revising ORV use regulations at Fire Island National Seashore.
4. **PUBLIC COMMENT PERIOD:** At this point, the agency must allow at least **30** days for the submission of comments and applications/nominations for committee membership.
5. **PUBLIC COMMENT & MEMBERSHIP APPLICATION/NOMINATION REVIEW:** The agency then reviews the submissions. The agency must take comments and requests into account when determining whether to establish the reg-neg committee and when determining the committee’s final composition.
6. **DECISION TO ESTABLISH REG-NEG COMMITTEE:** After considering the comments and membership applications, the agency then decides whether or not to establish a rulemaking

committee. Although the agency has already made a preliminary determination to do reg-neg, section 565 essentially requires the agency to make a new and separate determination of whether it will in fact establish a reg-neg committee.

- If the agency decides **not** to establish a reg-neg committee, it *must* publish notice of that decision *and the reasons therefor* in the Federal Register. Where appropriate, the agency must also publish notice of this decision in trade or other specialized publications, a copy of which must be sent to any person who applied for, or nominated another person for membership on the reg-neg committee. 5 U.S.C. § 565(2).
- If the agency **does** decide to establish a reg-neg committee after concluding that such a committee (1) can adequately represent the significantly affected interests and (2) is feasible and appropriate, *the agency must now comply with FACA*. Note that there is no language under the NRA itself requiring publication of the *decision to establish* a reg-neg committee, even though the Act requires publication of the decision *not* to establish a reg-neg committee.

\*\*It should also be noted that the above requirements (notice of intent to establish a reg-neg committee, review of public comments and applications) are satisfied before chartering the FACA committee.

#### 7. NOTICE OF ESTABLISHMENT: ESTABLISHING A REG-NEG COMMITTEE

**UNDER FACA:** Now that the agency has decided to do regulatory negotiation by forming a negotiated rulemaking committee, it must consult FACA's advisory committee establishment procedures and requirements.

- Section 9 of FACA provides that no advisory committee shall be established unless "determined as a matter of formal record...with *timely notice published in the Federal Register* to be in the public to be in the public interest..." 5 U.S.C. Appx Section 9(a)(2).

#### Examples:

**59 FR 32943 (June 27, 1994)** – "As required by Section 9(a)(2) of the Federal Advisory Committee Act (FACA)...DOI is giving notice of the establishment of the Federal Gas Valuation Negotiated Rulemaking Committee to develop specific recommendations with respect to Federal Gas Valuation."

**56 FR 10522 (Mar. 13, 1991)** – EPA's establishment of negotiated rulemaking committee on clean fuels guidelines and proposed rules: "As required by the Federal Advisory Committee Act, 5 U.S.C. App section 9(a)(2), and the Negotiated Rulemaking Act, EPA is giving notice of the establishment of an advisory committee to negotiate issues for the purpose of reaching a consensus on the development of proposed regulations under the clean fuels provision of section 211 of the Clean Air Act on clean fuels guidelines and proposed rules."

*See also, e.g.,* 60 FR 39167, 59 FR 55117, 58 FR 55033, 57 FR 52403

Several, but not all, of the establishment notices look almost identical to the notices of intent – they include a background section reviewing the scope of the rule, the parties to the negotiations, and the issues to be addressed. However, other establishment notices merely state that a reg-neg advisory committee has been established pursuant to section 9 of FACA.

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- An agency is required under § 564 to include the proposed committee membership in its notice of intent to establish a reg-neg committee. Besides this provision, there is no language in the NRA or the FACA requiring changes to committee membership to be published in the Federal Register. However, agencies will often publish a notice in the Federal Register of any changes or additions made to the committee membership.

- **67 FR 64347 (October 18, 2002)** – Notice of changes and additions to the negotiated rulemaking committee membership: “As required by section 3 of the Negotiated Rulemaking Act of 1990, 5 U.S.C. 564, the National Park Service (NPS) is giving notice of additions and changes to the members of the Negotiated Rulemaking Advisory Committee.” Note that here, NPS is locating the requirement to notify the public of changes to the reg-neg committee membership in section 564 of the NRA, which provides for the publication of notice of the agency’s intent to establish a reg-neg committee.

**9. NOTICE OF COMMITTEE MEETINGS:** FACA requires that advisory committee meetings be open to the public and provides that “*timely notice of each such meeting shall be published in the Federal Register.*” 5 U.S.C. Appx 1 § 10(a)(1) and (2).

Examples: 60 FR 46562 (Sept. 7, 1995) – NPS gave notice of a meeting of the Cape Cod National Seashore Off-Road Vehicle Use Negotiated Rulemaking Advisory Committee; 60 FR 50509 (Sept. 29, 1995) – NPS gave notice, pursuant to FACA, of a meeting of the Cape Cod National Seashore ORV Use Negotiated Rulemaking Advisory Committee; 67 FR 57357 (Sept. 10, 2002) – NPS gave notice, pursuant to FACA, of changes in meeting dates of the reg-neg advisory committee for ORV driving regulations at Fire Island.