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MEMORANDUM

To: David Jacob
From: Emma Cecil, Intern
Re: Negotiated Rulemaking Act and Associated Reg Neg Issues
Date: June 15, 2004

cc: Sandra Hamilton, Sarah Bransom, Michael Edwards

I. The Negotiated Rulemaking Act – Formal Requirements

Although negotiated rulemaking, or "reg neg," is of relatively recent vintage and is by no means a widespread practice, a number of federal agencies had successfully used various brands of informal negotiated rulemakings on an ad hoc basis, absent any Federal guidelines, for some time prior to the enactment of the Negotiated Rulemaking Act ("NRA") in 1990. 135 Cong Rec S 10060, S. Rep. No. 97, 101st Cong, 1st Sess. In an effort to "improve the Federal regulatory process," Congress formalized reg neg in the NRA, 5 U.S.C. § 561-570, Pub. L. No. 101-648, whose purpose was "[t]o establish a framework for the conduct of negotiated rulemaking by Federal agencies…to encourage agencies to use the process when it enhances the informal rulemaking process." 101 P.L. 648, 104 Stat. 4969, 4970, 101 Enacted S. 303. The practice of regulatory negotiation under the Act is fairly simple, in theory if not in practice, and can be divided into 4 phases – (1) the initial determination of whether regulatory negotiation should be used in a particular rulemaking; (2) the establishment of a negotiated rulemaking committee, (3) the actual negotiations between representatives of the affected interests in order to reach a consensus, and (4) publication of the consensus (if reached) as the proposed rule for notice and comment pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 550, et seq.

(1) *Determining Whether Negotiated Rulemaking is Appropriate*

Section 563 of the NRA and the Administrative Conference of the United States Recommendation No. 82-4, codified at 1 C.F.R. § 305.82-4, provide guidance as to when negotiated rulemaking ought to be employed by federal agencies when promulgating or revising rules. Such guidance is critical since not every proposed regulation is appropriate for development by way of regulatory negotiation. The factors to be considered in making the preliminary determination to proceed via reg neg are further outlined in section (2) below.

Section 563(a). An agency may establish a negotiated rulemaking committee to negotiate and develop a proposed rule, *if the head of the agency determines that the use of the negotiated rulemaking procedure is in the public interest.* In making such a determination, the head of the agency shall consider whether:

(1) *there is a need for a rule;*

(2) *there are a limited number of identifiable interests that will be significantly affected by the rule*; according to ACUS's recommendation, successful negotiations

cannot generally be conducted with a large number of participants. Although the ACUS suggests a maximum of 15 participants, Rec. 82-4 P 4(c), section 565(b) of the NRA permits up to 25 participants, and possibly more if necessary to achieve a balanced membership.

(3) *there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who (A) can adequately represent the interests identified under paragraph (2); and (B) are willing to negotiate in good faith to reach a consensus on the proposed rule*;

(4) *there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time*; The ACUS cautions agencies against using reg neg where the resolution of issues is "such as to require participants…to compromise their fundamental tenets." Recommendation 82-4, P 4(b). Thus a rule that implicates fundamental values militates against the use of negotiated rulemaking, since it is far less likely that a committee will arrive at a consensus on such a rule.

(5) *the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of a final rule*;

(6) *the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee*;

(7) *the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment*

It should be noted here that although the agency agrees to use the resulting consensus as the basis for its proposed rule, the agency alone retains the authority to publish the rule and may modify the proposal in response to comments issued during the notice-and-comment period, or for other reasons. 5 U.S.C. § 553; Philip J. Harter, Assessing the Assessors: The Actual Performance of Negotiated Rulemaking, 9 N.Y.U. Envtl. L.J. 32, 34. In USA Group Loan Services, Inc. v. Riley, 82 F.3d 708 (7th Cir. 1996), an official of the Department of Education had promised loan servicers that the Department would abide by any consensus, barring compelling reasons to depart therefrom, reached during NRA negotiations required to be conducted under the Higher Education Act. When it came time to publish the consensus as a proposed rule for notice and comment, the Department withdrew its promise to limit the servicers' liability. The Seventh Circuit unequivocally held that the NRA did not render the Department's promise enforceable, nor did the Department negotiate in bad faith by abandoning the consensus rule.

