Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking

Jeffrey Lubbers, American University Washington College of Law

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As the ADR movement made its way from the courts to the agency hearing rooms in the 1980s, negotiated rulemaking (sometimes called "regulatory negotiation" or simply "reg-neg") also emerged on a parallel track as an alternative to traditional procedures for drafting proposed regulations.

This exemplar of regulatory reform was based on two insights: (1) that the usual process of written notice-and-comment rulemaking has an intrinsic weakness because stakeholders engaged in it do not interact with each other or with the agency; and (2) in certain situations, it is possible to bring together representatives of the agency and the various affected interest groups to negotiate the text of a proposed rule. If the negotiators are able to achieve consensus on a draft rule, the resulting final rule is likely to be issued more quickly, easier to implement, and less likely to be subsequently challenged in court. Moreover, even in the absence of consensus on a draft rule, the process may be valuable as a means of better informing the regulatory agency of the issues and the concerns of the affected interests. For these reasons, negotiated rulemaking was seen as an appropriate application of ADR principles to the quasi-legislative rulemaking process.

Although its "founding father" called it "a cure for the malaise," reg-neg was never seen (even by him) as a panacea for all that ailed
administrative rulemaking. Nevertheless, its promise was evidenced by official executive branch encouragement, by congressional action intended to make its legality clear to all and to regularize its practice, and by numerous articles written by commentators debating its merits in the context of an otherwise increasingly "ossified" rulemaking process. However, after an initial groundswell of agency interest, its use has waned in recent years—to the point that it is used half as often as it was in the 1990s, and over half of those undertaken in this century have been of the nondiscretionary variety—required by specific legislation. This article will explore some of the apparent reasons for this.

I. OVERVIEW OF NEGOTIATED RULEMAKING

In negotiated rulemaking, the agency, with the assistance of one or more neutral advisers known as "convenors," assembles a committee of representatives of all affected interests to negotiate a proposed rule. The goal of the process is to reach consensus on a text that all parties can accept. The agency should be represented at the table by an official who is sufficiently senior to be able to speak authoritatively on behalf of the agency. Negotiating sessions, however, are chaired not by the agency representative, but by a neutral mediator or facilitator skilled in assisting in the resolution of multiparty disputes.

Originally developed by the Administrative Conference of the United States (ACUS) based on a foundational article by its consultant, Philip Harter, the early successful uses of the technique

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2. See infra note 44.
4. See infra note 50; see also infra note 53 & accompanying text.
5. Much of this initial overview is adapted from JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING (4th ed. 2006).
7. See ACUS Recommendations, supra note 1.
led to the enactment of the Negotiated Rulemaking Act of 1990 (NRA), which was amended and made permanent in 1996.9

The NRA established a statutory framework for agency use of negotiated rulemaking to formulate proposed regulations.10 The NRA supplements the rulemaking provisions of the Administrative Procedure Act (APA), largely codifies the practice of those agencies that had previously used the procedure, and incorporates relevant ACUS recommendations.11 The NRA does not require use of the technique; rather it was intended to clarify agency authority and to encourage agency use of the process, allowing each agency the discretion whether to employ it.12

Although the Act sets forth some basic public notice requirements, most of the language is permissive.13 Congress did not intend to impair any rights otherwise retained by agencies or parties, expressly providing that nothing in the Act "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."14 Moreover, although the NRA clearly permits an agency to publish as its own the consensus proposal adopted by the negotiating committee, and most agencies do so, the Act does not require the agency to publish either a proposed or final rule merely because a negotiating committee proposed it.15

Even its most fervent supporters acknowledge that negotiated

11. Id.; see also DAVID M. PRITZKER & DEBORAH S. DALTON, NEGOTIATED RULEMAKING SOURCEBOOK 11-17 (2d ed. 1995).
13. See Tex. Office of Pub. Util. Counsel v. FCC, 265 F.3d 313, 327 (5th Cir. 2001) ("The plain language of the statute undermines the notion that the NRA's procedures are mandatory.")
rulemaking is clearly not suitable for all agency rulemaking. The Negotiated Rulemaking Act sets forth several criteria to be considered when an agency determines whether to use reg-neg. These include (1) whether there are a limited number of identifiable interests—usually not more than 25, including any relevant government agencies—that will be significantly affected by the rule; (2) whether a balanced committee can be convened that can adequately represent the various interests and negotiate in good faith to reach consensus on a proposed rule; (3) whether the negotiation process will not unreasonably delay issuance of the rule; (4) whether the agency has adequate resources to support the negotiating committee; and (5) whether the agency—to the maximum extent consistent with its legal obligations—will use a committee consensus as the basis for a proposed rule. These criteria are based on recommendations of the Administrative Conference and actual agency experience using the process.

In “regular” rulemaking, absent special circumstances, the APA requires an agency planning to adopt a rule on a particular subject to publish a proposed rule in the Federal Register and to offer the public an opportunity to comment. However, the APA does not specify who is to draft the proposed rule nor any particular procedure to govern the drafting process. Ordinarily, agency staff performs this function, with discretion to determine how much opportunity for public input to allow. Any agency contacts with regulated parties or the general public while the agency is considering or drafting a proposed rule are usually informal and unstructured; some agencies bar such “ex parte” contacts after the issuance of the notice of proposed rulemaking. Typically, there is no opportunity for

20. See id.
22. See, e.g., Dept. of Transp. Order No. 2100.2 (1970) (discouraging ex parte communications after the end of the comment period and providing that after the notice of proposed rulemaking is published, all communications must be reduced to writing and promptly placed in the public docket and summaries should include list of participants, summary of discussion, and statement of commitments made by Department of Transportation personnel); see also 14 C.F.R. 11 app. 1 (2007) (setting forth the Federal
interchange of views among potentially affected parties, even if an agency chooses to conduct an oral hearing. The dynamics of this process tend to encourage interested parties to take extreme positions in their written and oral statements—in pre-proposal contacts as well as in comments on any published proposed rule. They may choose to withhold information they view as damaging. A party may appear to put equal weight on every argument, giving the agency little clue as to the relative importance it places on the various issues. There is usually little willingness to recognize the legitimate viewpoints of others. This adversarial atmosphere often contributes to the expense and delay associated with regulatory proceedings, as parties try to position themselves for the expected litigation. What is lacking is an opportunity for the parties to exchange views and to focus on finding constructive, creative solutions to problems.

This is what reg-neg is intended to provide. Negotiated rulemaking should be viewed as a supplement to the rulemaking provisions of the APA. This means that the negotiation sessions generally take place prior to issuance of the notice and the opportunity for the public to comment on a proposed rule. In some instances, negotiations may be appropriate at a later stage of the proceeding. But negotiated rulemaking does not reduce in any way the agency’s obligations to follow the APA process, to produce a rule within its statutory authority, or to adequately explain the result.

