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### **Negotiated Rulemaking Reaches Policy Goals, Limits Unintended Consequences**

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**N**egotiated rulemaking is a process used to create federal regulations in which representatives of a sponsoring government agency and relevant stakeholders work together to develop a consensus recommendation for the content of a proposed rule. In practice since the early 1980s and codified in the Negotiated Rulemaking Act of 1996, most federal agencies have initiated and participated in negotiated rulemakings, but continue to favor a rulemaking process that limits stakeholder involvement primarily to solicitation of and response to their comments.

In July of 2004, the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor successfully completed a negotiated rulemaking to develop a consensus proposal for revised worker safety standards for the cranes and derricks portion

(1926.550) of 29 C.F.R. Part 1926 Subpart N – Cranes, Derricks, Hoists, Elevators, and Conveyors.

The year before, in November of 2003, the U.S. Environmental Protection Agency completed a negotiated rulemaking to establishing federal standards and practices for the All Appropriate Inquiries (AAI) of potentially polluted properties, as required under CERCLA Section 101(35)(B), as amended by the Small Business Liability Relief and Brownfields Revitalization Act (Public Law No. 107-118). The proposed AAI rule was published in the Federal Register in August of 2004, and is expected to be made final in November of 2005.

Participants in both processes credited the negotiated rulemaking process with providing an opportunity to meet public policy goals while limiting unintended consequences, and reducing regulatory uncertainty for their industries and the public.

**An Overview of Negotiated Rulemaking.** The critical element of negotiated rulemaking, sometimes referred to as regulatory negotiations (reg neg), is a forum for participants to engage in complex negotiations to write enforceable federal regulations that achieve the government agency's public policy goals and satisfy stakeholders' key concerns. Reg neg creates an opportunity to integrate the differing perspectives and interests of 20-25 representatives of national, state, and local constituencies that will be affected by a rule as well as relevant expert information and public concerns.

Negotiations typically occur over a period of six months to a year and include multi-day meetings approximately once per month, work group conference calls to develop proposals for the negotiating committee, caucuses among subsets of the stakeholders, and ongoing communications among the participants and the mediation team.

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The opinions expressed here are those of the authors and do not necessarily represent those of BNA, which welcomes other points of view.

In the case of the Cranes and Derricks Negotiated Rulemaking Advisory Committee (C-DAC), 23 negotiators met over a period of one year for 11 meetings that lasted a combined 30.5 days and included expert panel presentations, extensive public comment, work groups, and caucuses. The All Appropriate Inquiry Negotiated Rulemaking Advisory Committee's 26 members and four resource participants conducted negotiations between April and November 2003, which included six meetings for a total of 13.5 meeting days, a series of work group conference calls, ongoing communication between meetings, and consideration of intensive public input throughout the process.

For the purpose of the negotiations, the federal agency establishes a negotiated rulemaking advisory committee in accordance with the requirements of the Federal Advisory Committee Act (FACA). Committee members are appointed by the chief official of the sponsoring federal entity, such as the Secretary of the U.S. Department of Labor or the Administrator of the U.S. Environmental Protection Agency. Committee composition must meet the FACA requirement of "balanced representation from affected and interested stakeholder groups."

The government agency always retains and never relinquishes jurisdiction over the final rule, as the consensus draft regulatory text of the reg neg advisory committee is its formal recommendation, which the agency has the authority to reject. However, if final consensus is reached, the federal agency is expected to publish the consensus regulatory text as the basis of its Notice of Proposed Rulemaking (NPRM). In return, the organizational members of the negotiated rulemaking committee agree to not submit formal negative comments on the NPRM.

This mutual commitment among the federal agency and the reg neg committee members is an acknowledgement that the final consensus on the proposed regulation represents a collection of joint decisions that satisfies the key concerns of each negotiator within existing political and resource constraints. Negative comments from committee members on issues for which they accepted less-preferred options in exchange for more-preferred options in other parts of the "package" of decisions would render the overall effort meaningless.

The government agency is represented on the advisory committee, actively participates in committee negotiations, and must be included in all consensus decisions. The final package of decisions should therefore effectively incorporate the concerns of the sponsoring agency, thus making it possible for the agency to accept the formal advisory committee recommendation.

The reg neg process is designed and facilitated by a public policy mediator, who is responsible for managing the group deliberations to achieve the goal of reaching consensus on draft regulatory text for the proposed rule.