Thus, an agency is not bound by the committee consensus in issuing a proposed rule or a final rule. See also ACUS Recommendation No. 82-4, P 4(g) (stating that the agency representative must make clear that he/she cannot bind the agency), 5 U.S.C. § 566(f) (stating that the committee, upon reaching a consensus, need transmit a report to the agency, presumably so that the agency can deliberate as to whether to adopt the consensus), 5 U.S.C. § 561 (stating that all provisions of NRA are to be carried out in a manner consistent with the APA, 5 U.S.C. § 553). If an agency *does* decide, in its discretion, to issue the consensus rule as its proposed rule for notice and comment, it retains the authority to amend the proposed rule in response to meritorious comments before issuing its final rule. See Recommendation 82-4 P 14. The agency's obligations during reg neg are discussed in more detail below in part II.

(2) *The Convening Process*

Section 563(b). Once an agency determines that reg neg is appropriate for a particular proposed regulation, section 563(b)(1) authorizes (but does not require) the agency to *appoint a convener*, who is responsible for (A) identifying persons who will be significantly affected by a proposed rule, including residents of rural areas; and (B) conducting discussions with such persons to identify the issues of concern to such persons, and to ascertain whether the establishment of a negotiated rulemaking committee is feasible and appropriate in the particular rulemaking. Upon concluding this inquiry, § 563(b)(2) requires the convener to report findings and permits the convener to make recommendations to the agency.

In Recommendation No. 82-4 the ACUS admonishes agencies considering reg neg to "select and consult with a convener *at the earliest practicable time* about the feasibility of its use." 1 C.F.R. 305.82-4, P 4. The need for prompt inquiry into the feasibility of reg neg in a particular case is due to the fact that, while reg neg is superior to conventional rulemaking in many respects, not every proposed regulation is a suitable candidate for development by way of negotiated rulemaking. Thus, before undertaking to promulgate a rule via regulatory negotiation, it is imperative that agencies, as a threshold matter, recognize when and under what circumstances negotiated rulemaking is proper in order to avoid highly contentious, protracted, and ultimately unsuccessful regulatory negotiations. In deciding whether reg neg is feasible and whether a negotiated rulemaking committee should be empanelled to develop a proposed rule, the ACUS recommends that a convener consider the following factors:

(1) *Ripeness of the issues*: "The issues…should be mature and ripe for decision. Ideally, there should be some deadline for issuing the rule, so that a decision on a rule is inevitable within a relatively fixed time frame."

(2) *Nature of the issues to be resolved*: "The resolution of issues should not be such as to require participants [ ] to compromise their fundamental tenets, since it is unlikely that agreement will be reached in such circumstances. [T]he issues involving such fundamental tenets should already have been determined, or not be crucial to the resolution of the issues involved in writing the proposed regulation."

(3) *Nature of affected interests*: "The interests significantly affected should be such that individuals can be selected who will adequately represent those interests. [T]here should be a limited number of interests significantly affected by the rule and therefore represented in the negotiations."

(4) *Number of issues*: "There should be a number of diverse issues that the participants can rank according to their own priorities and on which they might reach agreement";

(5) *Distribution of bargaining power*: "No single interest should be able to dominate the negotiations. The agency's representative in the negotiations will not be deemed to possess this power solely by virtue of the agency's ultimate power to promulgate the final rule."

(6) *Willingness to negotiate in good faith*: "The participants in the negotiations should be willing to negotiate in good faith to draft a proposed rule."

(7) *Agency participation*: "The agency should be willing to designate an appropriate staff member to participate as the agency's representative, but the representative should make clear that he/she cannot bind the agency." Id.