II. THE PROCESS

The Negotiated Rulemaking Act authorizes use of a convener to report on the feasibility of undertaking a negotiated rulemaking. The

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Aviation Administration’s policy regarding ex parte contacts).


26. LUBBERS, supra note 5, at 216.

public notice announcing the agency's intent to use the procedure is supposed to provide an opportunity, for at least thirty days, for members of the public who believe they are inadequately represented on the negotiating committee to apply for membership or better representation, though the agency retains discretion as to whether to grant such requests. If, after considering the public responses to the published notice of intent to establish a negotiating committee, the agency determines not to do so, the agency must publish a notice of that fact and the reasons for the decision.

The agency must comply with the Federal Advisory Committee Act (FACA) in establishing and administering the negotiating committee, although other agency procedural actions relating to establishing, assisting, or terminating the committee are not subject to judicial review. However, the otherwise available judicial review of a rule is not affected by the fact that it resulted from a negotiated rulemaking, and the NRA even specifies that a reviewing court is not supposed to accord such a rule any greater deference merely because of the procedure followed.

It is assumed that the agency will be represented on the committee, but committee meetings are to be chaired by an impartial facilitator who assists the committee in its deliberations. If the committee reaches consensus on a proposed rule, it transmits to the agency a report containing the proposal. Consensus is defined as "unanimous concurrence among the interests represented" unless the committee agrees on a different definition. If the committee does not reach consensus on a rule, it may transmit to the agency whatever information, recommendations, or other material it considers appropriate. The agency may keep a negotiating committee in

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29. Id. § 565(a). LUBBERS, supra note 5, at 172–73.
32. Id. § 570.
33. Id. However, courts obviously know whether a rule has been a product of negotiated rulemaking. See, e.g., Steel Joist Inst. v. OSHA, 287 F.3d 1165, 1166 (D.C. Cir. 2002) (upholding a rule and noting that it was "based on a consensus document submitted by a rulemaking advisory committee in a negotiated rulemaking"); Cent. Ariz. Water Conservation Dist. v. EPA, 990 F.2d 1531, 1544–45 (9th Cir. 1993) (upholding a negotiated sulfur dioxide emission rule designed to improve visibility at the Grand Canyon). LUBBERS, supra note 5, at 173.
34. 5 U.S.C. §§ 565(b), 566(c), (d).
35. Id. § 566(f).
36. Id. § 562.
37. Id. § 566(f).
existence until promulgation of the final rule, but earlier termination is permitted if the agency or the committee so chooses.\textsuperscript{38}

Agencies may contract with private parties or may use government employees to act as facilitators, or to assist the agency in the "convening" process—that is, the initial determination of the feasibility of negotiating a rule and the assembly of an appropriate committee membership.\textsuperscript{39} Agencies are authorized to pay expenses of certain committee members in accordance with FACA, and agencies are authorized to accept outside funds and use them in planning or conducting negotiated rulemakings if no conflict of interest is created.\textsuperscript{40}

For reg-neg to be successful, there should be a number of diverse issues that participants can rank according to their own priorities, so that each of the participants may be able to find room for compromise on some of the issues as an agreement is sought. However, it is essential that the issues to be negotiated not require compromise of principles so fundamental to the parties that meaningful negotiations are impossible. Parties must indicate a willingness to negotiate in good faith, and no single interest should be able to dominate the negotiations.\textsuperscript{41}

As mentioned above, the goal of the committee is to reach a consensus (usually meaning unanimity) on a draft rule. Negotiators try to reach a consensus through a process of evaluating their own priorities and making trade-offs to achieve an acceptable outcome on the issues of greatest importance to them. The existence of a deadline for completing negotiations, whether imposed by statute, the agency, or other circumstances, has been found to impart a degree of urgency that can aid the negotiators in reaching a consensus on a proposed rule. On the other hand, where the participants feel that they have a

\textsuperscript{38} \textit{Id.} § 567. \textit{But see} Jody Freeman & Laura I. Langbein, \textit{Regulatory Negotiation and the Legitimacy Benefit}, 9 N.Y.U. ENVTL. L.J. 60, 135 (2000) (recommending "that agencies maintain negotiating committees through rule promulgation, rather than disbanding them upon reaching consensus," and suggesting "that agencies experiment with keeping committees intact, or recalling them periodically, for post-promulgation consultation, perhaps through the implementation period"). LUBBERS, supra note 5, at 174.

\textsuperscript{39} 5 U.S.C. § 568(a).

\textsuperscript{40} \textit{Id.} §§ 568(c), 569(b), \textit{amended by} Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 11, 110 Stat. 3870, 3873 (1996). This provision was modified to take account of the closure of ACUS, which was previously authorized to accept and pay out such funds. \textit{See} ADMIN. CONFERENCE OF THE U.S., BUILDING CONSENSUS IN AGENCY RULEMAKING: IMPLEMENTING THE NEGOTIATED RULEMAKING ACT 10, 32 (1995). LUBBERS, supra note 5, at 174.

\textsuperscript{41} LUBBERS, supra note 5, at 214.
strong "BATNA" (best alternative to a negotiated agreement), such as hope of obtaining a better result from the agency or Congress through the political process, the chances of an agreement are reduced.

If a consensus is achieved by the committee, the agency ordinarily would publish the draft rule based on that consensus in a notice of proposed rulemaking—and the agency would have committed itself in advance to doing so. Such a commitment is not an abdication of the agency's statutory responsibility, for there would not be a consensus without the agency's concurrence in the committee's proposed rule. Even negotiations that result in less than full consensus on a draft rule can still be very useful to the agency by narrowing the issues in dispute, identifying information necessary to resolve issues, ranking priorities, and finding potentially acceptable solutions.

42. See ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 97–100 (Bruce Patton ed., 2d ed. 1991) (describing the concept of BATNA).

43. Nor would such an agreement undercut the agency's authority to make changes at the final rule stage. See Natural Res. Def. Council v. EPA, 859 F.2d 156, 194–95 (D.C. Cir. 1988).

III. OVERSIGHT AND ENCOURAGEMENT OF THE PROCESS

Three years after the passage of the NRA, President Clinton’s National Performance Review issued a report, “Improving Regulatory Systems,” which recommended that, “The President should encourage agencies to use reg neg.”\(^{45}\) His Executive Order 12,866 followed up by directing agencies to, “where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.”\(^{46}\) He followed that with a memorandum urging agencies to “Negotiate, Don’t Dictate,” and “to expand substantially . . . efforts to promote consensual rulemaking.”\(^{47}\) While retaining Order 12,866, and not modifying its support of reg-neg, George W. Bush’s Administration has not taken any supplemental action, either to promote or discourage the use of negotiated rulemaking.\(^{48}\) And, as discussed below, ACUS, which had been tapped by the NRA to play a key role in superintending agency reg-neg activities, was disbanded (for reasons having nothing to do with reg-neg) in 1995.\(^{49}\)

Congress, for its part, not only enacted the Negotiated Rulemaking Act, it also began to occasionally mandate use of negotiated rulemaking in connection with specific programs.\(^{50}\)

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\(^{45}\) NAT’L PERFORMANCE REVIEW, CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS: IMPROVING REGULATORY SYSTEMS 29, 32 (1993) [hereinafter IMPROVING REGULATORY SYSTEMS], available at http://govinfo.library.unt.edu/npr/library/reports/reg.html. The author was the Team Leader for this report.


