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Introduction

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Background

Negotiated rulemaking (or "neg reg") is a process that brings together those who would be significantly affected by a rule, including the Government, to reach consensus on some or all aspects thereof before the rule is formally proposed by the Government. The process is a voluntary one, and the participants establish their own rules of procedure. An impartial mediator is used to facilitate intensive discussions among the participants, who operate as a committee open to the public. Working groups are often used to study the issues involved: including technical, feasibility and cost issues. Since the participants have come together voluntarily to try and reach a consensus, each participant has a strong interest in helping to find a solution to the concerns of all the other parties. As a result, agreements which emerge from this process tend to be more technically accurate, clear and specific, and less likely to be challenged in litigation than are rules produced without such interaction. By substantially reducing the risk of rulemaking litigation, negotiated rulemaking correspondingly increases the predictability and efficiency of the rulemaking process. These are among the reasons why Congress in 1990 enacted specific legislation, the Negotiated Rulemaking Act (NRA) (5 U.S.C. 561-570), to encourage all agencies to consider use of this process in appropriate cases.

The concept of negotiated rulemaking (explained in considerably more detail in Part A of this Handbook) is not new to the Department of Labor (DOL). In fact, DOL was one of the earliest proponents of negotiated rulemaking, and some of the initial efforts at reg-neg took place in DOL rulemaking. Negotiations during 1983 and 1984 were conducted on a proposed Occupational Safety and Health Administration (OSHA) standard for workers exposure to benzene; and while they did not result in a draft rule, they did serve to narrow the issues in a useful manner. More recently, negotiated rulemaking did result in the development of a consensus standard on occupational exposure to 4,4' Methyleneedianiline (MDA), published as a final rule on August 10, 1992 (57 F.R. 35630). A discussion of these early DOL initiatives, and those of other Federal Departments and agencies, may be found in the Negotiated Rulemaking Sourcebook, Administrative Conference of the United States, 1990. Included in that Sourcebook is an excellent 1981 discussion of the problems inherent in traditional methods for developing proposed rules, by Secretary of Labor designate Robert B. Reich, which is reprinted as an appendix to this Handbook.

Despite this familiarity and the potential benefits of the process, however, negotiated rulemaking has not been used very often nor by many DOL agencies. Several factors have tended to discourage DOL agency use.

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First, use of a negotiated rulemaking process requires most DOL agencies to change the way they are accustomed to developing a rule. Standard practice in rule development is to have a particular office in the agency develop a draft regulatory document, and then that document is critiqued and reformulated as it is sequentially referred to other parts of the agency, the Department, the Executive Branch, and the public. In negotiated rulemaking, by contrast, the parties are brought together for simultaneous discussion and consideration of particular issues. This often imposes stress on bureaucratic chains of command.

Second, use of the process requires improved budgetary and priority coordination among offices of the Department. The negotiated rulemaking process requires that offices work together in a team effort. The effort cannot be undertaken in a particular case if all the necessary members of the team are not able or willing -- because of limited resources and other priorities -- to commit the resources required to carry out the negotiated rulemaking.

Third, negotiated rulemaking costs more money at the front end. In addition to the demands that the compressed decision and coordinating process will impose on staff and senior personnel, operating a negotiated rulemaking advisory committee involves certain expenditures that would not be needed in traditional rule development procedures: e.g. the costs of an impartial mediator to facilitate the discussion, room space for meetings, and in some cases travel and per diem for essential parties who can otherwise not afford to participate.

Finally, prior to the enactment of the Negotiated Rulemaking Act, there were uncertainties within the Department about the legality of the reg-neg process. The Act eliminated any such concern and encouraged the Department to undertake new initiatives to utilize the process where appropriate.