While negotiated rulemaking often achieves its goals of reducing conflict, saving transaction and litigation costs, and reaching a mutually agreeable draft regulation, reg neg is likely to fail where agencies attempt to develop rules that do not conform to the criteria set forth in ACUS's Recommendation No. 82-4. Jody Freeman and Laura I. Langbein, Regulatory Negotiation and the Legitimacy Benefit, 9 N.Y.U. Envt'l. L.J. 60

For example, OSHA's 1983 attempt to promulgate a new industry-wide standard for workplace exposure to benzene via reg neg ultimately failed. Carole C. Berry, Sub S One Class of Stock Requirement: Rulemaking Gone Wrong, 44 Cath. U.L. Rev. 11, 30. The establishment of a new benzene standard proved a poor candidate for negotiated rulemaking because, *inter alia*, (i) "the issues were 'overripe' for decision because there had been multiple attempts at promulgating a standard and numerous failures;" (ii) the parties to the negotiations "were entrenched in their positions," such that "trade-offs [were] more difficult than in a negotiation in which the participants were building a record and had more flexible positions;" (iii) a rule setting a benzene standard necessarily implicated concerns and thus may have involved fundamental values; (iv) the issues were technical in nature such that the benzene standard was necessarily the product of objective data versus discussion and compromise; and finally (v) OSHA failed to participate meaningfully in the negotiations so that "negotiators had little guidance as to what kind of compromise the agency would accept." Id. at 30-34.

If the convener determines that regulatory negotiation is appropriate, it must report findings and may make recommendations to the agency pursuant to NRA section 563(b)(2). If the agency and convener conclude that reg neg is the proper course, the convener "shall ascertain the names of persons who are willing and qualified to represent interests that will be significantly affected by the proposed rule, including residents of rural areas." Id. Section 563(b)(2) accords with the ACUS' recommendation under which the convenor is responsible for determining preliminarily the interests that will likely be significantly affected by a proposed rule, the individuals that will represent those interests in negotiations, the scope of the issues to be addressed, and a schedule for completing the work. 1. C.F.R. 305.82-4, P 5. Finally, this provision requires that "the report and any recommendations of the convener shall be made available to the public upon request."

(3) *Negotiations*

If the agency has determined that reg neg is "feasible and appropriate," it launches the negotiation process, which begins with a publication of notice in Federal Register of the agency's intent to establish a negotiated rulemaking committee for the purpose of conducting a negotiated rulemaking, and includes the agency's consideration of comments and applications for membership on the committee, the establishment of the committee under FACA, the appointment of a facilitator to oversee and assist the committee members in their negotiations, and the negotiations themselves. These steps are governed by §§ 564, 565, and 566 of the NRA.

(A) **Section 564(a).** If, 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 which shall include:

(1) an announcement of intent to establish a negotiated rulemaking committee to negotiate and develop a proposed rule;

(2) a description of the subject and scope of the rule to be developed and the issues to be considered;

(3) a list of the interests likely to be significantly affected by the rule;

(4) a list of the persons proposed to represent such interests and the person or persons proposed to represent the agency;

(5) a proposed 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;

(6) a description of administrative support for the committee to be provided by the agency, including technical assistance;

(7) a solicitation for comments on the proposal to establish the committee, and the proposed membership of the negotiated rulemaking committee; and

(8) an explanation of how a person may apply or nominate another person for membership on the committee, as provided under subsection (b).

Following the notice of intent to conduct a negotiated rulemaking, persons are afforded an opportunity to respond to the notice by commenting generally or by applying for membership to the committee. Section 564(b) sets forth the requirements for such applications:

(B) **Section 564(b) and (c).** Persons who will be significantly affected by a proposed rule and who believe that their interests will not be adequately represented by any person specified in a notice under subsection (a)(4) may apply for, or nominate another person for, membership on the negotiated rulemaking committee to represent such interests with respect to the proposed rule. Each application or nomination shall include--

(1) the name of the applicant or nominee and a description of the interests such person shall represent;

(2) evidence that the applicant or nominee is authorized to represent parties related to the interests the person proposes to represent;

(3) a written commitment that the applicant or nominee shall actively participate in good faith in the development of the rule under consideration; and

(4) the reasons that the persons specified in the notice under subsection (a)(4) do not adequately represent the interests of the person submitting the application or nomination.