\(^{47}\) Memorandum on Regulatory Reform, 1 PUB. PAPERS 304, 305 (Mar. 4, 1995).


However, it was early recognized that these statutory mandates could be problematic because they required negotiation of nonnegotiable issues and often contained unrealistic deadlines.  

IV. THE WANING OF NEGOTIATED RULEMAKING

I had the impression that agency use of reg-neg was significantly lower in the 2000s than in the 1990s. To check this, I searched Westlaw's Federal Register database for "negotiated rulemaking committee" or "negotiated rulemaking advisory committee." I then tried to find the earliest indication of intent to create a negotiated rulemaking committee. I found that from the beginning of 1991 (the year after the NRA was enacted) through the end of 1999, sixty-three separate such committees were created, while from 2000 to the end of 2007, there were only twenty-two. Thus, the number went from about seven per year to about three per year. More tellingly, the number of statutorily mandated committees was only twenty-three of sixty-three (36.5%) in the first period but fifteen of twenty-two (68%) in the most recent period.

What are the reasons for this waning of negotiated rulemaking? I think there are several factors at play here. First, I would have to mention the disbanding of ACUS in 1995. ACUS not only produced the recommendations that led to agency experimentation with reg-neg and the eventual enactment of the NRA, Congress also gave ACUS a series of official responsibilities pertaining to the technique: to compile data, serve as a clearinghouse of information, report to Congress, provide training, and even pay the expenses of agencies in conducting a reg-neg (including paying the expenses of the convenors, facilitators, and committee members). When ACUS lost its funding in 1995, this function went unassigned. A year later the NRA was amended to require the President to "designate an agency or... interagency committee to facilitate and encourage agency use of

51. See IMPROVING REGULATORY SYSTEMS, supra note 45, at 32. LUBBERS, supra note 5, at 175.
52. See Appendix. The search was done on December 1, 2007. I also found two additional (Postal Service) proceedings by searching "consensus committee." Not all of the notices indicating an intention to consider forming a negotiated rulemaking committee resulted in a completed process, but most seemed to. I also checked the results against data from 1991 to May 1995. See NEGOTIATED RULEMAKING SOURCEBOOK, supra note 11, at 375–98 (listing twenty negotiated rulemakings from 1983, when the Department of Transportation began the first one, through 1990).
53. See Appendix.
54. See NEGOTIATED RULEMAKING SOURCEBOOK, supra note 11, at 11–13, 16.
negotiated rulemaking. President Clinton then designated the Regulatory Working Group, which he had previously established under Section 4(d) of Executive Order 12,866, as the lead agency. However, it appears that in the Bush Administration the Regulatory Working Group is no longer a functioning entity, despite its retention in the Order.

A second major factor is budgetary. There is no question that convening and conducting a reg-neg involves a greater cost than organizing a notice-and-comment process. A 1995 report of EPA's costs for conducting reg-negs showed an average of $94,200 (or about $128,000 adjusted for inflation) per proceeding. This figure included costs for convening, facilitation, analysis, travel and per diem, and consultants.

These up-front costs are supposed to be more than cancelled out, when the process works effectively, by cost savings at the end of the proceeding that result from having fewer comments to consider and fewer challenges in court. I have not seen any data comparing negotiated rules to "regular" rules on number of comments, and the data on number of court challenges has been disputed (see below); but, even if these effects are present, they may still not be enough to persuade agency managers to voluntarily initiate a reg-neg. Budget officers tend to have a short-term perspective—what resources do we have this fiscal year? And the costs described above will be incurred immediately, while any savings are not only speculative, they will be accrued next year. Moreover some of the biggest savings—created by fewer court challenges—will tend to be pocketed more by the Department of Justice—the litigators—rather than the agency's own legal office. And, of course, overall agency resources at many agencies have seriously eroded in recent years.

57. See Memorandum on Agency Use of Alternate Means of Dispute Resolution and Negotiated Rulemaking, 1 PUB. PAPERS 663 (May 1, 1998).
58. At an ABA panel on the amendments to Exec. Order No. 12,866 on October 25, 2007, I asked OMB's Deputy General Counsel John Knepper whether the Regulatory Working Group was still performing this function or even meeting at all. He confessed he did not know, and then said that that was an indication of the probable answer. John Knepper, Deputy General Counsel, White House Office of Management and Budget, Remarks After Panel on Recent Changes to Executive Order 12,866: Good Governance or Usurpation, ABA Section of Administrative Law and Regulatory Practice Panel in Washington, D.C. (Oct. 25, 2007).
59. NEGOTIATED RULEMAKING SOURCEBOOK, supra note 11, at 274.
60. See, e.g., Sidney A. Shapiro & Randy Rabinowitz, Voluntary Regulatory
Another budgetary issue concerns the demands that reg-neg places on the stakeholders: attending a series of negotiating sessions can involve a devotion of considerable resources. This can be especially problematic for environmental and other public interest groups. Many such groups may find it more economical to file written comments in rulemaking proceedings and then litigate if dissatisfied. This is especially true of “repeat players,” such as lawyers from environmental organizations who are called upon to represent stakeholders in several lengthy negotiations.\textsuperscript{61} These problems were not unanticipated. The Negotiate Rulemaking Act provides that an agency may pay for a committee member’s reasonable travel and per diem expenses, expenses to obtain technical assistance, and a reasonable rate of compensation, if (1) such member certifies a lack of adequate financial resources to participate in the committee; and (2) the agency determines that such member’s participation in the committee is necessary to assure an adequate representation of the member’s interest.\textsuperscript{62}

In addition, the NRA authorized ACUS to provide funds (including any gift funds it had received) to defray the expenses of committee members.\textsuperscript{63}

The problem is that these funds have been scarce. ACUS’ own budget was extremely tight before it lost all funding in 1995, and in its 1995 sourcebook, ACUS noted that “most agencies have very tight travel budgets and cannot provide routine access to these budgets for external parties.”\textsuperscript{64} The sourcebook also described the difficulties encountered in approaching charitable organizations for contributions to a reg-neg resource pool, and the logistical and ethical issues raised by approaches to better-heeled committee members for such funds.\textsuperscript{65}

\textit{Compliance in Theory and Practice: The Case of OSHA}, 52 ADMIN. L. REV. 97, 98-99 (2000) (noting that in 2000, OSHA had 200 fewer employees than it did in 1971, and nearly 800 fewer employees than it had in 1980); David Cho, \textit{Energy Traders Avoid Scrutiny, As Commodities Market Grows, Oversight Is Slight}, WASH. POST, Oct. 21, 2007, at A1 (reporting that the Commodity Futures Trading Commission’s (CFTC) staffing has dropped to its lowest level in the agency's 33-year history, and quoting CFTC Acting Chairman Walter Lukken: “We are facing flat budgets and exponential growth in the industry. Over the long term this type of budgetary situation is not sustainable.”).

