



# Indian Affairs Negotiated Rulemaking

## *Process from Creation to Final Rule*

In 1990, Congress endorsed use by federal agencies of a procedure known as “negotiated rulemaking,” also called “regulatory negotiation” or “reg-neg.” It has been used by agencies to bring interested parties into the rule-drafting process at an early stage, under circumstances that foster cooperative efforts to achieve solutions to regulatory problems.

Where successful, negotiated rulemaking allows representatives of interested and affected parties a more direct input into drafting the text or main features of the regulation, and ensures the rule is based on a clear understanding of the concerns of all those affected.

Indian Affairs (IA) has established several negotiated rulemaking committees in the past for both the Bureau of Indian Affairs and the Bureau of Indian Education. This document serves as a guideline for IA to provide a basic understanding of what is negotiated rulemaking, the process for establishing a committee, negotiating in good faith with Tribal and non-Tribal committee members, and compliance with specific laws.

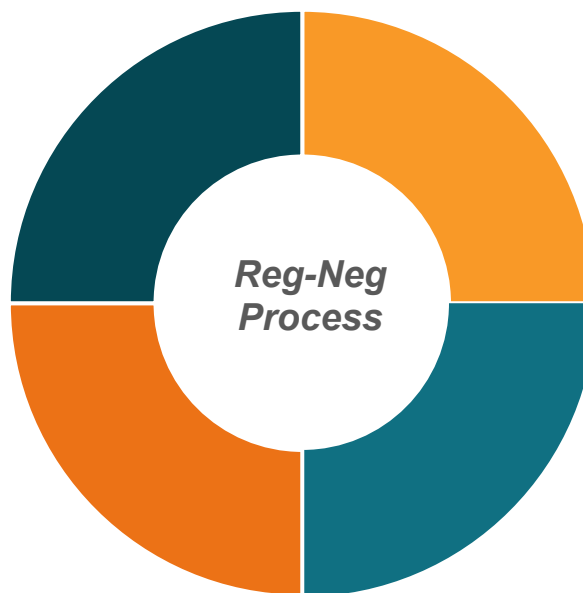
Visual of the Reg-Neg process:

### **Phase 1 - Establishment of Committee**

- Secretariat
- FRN of Intent
- FRN of Extension, if needed
- Review nominations
- White House vetting
- FRN of Membership
- FRN of Establishment
- Filing of Charter

### **Phase 4 - IA Rulemaking Process**

- Draft proposed rule
- Publication of proposed rule and consultation
- Review of comments
- Draft final rule
- Publication of final rule
- Final rule effective



### **Phase 2 - Committee Meetings**

- FRN of Meetings
- Meetings open to the public (in-person, virtual, or combo)
- Timeline of number of meetings with goals for each meeting
- Break out the work by subcommittees, if needed

### **Phase 3 - Committee Recommendations**

- Facilitator assists members with discussions and negotiations
- Reach consensus on the text of a proposed rule or main features of a rule
- Committee report with recommendations for the proposed rule



## NEGOTIATED RULEMAKING

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Negotiated rulemaking is a consensus-based process to develop a proposed rule through which:

- An agency establishes a balanced committee composed of representatives of all interests (Tribal and non-Tribal) that the rule will affect;
- The committee aims to reach consensus on the text of a proposed rule or the main features of a rule;
- The committee documents its consensus in a report to the agency; and
- The agency uses, to the extent allowable under law, the recommendations as a basis for their proposed rule.

Goals of the committee are to:

- Negotiate in good faith; and
- Reach consensus.

## COMPLYING WITH FEDERAL ADVISORY COMMITTEE ACT (FACA)

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Any advisory group, with limited exceptions, that is established or utilized by a federal agency and that has at least one member who is not a federal employee, must comply with the FACA, unless the Act of Congress establishing the advisory committee specifically provided otherwise. See 5 U.S.C. App. 4(a).

- Example: The Special Trustee’s Advisory Board is not subject to FACA because 25 U.S.C. 4046(c) states “*The advisory board shall not be subject to the Federal Advisory Committee Act.*”

In most circumstances, a negotiated rulemaking committee is an advisory group subject to FACA.



## PHASE I: ESTABLISH THE COMMITTEE

### CONSULT SECRETARIAT ON THE NEED FOR A COMMITTEE

The agency's Secretary must determine that forming a negotiated rulemaking committee is in the public interest, by determining:

- A need for a rule;
- There are a limited number of identifiable interests significantly affected by the rule;
- There is a reasonable likelihood that:
  - A committee can be convened with a balanced representation that can adequately represent the interests and will be willing to negotiate;
  - Consensus reached over fixed period of time;
- Negotiated rulemaking will not unreasonably delay the notice of proposed rulemaking;
- Adequate resources of staff (including technical assistance) and funding are available; and
- IA will use the consensus of the committee as basis for the proposed rule, consistent with the legal obligations.

For IA, the Secretary of the Interior makes the above determination. The Executive Secretariat serves as the Department of the Interior's Committee Management Officer.

### ADEQUATE RESOURCES

The IA program office(s) is/are responsible for funding the efforts for the duration of the committee, including:

- Facilitator (optional but recommended) labor, direct and indirect expenses;
- Committee members' travel and per diem for any planned in-person meetings;
- Office of the Solicitor (recommended) travel reimbursement for any planned in-person meetings;
- In-person meeting materials, meeting space, AV equipment, public attendance; and
- Management consultant, in rare cases, a neutral 3<sup>rd</sup> party to conduct audit/review (if specified in the Charter).