(c) Period for submission of comments and applications. The agency shall provide for a period of at least 30 calendar days for the submission of comments and applications under this section.

The next step in the negotiation process is establishing the negotiated rulemaking committee. Prior to the enactment of NRA, agencies not familiar with reg neg were understandably uncertain whether FACA applied to committees convened for the purpose

of conducting regulatory negotiations. Section 565(a)(1) has settled the matter in favor of FACA applicability, but the relationship between reg neg and FACA is discussed more thoroughly in part II below.

(C) **Section 565(a), (b) and (c).**

(a)(1) *Determination to establish committee.* If after considering comments and applications submitted under section 564, the agency determines that a negotiated rulemaking committee can adequately represent the interests that will be significantly affected by a proposed rule and that it is feasible and appropriate in the particular rulemaking, the agency may establish a negotiated rulemaking committee. In establishing and administering such a committee, ***the agency shall comply with the Federal Advisory Committee Act*** [5 USCS Appx.] with respect to such committee, *except as otherwise provided in this subchapter* [5 USCS §§ 561 et seq.].

(2) *Determination not to establish committee.* If after considering such comments and applications, the agency decides not to establish a negotiated rulemaking committee, the agency shall promptly publish notice of such decision and the reasons therefor in the Federal Register and, as appropriate, in trade or other specialized publications, a copy of which shall be sent to any person who applied for, or nominated another person for membership on the negotiating rulemaking committee to represent such interests with respect to the proposed rule.

(b) *Membership.* The agency shall limit membership on a negotiated rulemaking committee to 25 members, unless the agency head determines that a greater number of members is necessary for the functioning of the committee or to achieve balanced membership. Each committee shall include at least one person representing the agency.

(c) *Administrative support.* The agency shall provide appropriate administrative support to the negotiated rulemaking committee, including technical assistance.

Once the members of the negotiated rulemaking committee are assembled and the committee is formally established, section 566 addresses the duties of the committee, the facilitator, and the agency representative; the procedures for selecting a facilitator; committee procedures; committee reports to the agency; and committee records.

(D) **Section 566.**

(a) *Duties of committee.* Each negotiated rulemaking committee established under this subchapter [5 USCS §§ 561 et seq.] shall 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.

(b) *Representatives of agency on committee.* The person or persons representing the agency on a negotiated rulemaking committee shall participate in the deliberations and activities of the committee with the same rights and responsibilities as other members of the committee, and shall be authorized to fully represent the agency in the discussions and negotiations of the committee.

(c) *Selecting facilitator.* Notwithstanding section 10(e) of the Federal Advisory Committee Act [5 USCS Appx. § 10(e)], an agency may nominate either a person from the Federal Government or a person from outside the Federal Government to serve as a

facilitator for the negotiations of the committee, subject to the approval of the committee by consensus. If the committee does not approve the nominee of the agency for facilitator, the agency shall submit a substitute nomination. If a committee does not approve any nominee of the agency for facilitator, the committee shall select by consensus a person to serve as facilitator. A person designated to represent the agency in substantive issues may not serve as facilitator or otherwise chair the committee.

(d) *Duties of facilitator*. A facilitator approved or selected by a negotiated rulemaking committee shall--

(1) chair the meetings of the committee in an impartial manner;

(2) impartially assist the members of the committee in conducting discussions and negotiations; and

(3) manage the keeping of minutes and records as required under section 10(b) and (c) of the Federal Advisory Committee Act [5 USCS Appx. § 10(b), (c)], except that any personal notes and materials of the facilitator or of the members of a committee shall not be subject to section 552 of this title.

The appointment of neutral mediators, recommended by ACUS, Recommendation 82-4 P 10, and authorized by NRA, has, according to one law review become standard practice among federal agencies. 46 Duke L.J. 1351.