61. \textit{See} Freeman & Langbein, \textit{supra} note 38, at 63 (noting that the earlier study "reveals... the disproportionate costs [reg-neg] imposes on smaller groups with comparatively fewer resources.").


64. \textit{NEGOTIATED RULEMAKING SOURCEBOOK, supra} note 11, at 271.

65. \textit{See id.} at 272 (stating that such applications are "very time consuming," the organizations “make awards only at fixed times during the year, [so] this source of funding may not be timely," and approaching these organizations must "be considered carefully in
A third reason for reg-neg's travails is that key staff within the Office of Information and Regulatory Affairs (OIRA), which is part of the Office of Management and Budget (OMB), are distinctly unenthusiastic about it. OIRA is the office entrusted to carry out the President’s regulatory review program. Under the last two Executive Orders directing this program (issued by Presidents Reagan and Clinton), including the currently operative Executive Order 12,866, OIRA must approve any rule issued by non-independent executive agencies before it may be published in the Federal Register.

Executive Order 12,866 (originally issued by President Clinton, but carried forward with some amendments by President Bush) is officially supportive of the reg-neg process. Section 6(a) states: “Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.” This provision is consistent with the Clinton-era National Performance Review report, mentioned above, and the technique is not necessarily inconsistent with the OIRA review-of-rules-process. After all, the agency is a party to the negotiations and can consult with OIRA about the acceptability of the negotiated proposed rule as it develops. OIRA can also attend the negotiating sessions. But once a consensus on the proposed rule is achieved, it becomes problematic for OIRA to then seek changes in the proposed or final rule. This loss of leverage on the part of OIRA is certainly a foreseeable by-product of reg-neg. I once had an occasion to ask a career officer of OIRA (who shall remain nameless here) what he “really thought of reg-neg.” He replied succinctly, “We hate it.”

This is not to say that agencies can get a free pass from OIRA’s review of their proposed or final rules if they choose to use negotiated rulemaking. Just as the normal APA procedure takes place after the consensus proposed rule is published, OIRA still reviews the product

order to minimize the reluctance of some organizations to accept funds from sources that appear not to be neutral”.


67. See id.


69. IMPROVING REGULATORY SYSTEMS, supra note 45, at 32.

of a reg-neg. My position is that OIRA should welcome a well-done reg-neg—because the affected industry parties have by definition signed on to a successfully negotiated proposed rule, and, if the final rule changes, the normal review process is still available. OIRA also has enough on its plate already.

It should also be noted that in some situations the agency’s own rule clearance process may create a bigger problem. A case in point is EPA’s latest reg-neg—it is the only one since the 1990s—which established a rule governing all appropriate inquiries into the previous ownership and uses of a property for the purposes of meeting certain landowner liability protection provisions in the brownfields legislation.\(^71\) In this rulemaking, the proposed rule preamble (issued on August 26, 2004) indicated that the committee had reached agreement on the text of the rule the previous December.\(^72\) This nine month delay in publishing the proposed rule was occasioned in part by the normal need to write the proposed rule’s preamble—which took two months—but most of the delay was caused by internal review by the EPA’s Office of Policy, Economics and Innovation, which functions, in effect, as an internal OIRA.\(^73\) As part of its review, this Office, despite having participated as an observer in the negotiating sessions, insisted on the preparation of cost-benefit analyses not only for the proposed rule, which was clearly required, but also for a series of alternative approaches even though the committee had reached consensus on the preferred approach. Once these analyses were finally complete, the rule was transmitted to OIRA, which completed its review of the proposed rule in a few weeks. The same sequence also took place at the final rule stage. The EPA received a total of 400 comments, but 200 were fully favorable and the rest were relatively minor. Yet the EPA took fourteen months to publish the final rule.\(^74\) Here again, most of the delay was caused by the internal review of the economics analysis office; OIRA completed its review before its ninety day deadline.

This story indicates that agencies may institute very rigid internal regulatory development processes that do not provide the flexibility

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72. See id. at 52,548.
73. The factual description of this EPA negotiated rulemaking is derived from a telephone interview, on January 30, 2008, with Patricia Overmeyer, Office of Brownfields and Land Revitalization, EPA, who served as the “designated federal official” for this negotiated rulemaking. Any editorial comment on the process is the author’s alone.
necessary for reg-neg to be successful, or their internal power centers are not willing to accede to the needs and realities of negotiated rulemaking. Agency program offices are not likely to suggest doing a reg-neg if the clearance offices are not willing to build a fast lane for their ultimate review. For reg-neg to be “worth” the front-end costs, the agencies and OMB need to facilitate the back-end savings the process is designed to produce.

A fourth impediment to using reg-neg is the applicability of FACA to the process. The NRA makes clear that FACA is broadly applicable to reg-neg. One obvious problem occurred in the 1990s when the Clinton Administration’s directive to reduce the number of advisory committees produced some conflict with its stated desire to increase the use of negotiated rulemaking. This conflict was subsequently redressed when reg-neg committees were exempted from the ceiling on FACA committees. But beyond mere numbers, FACA’s requirements of chartering, balance, and openness may discourage agencies from undertaking reg-negs.80

This in turn has led to a related fifth reason for the demise of negotiated rulemaking—the emergence of “reg-neg lite.” While I cannot find any previous use of this term, early on there were examples of “informal negotiated rulemakings.” Some even involved FACA chartered committees. Of course, there is nothing wrong with agencies using techniques other than “formal” reg-neg to learn the views of affected stakeholders, and it may even be preferable when consensus seems impossible. Indeed the EPA, once the government’s leader in conducting reg-negs, has clearly moved away from doing so, conducting only one in the last seven years. This is not happenstance;

78. Id. at 122.
79. See generally Steven P. Croley & William F. Funk, The Federal Advisory Committee Act and Good Government, 14 YALE J. ON REG. 451 (1997) (considering whether FACA advances good-government goals such as openness).
81. See Bremberg, supra note 80, at 43.
82. See, e.g., Transportation for Individuals with Disabilities, 56 Fed. Reg. 45,584 (Sept. 6, 1991) (codified at 49 CFR pts. 27, 37, 38) (mentioning a FACA committee that was convened to discuss aspects of the proposed and final rule).
one of the EPA's leading officers in this area wrote in 2001 that the agency's emphasis had shifted toward "facilitation of public meetings and workshops." Such meetings may certainly be useful, but they are less likely to produce consensus-based rule texts.