**Identifying Stakeholder Representatives.** For the negotiated rulemaking process to yield a proposed regulation that will be considered legitimate by the regulated community and the public and not subject to challenge after promulgation, the reg neg advisory committee must consist of representatives of all key stakeholders. The sponsoring federal agency acts to identify and ensure legitimate membership on the advisory committee.

In some cases, the public policy mediator conducts a convening assessment to identify the categories of stakeholders and potential organizational members within each category of stakeholders, and to recommend a list of committee members. Alternatively, when an agency is familiar with the likely members of a reg neg committee, it may not need to conduct a convening assessment. In either case, the agency publishes a federal register notice of intent to establish a negotiated rulemaking advisory committee and seeks comment on proposed lists of categories of stakeholders and advisory committee members. This serves as a check on committee composition and ensures that any stakeholders not identified by the agency or through the convening process have an opportunity to nominate reg neg committee members.

For the All Appropriate Inquiry Negotiated Rulemaking Advisory Committee (AAI Committee), the public policy mediator, referred to as the "convener" during the "convening phase" of the reg neg, interviewed approximately 60 individuals and recommended potential committee members within the following nine stakeholder categories: federal government, state government, tribal government, local government, real estate developers (residential, commercial, industrial, for profit, not-for-profit), bankers and lenders, environmentalists, environmental justice advocates, and environmental professionals.

Given OSHA's experience with the Crane Work Group of the Advisory Committee on Construction Safety and Health (ACCSH) formed in 1998 to provide recommendations for revisions to the cranes and derricks standard, the agency published a list of potential C-DAC members in an FR Notice. As a result of comments received, three additional members were appointed to C-DAC. Committee members included representatives of crane manufacturers and suppliers; lessors and maintenance; users (employers and labor organizations); operators (labor organizations); training and operator testing; power line owners; insurance; and the OSHA Directorate of Construction.

Either as part of the convening assessment, or after committee members have been identified by the agency, the public policy mediator speaks with each committee member to identify the key issues to be negotiated, members' key concerns regarding the negotiations, and the dynamics that are likely to affect the negotiations. A convening assessment is also used to determine the feasibility of proceeding to the negotiations phase of the reg neg, unless Congress has mandated the reg neg.

**The Negotiations.** Negotiated rulemaking committees begin deliberations with several preliminary activities. The Committee develops a set of ground rules, which govern committee negotiations and include a statement of the committee's mission and deadline, its decision rule or definition of consensus, committee members' responsibilities, and the commitments resulting from agreements reached. Committee members also agree on a list of issues to be negotiated prior to completing the draft rule and identify needed expert information and background materials. For example, the American Society of Mechanical Engineers (ASME) provided C-DAC members with its industry consensus standards related to cranes and derricks, and the AAI Committee was provided with the relevant American Society for

Testing Materials (ASTM) industry consensus standards for environmental assessments.

Committee members then begin to discuss each issue in an effort to reach “agreements in concept.” The agency regulatory drafting team turns these agreements in concept into draft regulatory language, which is then reviewed until consensus is reached on the issue. This consensus is considered a “tentative agreement” until the complete text is prepared because the agreement may be revisited if decisions on a related issue affect it. If agreements in concept are not immediately reached on certain issues, the drafting team prepares text for the various options under discussion.

While some issues are resolved quickly, others require discussion and review over several meetings. The momentum generated by reaching tentative agreements helps provide focus and motivation to resolve the most difficult issues, which may remain unresolved until the last meeting. Once tentative agreements are reached on all issues, the committee may review each one to ensure consistency across the entire proposed regulatory text.

The public policy mediator assists throughout these deliberations by providing and maintaining the committee’s focus on the issues, from initial concepts through to decision-making. For example, in the C-DAC reg neg, passionate discussion arose over the issue of whether to require cranes on barges to be tied down. Some parties insisted cranes needed to be tied down for safety reasons, while others argued that on large ships such as aircraft carriers, cranes had to be mobile to perform necessary operations. After a series of questions posed by the mediator, it became clear that the goal shared by all was to prevent cranes from falling off any flotation device. The committee then developed a solution in which cranes on water vessels would be required to be either tied down, or fixed to rails with stops at each end, or corralled to prevent falling. This “menu” approach provides flexibility for the employer to select the strategy that fits the situation and best protects workers.

