

Topic: Regulatory Negotiations

The traditional process of regulatory development is typically top-down. Government initiates, formulates and proposes the rules. In centralized or closed systems, regulations are imposed; in more open systems, businesses, groups or individuals may comment on the proposals in public hearings, but with little possibility of making major structural and functional modifications to the regulations. This process, while well-intentioned, often leaves stakeholders feeling far removed from the process and disempowered. They may feel that they have minimal voice in designing the regulations, standards and provisions that must be obeyed, and, as a result, compliance may be low and enforcement costs high -- a double-edged sword.

Stakeholder reactions to top-down regulatory development can have negative implications. If penalties are increased to discourage noncompliance, businesses may migrate into a "shadow economy," thereby fueling corruption, reducing tax revenues and evading the regulatory regime altogether. In some societies, lengthy and costly litigation in the courts is sometimes pursued by civil society groups to modify or eliminate imposed regulations. Antagonistic and adversarial relations between regulatory agencies and the regulated parties may ensue, resulting in delay or outright disregard for the regulation's intent. The lack of effective and frank dialogue between the regulators and the regulated is usually blamed for these negative consequences.

There is an alternative approach to the traditional process of regulatory formulation and implementation – *negotiated rulemaking* or *regulatory negotiation (reg-neg)*. Negotiated rulemaking brings together affected stakeholder groups -- businesses, organizations, and citizens -- with the relevant government agency and a neutral mediator or facilitator to build a consensus on the features of a new regulation *before* it is proposed officially by the agency. Regulatory provisions are developed as a bottom-up participatory process of negotiation.

Negotiated rulemaking is a fully collaborative process, in which all interested groups are convened in an "Advisory Committee." Key issues and concerns are identified, the interests of all sides are compared and contrasted, negotiations take place, and hopefully, agreements based on consensus are developed.

In the United States, negotiated rulemaking became an officially recommended approach to develop new regulations by federal government agencies in 1990 when the Negotiated Rulemaking Act (5 U.S.C. 561-570) was passed by Congress. A September 1993 Executive Order from the White House requires all federal agencies to consider applying negotiated rulemaking strategies in future regulatory actions. However, the approach has been used informally by government agencies since the 1970s. The Department of Labor, the Environmental Protection Agency (EPA), and the Department of the Interior, are its principal proponents. By far, the EPA has been the most frequent user of negotiated rulemaking. Over 50 federal negotiated rulemaking cases have been documented between 1982 and 1995; many more applications have been conducted in the United States at the

state level. Examples of environmental regulations developed using negotiated rulemaking in the United States include:

- Penalties for businesses for noncompliance with the Clean Air Act
- Exceptions for licensing pesticides
- Performance standards for wood burning stoves
- Controls on volatile organic chemical equipment leaks
- Standards for transporting hazardous wastes
- Standards for chemicals used in manufacturing wood furniture.

The experience with negotiated rulemaking in the United States has produced several benefits:

- While negotiated rulemaking takes more time and effort upfront than traditional modes of developing regulations, all the stakeholders, including government agencies, are more satisfied with the results.
- Participants find that with a negotiated process, the resulting regulations tend not to be challenged in court. (In contrast, about 80 percent of all EPA regulations have been challenged in court and about 30 percent have been changed as a result.)
- Less time, money and effort are expended on enforcing the regulations.
- Final regulations are technically more accurate and clear to everyone.
- Final regulations can be implemented earlier and with a higher compliance rate.
- More cooperative relationships are established between the agency and the regulated parties.

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