Moreover, such meetings should not be seen as a substitute for achieving negotiated consensus where possible. It may even be misleading to participants if an agency convenes such meetings without notifying the participants of their real, less ambitious purpose. The Association of Conflict Resolution, in its authoritative 1997 Best Practices for Government Agencies: Guidelines for Using Collaborative Agreement-Seeking Processes (ACR Guidelines), articulates this concern as follows:

Misunderstanding between the agency and stakeholders can occur if the agency calls a meeting for one purpose, but tries to achieve another. One example is convening a process for information sharing and then expecting agreements to emerge. Another is holding meetings under the guise of consensus building, when information gathering is the sole and intended purpose, or portraying a public relations (opinion changing) initiative as a collaborative process. Misuse of collaborative processes diminishes the likelihood of their future use. The same cynicism that sometimes marks public reaction to government's efforts to solve problems can extend to improperly used collaborative processes.84

Another shortcut that may appear attractive to agencies is to skimp on the convening or facilitating functions, perhaps by using agency officers for this purpose. This practice would be penny-wise and pound-foolish because of the importance of laying the groundwork for a successful negotiation committee at the convening stage and the crucial role of the facilitator during the negotiation

83. Deborah S. Dalton, Negotiated Rulemaking Changes EPA Culture, in FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK 135, 151 (Marshall J. Breger et al. eds., 2001). In a section called "Negotiated Rulemaking Evolves," Dalton noted that in 1999 there were 206 projects under an EPA services contract for facilitation and services, while in 1988 there were fewer than 10. Id. She also noted that EPA's Regulatory Negotiation Project was renamed the "Consensus and Dispute Resolution Program." Id. at 150.

84. ASS'N FOR CONFLICT RESOLUTION, BEST PRACTICES FOR GOVERNMENT AGENCIES: GUIDELINES FOR USING COLLABORATIVE AGREEMENT-SEEKING PROCESSES Recommendation 1 (1997), available at http://acrnet.org/acrlibrary/more.php?id=13_0_1_0_M. Appendix 4 of the Guidelines specifically states: "Facilitators or mediators should not participate in any process that is misrepresented as to its purpose or that is intended to circumvent legal requirements." Id. app. 4.
phase. The ACR Guidelines also raise concerns about this practice:

If an agency or department considers using a facilitator from within government (whether inside or outside the sponsoring agency), several questions should be asked: Is it likely participants will regard the facilitator as unbiased and capable of being equally accountable to all participants? Will the facilitator be able to act independently, or will he or she be under the direction of the agency? Will participants feel comfortable consulting or confiding in the facilitator when the going gets tough?8

More generally, even when the agency hires outside contractors, "[t]he selection criteria for facilitators or mediators should be based on experience, skill, ability, and acceptability to participants, and not solely on costs."86

Anecdotal evidence is that agencies are using their own officers more often in reg-negs and are certainly moving away from the full reg-neg process envisioned (though admittedly not mandated) by the Negotiated Rulemaking Act.

A sixth reason for the waning of reg-neg may be that criticism by several respected scholars has had an impact even though these critics seem to be in the minority. The criticism has two main tenets. The first one, led by Professor William Funk, suggests that reg-neg leads agencies to too easily shirk their responsibilities to uphold the public interest by accepting the consensus rule—thus turning the regulatory responsibility to the regulated, sometimes leading to results that are outside the agency's legal authority.87 The second strain of criticism, led by Professor Cary Coglianese, suggests that the reg-neg's purported savings of time and litigation costs are illusory.88 Professor Harter has forcefully rebutted these latter concerns,89 and this is not the place for a thorough re-airing of these debates. Nor am I the most objective observer. But I will opine that Professor Funk's concerns are largely theoretical, and that if the convening stage is done correctly, the right stakeholders and the agency representatives are all around the table. Moreover, if the resulting rule somehow strays outside of the agency's statutory authority, it can be challenged by an adversely affected person in court.

As for the empirical debate concerning time savings and reduced

85. Id. Recommendation 6.
86. Id.
87. See Funk, Bargaining Toward the New Millennium, supra note 44, at 1356.
89. See Harter, Assessing the Assessors, supra note 44, at 32–33.
court challenges, I would say that it misses the point to some degree. First, I think Professor Harter clearly has the better of the argument when it comes to court challenges. As he argues, no reg-negged rule has been overturned, and the courts have not been receptive to challenges to the reg-neg procedure itself. Even if reg-neg does take longer than paper rulemaking (which I do not concede), a large but hard-to-measure benefit of the process is the buy-in of the stakeholders in the rulemaking and eventual implementation of the rule. Thus, even a longer process would be worth it if the resulting rule proved to be more durable and easier to implement because of the reg-neg process.

But, perhaps for all of the six reasons suggested above, most agencies have stopped using reg-neg voluntarily. Other than the one EPA reg-neg mentioned above, only four agencies (Interior, Labor, Transportation, and the Postal Service) have voluntarily considered establishing reg-neg committees from 2000 to the present. Fifteen of the twenty-two reg-neg committees formed were done so due to specific statutory mandate, seven of them by the Department of Education, three by HUD, two by DOT and HHS, and one by Interior. This can be problematic because it leapfrogs over the convening process and may only serve to punt a nonnegotiable issue from Congress to the agency. As the National Performance Report states:

Reg-neg should rarely, if ever, be required by statute for particular rulemakings because its success depends on the voluntary participation of all participants, including the agency. Moreover, Congress should recognize that short statutory deadlines to issue proposed or final rules, especially if they are shorter than two years, may preclude the use of negotiated


91. See USA Group Loan Servs., Inc. v. Riley, 82 F.3d 708, 714-15 (7th Cir. 1996); Ctr. for Law & Educ. v. U.S. Dep't of Educ., 315 F. Supp. 2d 15, 30 (D.D.C. 2004), aff'd on other grounds, 396 F.3d 1152 (D.C. Cir. 2005) (holding that Section 570 of the NRA precluded a challenge to a rule in which the plaintiff claimed that the composition of the rulemaking committee violated the requirements of the Federal Advisory Committee Act).

92. Professor Coglianese's figures indicate a modest time savings. Coglianese, Assessing Consensus, supra note 44, at 1284 (finding "(at most) little more than three months savings" when compared to other EPA rulemakings during the same period). Professor Harter argues that, properly analyzed, the time savings are significant. See Harter, Assessing the Assessors, supra note 44, at 39-49.