(e) *Committee procedures*. A negotiated rulemaking committee established under this subchapter [5 USCS §§ 561 et seq.] may adopt procedures for the operation of the committee. No provision of section 553 of this title shall apply to the procedures of a negotiated rulemaking committee.

(f) *Report of committee*. If a committee reaches a consensus on a proposed rule, at the conclusion of negotiations the committee shall transmit to the agency that established the committee a report containing the proposed rule. If the committee does not reach a consensus on a proposed rule, the committee may transmit to the agency a report specifying any areas in which the committee reached a consensus. The committee may include in a report any other information, recommendations, or materials that the committee considers appropriate. Any committee member may include as an addendum to the report additional information, recommendations, or materials.

(g) *Records of committee*. In addition to the report required by subsection (f), a committee shall submit to the agency the records required under section 10(b) and (c) of the Federal Advisory Committee Act [5 USCS Appx. § 10(b), (c)].

The negotiated rule making committee's work is essentially concluded when it either *reaches a consensus or determines that a consensus is unachievable*. If a consensus is reached, the committee must submit a report to the agency containing the proposed rule. The negotiated text is thereafter published as a proposed rule (or NPRM) in the Federal Register. See section (4) below. Although ACUS recommended that the committee be afforded an opportunity to review the comments received during the notice and comment period in order to decide whether or not to recommend modifications to the consensus rule, Recommendation 82-4, P. 14, not all agencies follow this practice. William Funk, Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest, 46 Duke L.J. 1351, note 2. Agencies that do follow this practice obviously extend the role of reg neg committees in the rulemaking process beyond the development of the initial draft regulation. This practice does not likely

contravene the non-delegation doctrine since the final responsibility for issuing the rule ultimately reposes in the agency. See Recommendation 82-4 P 14. The non-delegation doctrine is discussed more fully in section II, part C.

(4) *Publication of Proposed Rule for Notice and Comment*

Finally, the agency publishes the consensus rule in the Federal Register in a Notice of Proposed Rulemaking. The rule is then subjected to existing notice and comment procedures as provided for in section 553 of the APA. 9 N.Y.U. Envtl. L.J. 32, 34. The agency, however, retains authority over the wording of any proposed or final rule and is free to amend the negotiated rule in response to significant public comment received during the notice and comment period. Charles C. Caldart and Nicholas A. Ashford, Negotiation as a Means of Developing and Implementing Environmental and Occupational Health and Safety Policy, 23 Harv. Envtl. L. Rev. 141, 144. The agency may also modify the negotiated rule if it believes the negotiated rule "is inconsistent with the applicable congressional mandate." Id. The role of APA procedures and agency autonomy in the reg neg process are discussed in part II, sections A and C.

II. Issues Arising Under the Negotiated Rulemaking Act

As section I demonstrates, regulatory negotiation under the NRA is a relatively straightforward process. However, because negotiated rulemaking is still in its adolescence, questions remain as to how reg neg operates in agency life, especially in relation to agency obligations during reg neg (e.g., non-delegation doctrine), judicial review of rules developed via reg neg, and finally, reg neg's relationship to other administrative laws, in particular the Administrative Procedure Act and the Federal Advisory Committee Act ("FACA").

(A) *Negotiated Rulemaking and the Administrative Procedures Act*

The NRA's basic statutory requirements in no way abrogate the operation of the Administrative Procedures Act ("APA"), which sets out the general requirements for notice and comment rulemaking, but rather were specifically designed to work in tandem with the APA. In fact, section 561 of the NRA expressly states that the provisions of the NRA are to be implemented consistently with APA. The NRA is thus an adjunct, or supplement, to traditional APA procedures since the negotiated rulemaking occurs *prior* to, and not in lieu of, the notice and comment proceedings required under the APA. This symbiosis results in an enhanced rulemaking process that simultaneously encourages compromise on contentious issues through innovative administrative methods, while complying with the traditional mandates of the APA.