Soon after the enactment of the Negotiated Rulemaking Act, the Department amended its internal regulatory review procedures to require that Department of Labor agencies must consider using negotiated rulemaking to develop a rule when making an initial recommendation to proceed with , rulemaking action. This alone, however, failed to spur interest in the process: in part because of the reasons set forth above, and in part because of lack of information about how to go about a negotiated rulemaking. The Office of the Solicitor therefore initiated a series of almost a dozen seminars to study specific aspects of the negotiated rulemaking process. Experienced DOL regulatory staff from throughout the Department engaged in an active discussion with both experts and previous participants. Particular consideration was devoted to features of the new Act. Based on the work of this group, the Department developed a negotiated rulemaking policy which it anticipates will, by addressing certain key points of concern to DOL agencies, actively facilitate and encourage the use by DOL agencies of negotiated rulemaking. This Handbook is a further effort to that end.

Purpose

The purpose of this Handbook is to provide guidance, to Federal personnel and to the public, on implementation of the negotiated rulemaking policy of the Department of Labor and the provisions of the Negotiated Rulemaking Act.

Those seeking to learn about DOL negotiated rulemaking activities for the first time may take the bulk of this Handbook as a sign that the process is so complex that it is not worth pursuing. Such a conclusion would seriously misconstrue the reg-neg process and the purpose of this Handbook. Negotiated rulemaking is conceptually different from traditional approaches to developing rules under the Administrative Procedure Act and program statutes, but it is not any more complex. It is, however, still unfamiliar to many, including DOL agency personnel. The Handbook is designed as a working tool for those who are considering or actually using the process, serving as a ready reference on procedural issues

with which they may have limited experience. The entire Handbook does not have to be mastered to make decisions about whether to engage in negotiated rulemaking, nor to participate in the process.

Moreover, the fact that the Handbook is detailed does not mean it limits the flexibility of agencies and negotiated rulemaking committees to carry out their activities in innovative ways. Like the Negotiated Rulemaking Act itself, the Handbook seeks to provide both specification and flexibility. On the one hand, the NRA sets forth a detailed set of instructions on how to conduct the process; and on the other hand, it explicitly provides that: "Nothing in this subchapter should be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process or with other innovative rulemaking procedures otherwise authorized by law." 5 U.S.C. 561. Until they gain familiarity with the concepts of negotiated rulemaking, agencies and negotiated rulemaking committees of the Department may derive comfort from following the "safe harbor" guidance in the Act and this Handbook. Moreover, following a consistent approach can help other interested parts of the Government, other parties and the public understand and have confidence in negotiated rulemaking efforts undertaken by all DOL agencies and negotiated rulemaking committees -- particularly during the initial years of operation under the new law. Agencies and negotiated rulemaking committees which decide that an alternative approach is a better way to proceed should not be discouraged from that decision by this Handbook, although they should consult carefully with legal counsel about the legal consequences of alternatives under consideration.

Users of this Handbook should note that it does not deal with internal agency rulemaking requirements (e.g. which specific offices in an agency must

sign off on a particular document), nor with similar features at the Departmental level. These requirements may change from time to time. Agencies engaged in a negotiated rulemaking may wish to supplement the guidance provided in this Handbook with more specific guidance that will explicitly cover such details.

This Handbook will be supplemented and modified from time to time to reflect the experience gained. Users are encouraged to forward suggestions that will help others in the future. Please forward such suggestions to:


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This Handbook was conceived and prepared by Peter Galvin, Co-Counsel for Administrative Law, Division of Legislation and Legal Counsel. It was developed as the result of a group effort by DOL agency regulatory specialists and their legal counsel to further their own understanding of the negotiated rulemaking process. All who participated in that effort, and who commented on the drafts of this edition, are gratefully acknowledged.

Special mention must be made of the particularly significant contributions by several individuals: Jim Estep, Hearings Officer, Division of Occupational Safety and Health, Office of the Solicitor; Debby Dalton, Negotiated Rulemaking Project, Environmental Protection Agency; and Miriam Miller, Co-Counsel for Administrative Law, Division of Legislation and Legal Counsel, Office of the Solicitor. The expert advice of David Pritzker of the Administrative Conference of the United States was most valuable. The unique and thoughtful contributions of Phil Harter, Henry Perritt, Frank Grimes and Roger Daniel were also noteworthy.

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