93. Based on Westlaw search described at note 52. See Appendix.
rulemaking.94

The Department of Education's statutorily mandated reg-negs have been especially troubled. Several of them have been challenged in court95 and one commentator has gone so far as to allege that the Department "has intentionally created negotiated rulemaking committees that inadequately represent the interests of parents and students" by intentionally "exclud[ing] representatives of parents and students who might disagree with the agency's policy choices."96

V. CONCLUSION

While I do not discount the possibility that other types of agency facilitation of public meetings may be useful, the waning of the use of negotiated rulemaking is unfortunate. Not because it is a panacea, but because when used in a properly targeted way, it can be very effective.97 Indeed, the conclusion to a detailed article describing a recent major California reg-neg concludes:

[T]he present rulemaking does indicate one set of circumstances where the [reg-neg] process was quite beneficial. Furthermore, by its detailed description of the actual negotiations, this article shows how the dynamics of regulatory negotiation are very different from those in a notice and comment rulemaking. It demonstrates how, in one situation, regulatory negotiation can help parties with very different interests reach creative solutions

94. See IMPROVING REGULATORY SYSTEMS, supra note 45, at 32 (footnote omitted).
95. See Riley, 82 F.3d at 714-15; Ctr. for Law & Educ., 315 F. Supp. 2d at 30 (holding that Section 570 of the NRA precluded a challenge to a rule in which the plaintiff claimed that the composition of the rulemaking committee violated the requirements of the Federal Advisory Committee Act).
97. As one commentator has put it:

More importantly, for too long the debate over negotiated rulemaking has revolved around extreme conclusions about its benefits or failures. It is portrayed either as a panacea or a totally misguided venture. In fact, it is neither. It will certainly not be a complete "cure" for administrative malaise, and it will not be effective in many situations where the proposed rule affects a wide range of interests. It can, however, be quite useful in some instances. Accordingly, the expectations for regulatory negotiation need to be recalibrated, and, to be effective, its use must be targeted.

to regulatory problems.  

The federal government acutely needs creative solutions to regulatory problems. Negotiated rulemaking is one of the few "regulatory reform" initiatives that does not raise political hackles, and it has been shown to be of proven value in solving some knotty regulatory problems. The White House should breathe new life into it by providing real support for it, not just lip service; Congress should support agency use of the technique with funding and should eschew mandating it indiscriminately, and both branches should support the revival of the Administrative Conference to lend encouragement and aid to the agencies in its use.

98. Id.
99. For an early recognition of this, see Lawrence Susskind & Gerard McMahon, The Theory and Practice of Negotiated Rulemaking, 3 Yale J. On Reg. 133, 133-34 (1985) (describing negotiated rulemaking as a regulatory reform and suggesting that it should be an acceptable approach for both business and other advocacy groups).
100. Congress has twice taken action to attempt to reestablish ACUS. The Federal Regulatory Improvement Act of 2004, Pub. L. No. 108-401, 118 Stat. 2255 (2004), reauthorized ACUS for three years, but no appropriations were made during that period. As that period was expiring, the House of Representatives passed H.R. 3564, 110th Cong. (2007), the Regulatory Improvement Act of 2007, which would reauthorize the Administrative Conference of the United States for four years. On October 25, it was placed on the Senate Calendar, but was apparently blocked from further action by a Senator's hold. For earlier entreaties along this same line, see Jeffrey Lubbers, "If It Didn't Exist, It Would Have to Be Invented"—Reviving the Administrative Conference, 30 Ariz. St. L.J. 147 (1998); Jeffrey S. Lubbers, Reviving the Administrative Conference of the United States: The Time Has Come, Fed. Law., Nov./Dec. 2004, at 26, 26; Jeffrey S. Lubbers, Consensus-Building in Administrative Law: The Revival of the Administrative Conference of the U.S., Admin. & Reg. L. News, Winter 2005, at 3, 3. See also Ronald M. Levin, Statutory Reform of the Administrative Process: The American Experience and the Role of the Bar, 83 Wash. U. L.Q. 1875, 1889 (2005) (describing the decision to close ACUS in 1995 as "regrettable" and "distressing").
Appendix

NEGOTIATED RULEMAKING COMMITTEES FORMED OR ANNOUNCED FROM JANUARY 1, 1990 TO DECEMBER 1, 2007

* Statutorily mandated

Department of Education, Office of Postsecondary Education; Notice of Negotiated Rulemaking for Programs Authorized under Title IV of the Higher Education Act of 1965, as amended, 34 CFR Chapter VI

Department of Education, Office of Postsecondary Education; Notice of Negotiated Rulemaking for Programs Authorized Under Title IV of the Higher Education Act of 1965, as amended, 34 CFR Chapter VI (establishing up to four negotiated rulemaking committees to prepare proposed regulations under Title IV of the Higher Education Act of 1965, as amended)

Department of the Interior, National Park Service; Cape Hatteras National Seashore; Off-Road Vehicle Management; Notice of Intent to Establish a Negotiated Rulemaking Committee, 36 CFR Part 7

Department of Transportation, Federal Transit Administration; Notice of Intent to Form a Negotiated Rulemaking Advisory Committee, 49 CFR Part 604

Department of the Interior, National Park Service; Negotiated Rulemaking Advisory Committee for Dog Management at Golden Gate National Recreation Area

9. **February 23, 2005**, 70 Fed. Reg. 8,756*
Department of Transportation, Office of the Secretary; Driver’s Licenses and Personal Identification Cards; Notice of Intent to Form a Negotiated Rulemaking Advisory Committee, 49 CFR Subtitle A

10. **February 22, 2005**, 70 Fed. Reg. 8,674*
Department of Housing and Urban Development, Office of the
Assistant Secretary for Public and Indian Housing; Indian Housing Block Grant Program; Advance Notice of Intent to Establish aNegotiated Rulemaking Committee and Request for Nominations for Committee Membership, 24 CFR Part 1000

11. **March 10, 2004**, 69 Fed. Reg. 11,349*
Department of Housing and Urban Development, Office of the Assistant Secretary for Public and Indian Housing; Operating Fund Program; Establishment of Negotiated Rulemaking Committee and Notice of First Meeting, 24 CFR Part 990

Environmental Protection Agency; Establishment and Meeting of the Negotiated Rulemaking Committee on All Appropriate Inquiry, 40 CFR Chapter I

Postal Service; Standards Governing the Design of Apartment House Mailboxes; Notice of Intent to Establish a Consensus Committee and Notice of First Meeting, 39 CFR Part 111


Department of Transportation, Federal Motor Carrier Safety Administration; General Requirements; Inspection, Repair, and Maintenance; Intermodal Container Chassis and Trailers; Notice of Intent to Consider Negotiated Rulemaking Process, 49 CFR Parts 390 and 396

Department of Labor, Occupational Safety and Health Administration; Safety Standards for Cranes and Derricks; Notice of Intent to Establish Negotiated Rulemaking Committee; Request for Nominees and Comments, 29 CFR Part 1926

Department of Health and Human Services, Centers for Medicare & Medicaid Services; Medicare Program; Establishment of Special
Payment Provisions and Standards for Suppliers of Prosthetics and Certain Custom-Fabricated Orthotics; Intent to Form Negotiated Rulemaking Committee, 42 CFR Chapter IV

