



# FMCS

# FEDERAL MEDIATION & CONCILIATION SERVICE

## Negotiated Rulemaking

### Regulating by Consensus

Could a neutral third party help your agency overcome potential barriers to multi-party regulatory negotiations?

#### What Is Negotiated Rulemaking?

Negotiated rulemaking, sometimes known as regulatory negotiation or “reg neg,” is a process in which a governmental agency invites representatives of stakeholders impacted by a rule to participate in its drafting. The interested parties and the agency form a committee and, with the assistance of a neutral third-party facilitator, work toward reaching a consensus on the content of the rule. If the parties reach consensus and make a recommendation, the final rule, when issued, is much more likely to be implemented without costly challenges and delays.

#### Key Advantages of Negotiated Rulemaking

- Dialogue and discussion during the drafting of a rule give all parties the chance to interact with each other and present their views, needs and concerns directly to the regulatory agency. Issues are raised while the rule is being drafted, rather than during a post-issuance notice and comment period.
- The free and open exchange of ideas encouraged by an effective “reg neg” process allows for the consideration of issues that may not otherwise have come to light.
- Interested parties, particularly those who might otherwise oppose or challenge the rule, are given the chance to participate in its formulation, and are therefore less likely to challenge its implementation.
- The public has increased confidence in the regulation because of the transparency and inclusiveness of the process; the result is a rule that is balanced and acceptable to the regulated parties.

#### FMCS and Regulatory Negotiation

The Administrative Dispute Resolution Act of 1990 and the Negotiated Rulemaking Act of 1990 authorized FMCS to use its dispute resolution expertise to bring together the regulators and those impacted by their regulations in a collaborative process prior to the issuance of a new rule. FMCS mediators use their professional skills and expertise as neutrals to convene and facilitate complex, multi-party rulemakings and to help parties produce consensus rules.

FMCS assisted negotiated rulemakings have produced many successful results. For example, under the Mandatory Price Reporting Act of 2010, FMCS facilitated the deliberations of a committee of pork producers, packers, retailers, buyers, and other interested parties, which then recommended to the Secretary of Agriculture a consensus draft for new mandatory pork pricing reporting requirements.



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In another recent case, FMCS facilitated a negotiated rulemaking committee established by the Secretary of Health and Human Services to develop a consensus among interested parties for defining medically underserved areas around the nation. Also for the Department of Health and Human Services, FMCS facilitated a complex, multi-agency effort to achieve better coordination and efficiency in the awarding of Federal emergency preparedness grants by the Office of Preparedness and Response.

FMCS successfully facilitated the very first negotiated rulemaking for the Federal Aviation Administration in 1982, and subsequently facilitated negotiated rulemaking with the U.S. Departments of Housing and Urban Development, Transportation, Health and Human Services, Labor, Agriculture, and Education as well as the Centers for Medicare and Medicaid Services, the FAA, EPA, OSHA, the States of Iowa, Tennessee, and New York, and other Federal and state agencies.

## FMCS's Role in Negotiated Rulemaking

FMCS assistance covers all aspects of the regulatory negotiation process, from initial planning to facilitating the drafting of final text. It can be especially helpful with:

- Making decisions about the composition of the committee in the process of convening to ensure that all appropriate and interested parties are given an opportunity to participate in the "reg neg."
- Creating smaller working groups on specific topics, and often just acting as observers.
- Providing negotiation and joint problem solving training for committee members and controlling process issues, such as dates, locations and ground rules for conducting meetings.
- Keeping the negotiated rulemaking process on track and on schedule. Mediating conflicting views and working out resolutions to the disputes that invariably arise in the course of a "reg neg."
- Dealing with the media, if requested, and otherwise serving as the committee's neutral spokesperson.
- Managing the final approval process for the committee's consensus recommendation to the relevant agency.

## FMCS Technology-Assisted Collaboration Tools

FMCS negotiated rulemaking support can be delivered with a variety of technology tools, allowing for both face-to-face and virtual collaboration. Our **T**echnology **A**ssisted **G**roup **S**olutions (TAGS), eRooms, and video conferencing platforms provide agencies with a wide variety of facilitation delivery options to meet the challenges of geographically dispersed participants and limited budgets.

## For More Information

For additional information regarding negotiated rulemaking, please contact the FMCS Office of Alternative Dispute Resolution at 202-606-5445.

"In 2015, the FMCS facilitated a rulemaking at the Department of Energy that resulted in the largest energy-savings from a single DOE rulemaking in history."