In USA Group Loan Servs. v. Riley, 82 F.3d 708 (7th Cir. 1996), Judge Posner, writing for the court, emphasized the continuing legal relevance of the APA's notice and comment procedures when holding that a promise, made during a regulatory negotiation by an official of the Department of Education, to abide by the consensus of the committee in issuing its proposed rule, was not enforceable by operation of the NRA. The court reasoned in part that to enforce such a promise would erroneously render the APA

obsolete: "[t]he practical effect of enforcing it [the promise to abide by a consensus of the regulated industry] would be to make the Act [NRA] extinguish notice and comment rulemaking in all cases in which it was preceded by negotiated rulemaking; the comments would be irrelevant if the agency were already bound by promises that it had made to the industry." Id. at 714. Clearly, the court was troubled by the prospect of the NRA being interpreted as displacing the APA and wanted to shore up the enduring legal significance of the APA despite the advent and implementation of reg neg. Echoing these sentiments, Judge Wald of the D.C. Circuit Court of Appeals points out that, while agencies enter enforceable agreements with parties almost daily in the adjudicatory-enforcement context, promises made during regulatory negotiations should be treated differently due to "the peculiar role of reg neg as a prelude to, rather than a substitute for, the regular statutorily mandated APA rulemaking process whose independence, integrity and transparency judges feel they must keep intact." Patricia M. Wald, ADR and the Courts: An Update, 46 Duke L.J. 1445, 1471.

Even though NRA in no way trumps the APA (the two statutes are coterminous and complementary), one source of confusion is section 566(e) which provides that "no provision of section 553 [APA] of this title shall apply to the procedures of a negotiated rulemaking committee." This does not mean that rules developed via reg neg are exempted from § 553 notice and comment procedures; it merely means that the committee "may adopt procedures for the *operation of the committee*." § 566(e). Although the reg neg committee need not comply with § 553 notice and comment requirements during committee negotiations, once the convened parties agree upon a proposed rule, ordinary rulemaking procedures under § 553 must commence.

The legislative history of NRA reinforces the continued applicability of APA and other administrative laws (e.g., Federal Advisory Committee Act) by touting the NRA as definitive guidance on "how an agency should conduct a negotiated rulemaking so that it is consistent with other laws governing Federal administrative practice, such as the Administrative Procedure Act and the Federal Advisory Committee Act." 135 Cong Rec S 10060, 10063. According to the Senate Report, "[t]he bill explains how to form a rulemaking committee in compliance with the Federal Advisory Committee Act, and how to conduct proceedings in conformance with the Administrative Procedures Act's requirements for informal rulemaking." Id. Existing rulemaking procedures under § 553 thus pick up where reg neg leaves off. NRA simply sets forth the procedures to be followed during the establishment of committees and committee negotiations, and does not strip the APA of its legal effect since reg neg and § 553 notice and comment proceedings are discrete, yet not mutually exclusive, steps in the overall rulemaking process.

(B) *Negotiated Rulemaking and the Federal Advisory Committee Act*

The Federal Advisory Committee Act essentially regulates the creation, composition, and general function of advisory committees. Wherever FACA applies, it restricts an agency's solicitation of advice from non-governmental sources by requiring the agency to formally charter an advisory committee before receiving such advice. Steven P. Croley, Practical Guidance on the Applicability of the Federal Advisory Committee Act, 10 Admin. L.J. Am. U. 111, 114. Although FACA does not require

agencies to charter advisory committees in the routine course of rulemaking, *negotiated rulemaking* is precisely the kind of agency activity that will trigger FACA's formal chartering requirements. Id. Although prior to the enactment of NRA there had been uncertainty as to whether FACA applied to negotiated rulemaking-type groups, it is now universally agreed, based on the language of section 565 of the NRA and the Act's legislative history, that regulatory negotiations conducted under the NRA are subject to FACA.