Department of Education; Student Financial Assistance; Notice of Intention to Establish Two Negotiated Rulemaking Committees on Issues for Programs Authorized Under Title IV of the Higher Education Act of 1965, as amended, 34 CFR Chapter VI (one negotiating committee will focus on student loan issues while the other will focus on other program issues)

Department of Housing and Urban Development, Office of the Assistant Secretary for Public and Indian Housing; Indian Housing Block Grant Allocation Formula; Notice of Intent to Establish a Negotiated Rulemaking Committee and Request for Nominations, 24 CFR Part 1000

Department of Health and Human Services, Indian Health Service; Joint Tribal and Federal Self-Governance Negotiated Rulemaking Committee, 42 CFR Part 36

22. **November 27, 2000**, 65 Fed. Reg. 70,674
Department of the Interior, National Park Service; Negotiated Rulemaking Advisory Committee for Off-Road Driving Regulations at Fire Island National Seashore, 36 CFR Chapter I

23–24. **December 30, 1999**, 64 Fed. Reg. 73,458*
Department of Education; Student Financial Assistance; Notice of Intention to Establish Negotiated Rulemaking Committees on Issues Under Title IV of the Higher Education Act of 1965, as amended, 34 CFR Chapter VI (establishing two negotiated rulemaking committees)

Department of Agriculture, Forest Service; Negotiated Rulemaking Advisory Committee; Fixed Anchors in Wilderness, 36 CFR Chapter II
Postal Service; Standards Governing the Design of Curbside Mailboxes; Notice of Intent to Establish a Consensus Committee and Notice of First Meeting, 39 CFR Part 111

27. **June 30, 1999**, 64 Fed. Reg. 35,105*
Department of Education, Office of Postsecondary Education; Gaining Early Awareness and Readiness for Undergraduate Programs; Negotiated Rulemaking Committee, 34 CFR Part 694

Department of Transportation, National Highway Traffic Safety Administration; Vehicles Built in Two or More Stages; Notice of Intent to Form a Negotiated Rulemaking Advisory Committee, 49 CFR Parts 567 and 568

29. **March 19, 1999**, 64 Fed. Reg. 13,533*
Department of Housing and Urban Development, Office of the Assistant Secretary for Public and Indian Housing; Capital Fund Rule; Notice of Intent to Establish a Negotiated Rulemaking Committee and Notice of First Meeting, 24 CFR Chapter IX

30. **March 16, 1999**, 64 Fed. Reg. 12,920*
Department of Housing and Urban Development, Office of the Assistant Secretary for Public and Indian Housing; Operating Fund Rule; Final Notice of Establishment of Negotiated Rulemaking Committee and Notice of First Meeting, 24 CFR Part 990

Department of Health and Human Services, Health Care Financing Administration; Medicare Program: Ambulance Fee Schedule; Intent to Form Negotiated Rulemaking Committee, 42 CFR Part 405

Department of Education, Office of Postsecondary Education; Higher Education Act of 1965; Notice of Intent to Establish Negotiated Rulemaking Committees, 34 CFR Chapter VI (establishing four negotiated rulemaking committees)

36. **December 17, 1998**, 63 Fed. Reg. 69,580*
Department of the Interior, Bureau of Indian Affairs; Notice of Intent to Form a Negotiated Rulemaking Committee and Accept
Applications for Membership Under Section 1115 of the Transportation Equity Act for the 21st Century (TEA-21), 25 CFR Chapter I

Department of Transportation, Federal Highway Administration; Hours of Service of Drivers; Notice of Intent to Consider Negotiated Rulemaking Process, 49 CFR Part 395

Department of Transportation, Research and Special Programs Administration; Hazardous Materials: Safety Standards for Preventing and Mitigating Unintentional Releases During the Unloading of Cargo Tank Motor Vehicles in Liquefied Compressed Gas Service; Notice of Intent to Establish a Negotiated Rulemaking Committee and Announcement of Public Meeting, 49 CFR Parts 171, 177, 178, and 180

Department of Health and Human Services, Health Care Financing Administration; Medicare Program; Coverage and Administrative Policies for Clinical Diagnostic Laboratory Tests; Intent to Form Negotiated Rulemaking Committee, 42 CFR Chapter IV

Department of Labor, Pension and Welfare Benefits Administration; Plans Established or Maintained Pursuant to Collective Bargaining Agreements under ERISA, Section 3(40)(A); Notice of Intent to Form a Negotiated Rulemaking Advisory Committee, 29 CFR Part 2510

Department of Health and Human Services, Health Care Financing Administration; Medicare Program; Solvency Standards for Provider-Sponsored Organizations; Intent to Form Negotiated Rulemaking Committee, 42 CFR Chapter IV

42. **May 23, 1997**, 62 Fed. Reg. 28,410*
Department of Health and Human Services, Office of Inspector General; Health Care Programs, Fraud and Abuse; Intent to Form a Negotiated Rulemaking Committee for the Shared Risk Exception, 42 CFR Part 1001
Department of Housing and Urban Development, Office of the Assistant Secretary for Public and Indian Housing; Native American Housing Assistance and Self-Determination; Negotiated Rulemaking Committee; Meetings, 24 CFR Chapter I

Department of Housing and Urban Development, Office of the Assistant Secretary for Public and Indian Housing; Native American Housing Block Grant Program—Notice of Transition Requirements and Negotiated Rulemaking

45. **December 9, 1996, 61 Fed. Reg. 64,849**
Department of Transportation, Bureau of Transportation Statistics; Negotiated Rulemaking Committee to Revise the Motor Carrier Financial and Operating Data Collection Program, 49 CFR Chapter XI

Department of Transportation, Research and Special Programs Administration; Qualification of Pipeline Personnel; Notice of Intent to Form a Negotiated Rulemaking Committee, 49 CFR Parts 192 and 195

47. **June 6, 1996, 61 Fed. Reg. 28,824**
Department of Labor, Occupational Safety and Health Administration; Safety Standards Fire Protection in Shipyard Employment; Notice of Intent to Form Negotiated Rulemaking Advisory Committee to Develop a Proposal Rule on Fire Protection in Shipyard Employment, 29 CFR Part 1915

Department of Transportation, Federal Highway Administration; Commercial Driver Physical Qualifications as Part of the Commercial Driver's License Process; Notice of Intent to Form a Negotiated Rulemaking Committee on Commercial Driver's License and Physical Qualifications Requirements, 49 CFR Parts 383 and 391

49. **February 1, 1996, 61 Fed. Reg. 3,666**
Department of Commerce, National Oceanic and Atmospheric Administration; Negotiated Rulemaking Advisory Committee on
Tuna Management in the Mid-Atlantic, 50 CFR Part 285

Department of Housing and Urban Development, Office of the Assistant Secretary for Housing-Federal Housing Commissioner; Mortgage Broker Fee Disclosure Rule: Intent to Establish a Negotiated Rulemaking Advisory Committee and Notice of First Meeting, 24 CFR Part 3500