The regulatory negotiations also provide a means for integrating expert information and public concern into the deliberations. In the C-DAC and AAI processes, the interested public read comments at committee meetings, submitted written comments, and, in some cases, were invited as expert panelists to brief the committee or participate on work groups. For example, when questions arose among C-DAC members regarding the difference between European and U.S. verification standards, Liebherr, the German crane manufacturer, sent its Chief Design Engineer to present to the committee on the new European Union crane standards, and the Environment, Energy, and Resources Section of the American Bar Association served as a resource participant on the AAI Committee to provide advice on questions of liability and precedent.

Finally, the reg neg process provides a forum for stakeholders to collectively grapple with complicated, divisive issues and to clarify potential regulatory ambiguities. Interestingly, the most difficult issue faced by both C-DAC and the AAI Committee was qualifications, for crane operators and environmental professionals, respectively. Within the context of the reg neg processes, committee members worked through the nuances of various options and considered information provided in dozens of public comments. Both committees held caucuses to discuss and develop possible solu-

tions. Ultimately, both AAI and C-DAC reached consensus on qualifications at their final meetings.

**Benefits of Negotiated Rulemaking** Developing regulations through negotiated rulemakings provides needed integrated technical expertise to government agency regulators and fosters education and compliance with new standards among the regulated community. Although the time commitment for committee members is substantial, members of C-DAC and AAI found great benefit in participating.

In the C-DAC and AAI reg negs, every expertise required for developing the standards resided within the collective wisdom and experience of the committee members and the public that participated on panels and work groups and provided public comment. This expertise, combined with the hard work of harmonizing perspectives and interests, resulted in draft proposed rules that are more likely to achieve their public policy goals with limited unintended consequences than those produced by a team of consultants with stakeholder involvement restricted to a formal comment period. As Congress stated in the Negotiated Rulemaking Act, Section 561:

Adversarial rulemaking deprives the affected parties and the public of the benefits of face-to-face negotiations and cooperation in developing and reaching agreement on a rule. It also deprives them of the benefits of shared information, knowledge, expertise, and technical abilities possessed by the affected parties.

C-DAC and AAI members gained from the opportunity to articulate regulatory needs, areas of uncertainty, and the impact that different regulatory options would have on their industries and the public. The industry stakeholders in the C-DAC process worked closely with OSHA officials to develop clear, rational, reasonable, and enforceable regulations. The AAI process resulted in a standard that balances the goals of brownfields redevelopment and community revitalization with protection of public health and the environment and is rooted in the complex real world conditions within which the AAI standard will be implemented.

The regulated community also benefits from getting a head start in complying with the anticipated new standard. The C-DAC and AAI Negotiated Rulemaking processes significantly contributed to public education of the new standards, given that the Committees included members of key associations and organizations that educate their members about government regulations. Additionally, members of the public attended meetings and obtained reg neg documents through E-mail and online government dockets. As a result, the interested public is well versed in the proposed standards and an infrastructure of knowledgeable individuals exists for relevant ongoing public education. Anecdotal evidence suggests that even though neither standard is yet final, training programs and practices are already being revised to meet the proposed consensus standards. There is also an expectation that the regulated communities will require fewer government clarifications related to the standards because there are many people intimately familiar with each element of the new standard and many potential ambiguities were clarified during the negotiations.

**Conclusion.** Negotiated rulemaking offers the opportunity for federal agencies and relevant stakeholders to work together to develop technically accurate, imple-

mentable and enforceable regulations that meet their intended public policy goals within the context of resource and political constraints. In addition, as a result of in-depth deliberations, the regulated communities and the public better understand and respect the government's role in working to balance the interests of a multitude of stakeholders as it seeks to develop, implement, and enforce regulations under complex, real-world conditions. Government officials also come to better understand the interests and perspectives of stakeholders, including the regulated community, and the public. Finally, anecdotal evidence suggests that compliance with regulations developed through negotiated rulemakings may occur more quickly and with less government involvement.

### **FACA Filing Requirements**

Once an agency has decided to promulgate a rule through negotiated rulemaking, it must comply with Federal Advisory Committee Act (FACA) and Negotiated Rulemaking Act requirements. These include publishing a Notice of Intent to Establish a Negotiated Rulemaking Committee and Notice of First Meeting (and subsequent meetings) in the *Federal Register* and filing a FACA Charter with the General Services Administration (GSA) and Congress. The Notice of Intent, which must be filed at least 45 days before the Committee's first meeting, includes solicitation of comments on the purpose of the reg neg, issues to be discussed, proposed stakeholder categories, and proposed committee members, and it provides for a nominations process for committee membership.