Section 565(a)(1) of the Act explicitly provides that "[i]n establishing and administering [a negotiated rulemaking committee], the agency shall comply with the Federal Advisory Committee Act, except as otherwise provided." Section 562(7) defines a "negotiated rulemaking committee" as "an advisory committee established by an agency in accordance with this subchapter and the Federal Advisory Committee Act to consider and discuss for the purpose of reaching a consensus in the development of a proposed rule." The Act's legislative history is also replete with references to FACA's continuing applicability thereby resolving any confusion about the interface between FACA and the NRA. 135 Cong. Rec. S. 10060, 101st Cong. 1st Sess. 1989. Indeed, the NRA states "unequivocally that negotiated rulemaking committees are subject to FACA." S. Rep. No. 97, at 16-17 (cited at 44 Cath. U.L. Rev. 11, note 246). Thus, conduct that triggers the NRA will also trigger the FACA, even though the reverse is not true.

While FACA applies unequivocally to the establishment and functioning of negotiated rulemaking committees, section 565 states that the agency must comply with FACA in establishing and administering committees under NRA, "except as otherwise provided." With this language, Congress carved out 2 limited exceptions to FACA that may be found in section 567 (providing that a reg neg committee shall terminate upon promulgation of the final rule) and section 568 (authorizing an agency to reimburse committee members' expenses). According to the Senate committee report, the first exception "provides more flexible rules for terminating a negotiated rulemaking committee," and the second exception "provides different rules for agency reimbursement of committee member expenses." S. Rep. No. 97, at 17 (cited at 44 Cath.U.L.Rev. 11, note 244). FACA thus appears to be in full force during the negotiated rulemaking process since the only time FACA does *not* apply is when terminating a reg neg committee, and when reimbursing committee expenses. In these situations, NRA has slightly different, more flexible requirements. Id.

One final issue that created some confusion was Executive Order 12, 838, implemented by OMB Circular A-135, directing each agency to reduce its reliance upon advisory committees and establishing caps on the number of advisory committees chartered by federal agencies. 58 FR 8207 (February 10, 1993). Because NRA expressly subjects reg neg committees created under the Act to FACA, agencies seeking to establish advisory committees for the purposes of conducting regulatory negotiations are now presumably immune from EO 12,838. In a memorandum to heads of departments and agencies, President Clinton appeared to have reconciled the contradictory requirements of NRA/FACA and EO 12,838 when he announced his intent to exempt negotiated rulemaking committees from agencies' advisory committee ceilings. 31 Weekly Comp. Pres. Doc. 364 (March 4, 1995); 10 Admin. L.J. Am. U. 111, note 41. Certainly, then, the intent of Congress and the executive cannot have been to remove

NRA from FACA's chartering requirements, but rather to ensure that reg neg committees comply fully with FACA.

It bears mention here that, during my research, I encountered not one instance of negotiated rulemaking in which the agency did not formally charter a negotiated rulemaking committee pursuant to FACA. It seems rather obvious that regulatory negotiation is intended to, and must, comply with both APA and FACA since none of the three statutes (NRA, APA, FACA) displace or supplant, or otherwise render inapplicable, any of the others. The requirements of each are such that they are all coterminous and can be complied with simultaneously.

(C) *Agency Obligations and the Non-Delegation Doctrine*

In the early days of regulatory negotiation, there was some concern that the practice of negotiated rulemaking could violate the constitutional non-delegation doctrine, not by unlawfully delegating legislative power to an executive branch agency, but by unlawfully delegating legislative power to the private negotiating parties. William Funk, Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest, 46 Duke L.J. 1351, 1373. However, the fact that reg-neg is limited to the formulation of a proposed rule (which is not binding on the agency and which is subject to notice and public comment pursuant to the APA), coupled with the agency's reservation of the power to adopt or depart from the regulation, quiets any concern over the constitutional validity of the negotiated rulemaking process. Id. at 1374.