Equal Employment Opportunity Commission; Older Workers Benefit Protection Act of 1990 (OWBPA); Notice of Intent to Form a Negotiated Rulemaking Advisory Committee to Develop a Proposed Rule: Request for Representation, 29 CFR Chapter XIV

Department of Transportation, National Highway Traffic Safety Administration; Lamps, Reflective Devices and Associated Equipment; Establishment of Negotiated Rulemaking Advisory Committee, 49 CFR Part 571

Department of Agriculture, Animal and Plant Health Inspection Service; Marine Mammal Negotiated Rulemaking Advisory Committee; Establishment, 9 CFR Part 3

Department of the Interior, National Park Service; Cape Cod National Seashore Off-Road Vehicle Use Negotiated Rulemaking Committee, 36 CFR Part 7

55. **April 10, 1995**, 60 Fed. Reg. 18,061
Department of Transportation, Coast Guard; Drawbridge Operation Regulations; Chicago River, IL; Notice of Intent to Form a Negotiated Rulemaking Committee; Request for Public Comment and Membership, 33 CFR Part 117

Department of the Interior, Office of Surface Mining Reclamation and Enforcement; Establishment of an Advisory Committee to Negotiate Regulations, 30 CFR Part VII
57. **February 28, 1995**, 60 Fed. Reg. 11,004*
Department of Education, Office of Postsecondary Education; Borrower Defenses Regulations Negotiated Rulemaking Advisory Committee; Establishment

Department of Housing and Urban Development, Office of the Assistant Secretary for Public and Indian Housing; Vacancy Rule: Notice of Establishment of a Negotiated Rulemaking Advisory Committee and of First Meeting, 24 CFR Chapter IX

59. **February 15, 1995**, 60 Fed. Reg. 8,806*
Department of the Interior, Office of the Secretary; Joint Tribal and Federal Self-Governance Negotiated Rulemaking Committee, 25 CFR Chapter VI

60. **February 7, 1995**, 60 Fed. Reg. 7,152
Department of the Interior, Minerals Management Service; Notice of Establishment of the Indian Gas Valuation Negotiated Rulemaking Committee, 30 CFR Chapter II

Department of the Interior, Bureau of Indian Affairs; Indian Self-Determination Negotiated Rulemaking Committee, 25 CFR Chapter 1 & 42 CFR Part 36

Federal Communications Commission; Establishment of an Advisory Committee to Negotiate Regulations, 47 CFR Part 68

Department of Education, Office of Elementary and Secondary Education; Title I—Helping Disadvantaged Children Meet High Standards; Request for Advice and Recommendations on Regulatory Issues Under Title I of the Elementary and Secondary Education Act, 34 CFR Parts 200, 201, 203, and 212

64. **October 14, 1994**, 59 Fed. Reg. 52,129
Department of Health and Human Services, Health Care Financing Administration; Hospice Services Under Medicare Program; Intent to Form Negotiated Rulemaking Committee, 42 CFR Part 418
Department of Transportation, Federal Railroad Administration; Roadway Worker Protection; Notice of Proposal to Form a Negotiated Rulemaking Advisory Committee, 49 CFR Part 214

Federal Communications Commission; Notice of Advisory Committee Establishment; Notice of Advisory Committee Meetings, 47 CFR Chapter I

Department of the Interior, Minerals Management Service; Meeting of the Federal Gas Valuation Negotiated Rulemaking Committee, 30 CFR Chapter II

Interstate Commerce Commission; Electronic Filing of Tariffs; Notice of Proposal to Establish a Negotiated Rulemaking Committee, 49 CFR Parts 1312 and 1314

Department of Education, Office of Postsecondary Education; Direct Student Loan Regulations Negotiated Rulemaking Advisory Committee and the Guaranty Agency Reserves Regulations Negotiated Rulemaking Advisory Committee; Proposed Establishment, 34 CFR Chapter VI (establishing two negotiated rulemaking committees)

Environmental Protection Agency; Public Meeting of the Proposed Small Non-Road Engine Negotiated Rulemaking Committee, 40 CFR Chapter I

Environmental Protection Agency; Wood Furniture Manufacturing Industry Negotiated Rulemaking Advisory Committee; Establishment and Open Meeting, 40 CFR Chapter I

Department of Education, Office of Postsecondary Education; The Higher Education Amendments of 1992; Negotiated Rulemaking, 34 CFR Chapter VI
74. **December 29, 1992**, 57 Fed. Reg. 61,860
Department of Labor, Occupational Safety and Health Administration; Safety Standards for Steel and Other Metal and Non-Metal Erection; Announcing of Intent to Establish Negotiated Rulemaking Committee; Request for Representation, 29 CFR Part 1926

75. **December 22, 1992**, 57 Fed. Reg. 60,781
Federal Communications Commission; MSS Above 1 GHZ Negotiated Rulemaking Committee, 47 CFR Chapter I

76. **September 15, 1992**, 57 Fed. Reg. 42,533
Environmental Protection Agency; Intent to Form an Advisory Committee to Negotiate the Drinking Water Disinfection Byproducts Rule and Announcement of Public Meeting, 40 CFR Chapter I

Federal Communications Commission; Below 1 GHz Negotiated Rulemaking Advisory Committee; Schedule of Meetings, 47 CFR Chapter I

Environmental Protection Agency; Intent to Form an Advisory Committee to Negotiate a Proposed Regulation for Architectural and Industrial Maintenance Coatings Under Section 183(e) of the Clean Air Act as amended, and Announcement of Public Meeting, 40 CFR Chapter I

Environmental Protection Agency; Intent to Form an Advisory Committee to Negotiate the Hazardous Waste Manifest Rule, 40 CFR Chapter I

Farm Credit Administration; Assessment and Apportionment of Administrative Expenses; General Provisions; Notice of Intent to Establish a Negotiated Rulemaking Committee, 12 CFR Parts 607 and 618

Environmental Protection Agency; National Emission Standards for
Coke Oven Batteries Advisory Committee; Establishment and Open Meeting

Federal Energy Regulatory Commission; Notice of Intent to Establish a Negotiated Rulemaking Committee, 18 CFR Chapter I

Department of Transportation, Coast Guard; Vessel Response Plans and Carriage and Inspection of Discharge-Removal Equipment; Notice of Intent to Form a Negotiated Rulemaking Committee, 33 CFR Part 155

Environmental Protection Agency; Establishment of Negotiated Rulemaking Advisory Committee to Negotiate Guidelines and Proposed Regulations Implementing Clean Fuels Provisions of Section 211 of the Clean Air Act, 40 CFR Chapter I

Environmental Protection Agency; Establishment and Open Meeting of the Negotiated Rulemaking Advisory Committee for the Lead Acid Battery Recycling Rule, 40 CFR Chapter I