The only case addressing the issue of delegation and agency responsibility under the NRA is USA Group Loan Servs. v. Riley, 82 F.3d 708, where the 7th Circuit held that an agency's promise to use the consensus reached during a reg neg was unenforceable. To hold otherwise, the court reasoned, would be tantamount to sanctioning what "sounds like an [agency's] abdication of regulatory authority to the regulated." Id. at 714. Although it has no obligation even to propose the consensus for notice and comment, and is not bound by promises it makes prior to or during negotiations, even if such promises are improper, the agency is ill-advised to dismiss a consensus rule too cursorily – if it does, "the viability of the whole negotiating process is seriously impugned." Patricia M. Wald, ADR and the Courts: An Update, 46 Duke L.J. 1445, 1470. Despite the 7th Circuit's holding in U.S.A. Group, the dearth of case law on reg neg means that "the standard of review and the extent to which an agreement may be binding on either a signatory or someone whom a party purports to represent are still unknown." 9 N.Y.U. Envtl. L.J. 32, 50. Right now, the conventional wisdom seems to be that an agency engaging in reg neg is not bound by the consensus reached by the negotiating committee in issuing a proposed or final rule, nor is it bound by promises it makes during negotiations. These general principals are due to the operation of the APA and concerns over the unlawful delegation of legislative authority to private entities.

(C) *Judicial Review*

Section 570 of the NRA states that "[a]ny agency action relating to establishing, assisting, or terminating a negotiated rulemaking committee under this subchapter [5 USCS §§ 561 et seq.] shall not be subject to judicial review. Nothing in this section shall

bar judicial review of a rule if such judicial review is otherwise provided by law. A rule which is the product of negotiated rulemaking and is subject to judicial review shall not be accorded any greater deference by a court than a rule which is the product of other rulemaking procedures." 5 U.S.C. § 570.

This section seems to indicate that a negotiated rule cannot be challenged on the ground that the negotiated rulemaking process itself was deficient, 46 Duke L.J. 1445, 1460; the final rule, however, may be challenged on substantive grounds. Moreover, although the fact that a consensus was reached during negotiations might strongly support the reasonableness of the rule, section 570 unambiguously provides that such rules are not to be accorded more deference than a rule developed through other rulemaking processes.

In a recent case concerning the No Child Left Behind Act ("NCLBA"), which required the Department of Education to use reg neg when promulgating rules under the Act, the D.C. district court dismissed plaintiff's motion for a preliminary injunction. The plaintiffs had claimed that the Department's selection of participants in a negotiated rulemaking was invalid. In response, the defendants moved to dismiss on the ground that judicial review of the reg neg process was barred. Without fanfare, the court granted the defendant's motion, finding that the NCLBA, by incorporating section 570 of the NRA, precluded judicial review of the negotiated rulemaking process. Ctr. For Law & Educ. v. United States Dep't of Educ., 209 F. Supp. 2d 102, 106 (D.D.C. 2004).

This case, coupled with the 7th Circuit's refusal to allow petitioners more discovery in order to demonstrate instances of bad faith on the part of the Education Department during regulatory negotiations, U.S.A. Group, 82 F.3d 708, suggest that the NRA creates a right (to fair negotiations) without a remedy (for deficient negotiations or negotiations not in accord with the NRA). Addressing whether there is a remedy for bad faith negotiations, Judge Posner points out that section 570 of the NRA "strongly implies there is none." Id. at 714. Indeed, section 570 clearly disfavors judicial inquiry into the reg neg *process*, even if it is flawed, since "the Act's purpose – to reduce judicial challenges to regulations by encouraging the parties to narrow their differences in advance of the formal rulemaking proceeding – would be poorly served if the negotiations became a source of litigation." Id. at 715. Under Posner's view, everything leading up to the notice and comment period is essentially irrelevant to the determination of whether a final rule is valid. It is unclear, however, whether bad faith during regulatory negotiations *could* affect the validity of the final rule. Judge Posner seems to hint at the possibility when he comments that, "a refusal to negotiate that really was in bad faith, because the agency was determined to stonewall, might invalidate the rule eventually adopted by the agency," Id., but proceeds no further with his analysis. For the time being, this question remains unresolved, although the 7th Circuit, as well as section 570 itself, seem to favor the view that the NRA would *not* permit "bad faith" judicial challenges to such negotiations.