### SIZE OF THE COMMITTEE

IA can select up to 25 members, unless there is a need for greater amount for the functioning or achieve balanced membership.

- **IA** – at least one federal employee should represent the IA program with an alternate member;

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- Should there be another IA program involved, the federal employee should represent the IA program with an alternate member;
- **SOL** – at least one federal employee and an alternate should represent SOL to ensure IA is negotiating within legal parameters; and
- **Tribal and Non-Tribal** – composed of representatives of all interests to be affected by the rule with alternate members (if feasible).

The Designated Federal Officer (DFO) is a (non-member) federal employee appointed by IA or the Department with an alternate.

## DESIGNATED FEDERAL OFFICER (DFO)

The Secretariat must designate a Federal officer or employee who must be either full-time or permanent part-time, to be the DFO for each advisory committee and its subcommittees. Prior to serving as a DFO, mandatory training is required [www.gsa.gov/portal/content/162635](http://www.gsa.gov/portal/content/162635). The DFO must:

- Approve or call the meeting of the committee or subcommittee;
- Approve the agenda;
- Attend the meetings;
- Adjourn any meetings when in the public's interest; and
- Chair the meeting when so directed by the agency head.

No advisory committee may conduct any meeting in the absence of the DFO.

## FACILITATOR

IA may nominate a person from the Agency or a person outside the Agency to serve as a facilitator.

DOI Office of Collaborative Action and Dispute Resolution can assist in the process of finding a qualified facilitator outside the Agency. (See [www.doi.gov/pmb/cadr/index.cfm](http://www.doi.gov/pmb/cadr/index.cfm)).

Role of a Facilitator:

- Assist DFO with chairing meetings in an impartial manner;
- Keep focused on mission, goals, and objectives;
- Assist members with discussions and negotiations; and
- Assist IA program with preparing for next meeting.

## PREPARATION

With the Secretariat's approval to form committee, IA determines:

- Who will serve as DFO;

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- Who will serve as Facilitator;
- Who will be affected by the rule and will comprise membership;
- Identify support staff and technical assistance;
- Draft timeline identifying the number of meetings with goals for the end of each meeting to include timeline for drafting proposed rule and Tribal consultation;
- Identify funding and develop proposed budget;
- Determine how meetings will be kept open to the public (in-person, virtual or combination);
- Who will support in-person meetings, if any, for travel arrangements, meeting locations, lodging, travel vouchers, etc.; and
- How the public will be able to access information (e.g., webpage on IA website).

RACA will file a request for a Regulatory Identification Number (RIN) if a recommendation for a proposed regulation is expected to be the final product of the committee.

- Required for DOI Semiannual Regulatory Agenda.

## FRN OF INTENT TO ESTABLISH COMMITTEE

IA will publish a Federal Register Notice (FRN) of Intent to Establish a Negotiated Rulemaking Committee to Negotiate and Develop a Proposed Rule (DTLL can accompany), including;

- A description and scope of the rule to be developed and issues to be considered;
- A list of the interests which are likely to be affected by the rule;
- A list of the professional background (such as school administrators, etc.), experience, and/or affiliations proposed to represent such interests;
- A statement that individuals who are currently Federally registered lobbyists are ineligible to serve on all FACA and non-FACA boards, committees, or councils
- A request for nominations and an explanation of how a person may apply or nominate for membership;
- A proposed agenda and schedule for completing the work;
- A description of administrative and technical support provided by IA; and
- A solicitation for comments.

## OTHER DOCUMENTS TO PREPARE

Committee Charter –

- <https://www.gsa.gov/policy-regulations/policy/federal-advisory-committee-management/advice-and-guidance/federal-advisory-committee-charters>
  - Automatically terminates 2-years after date of establishment
  - IA can extend beyond 2-years by filing a renewal
  - Appointment letters of membership for primary & alternate

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- FRN of Extension of Solicitation of Nominations (if needed);
- FRN of Committee Membership;
- FRN of Establishment; and
- FRN of Meetings published at least 15 days in advance of meeting.

## REVIEW OF NOMINATIONS

The IA program will develop a score sheet based on criteria outlined in FRN of Intent to select nominees. Score sheet will eliminate:

- Persons who do not have the qualifications outlined in FRN (i.e., professional background) proposed to represent such interests;
- Individuals who are currently federally registered lobbyists are ineligible to serve on all FACA and non-FACA boards, committees, or councils; and
- Federal employees not identified by IA (nomination of federal employee).

Once all nominations are evaluated, IA will determine if the selected nominees represent a balanced representation. If not, IA will publish a FRN for Extension of Time for Submitting Nominations.

## WHITE HOUSE VETTING OF SELECTED NOMINEES

All nominations to serve on an advisory committee must be vetted by the White House.

- This requirement applies to federal employees and Tribal and non-Tribal nominees to serve as committee members (DFO excluded);
  - Federal employees submit a biographical statement and resume;
  - Tribal and non-Tribal submit material received in nomination package;
  - Requires nominee's full legal name, DOB, and SSN;
- IA sends the package to the Secretariat who coordinates with the DOI White House Liaison; and
- This vetting process can take 60+ days to complete.

During the vetting process, IA continues to work on materials in preparation of committee. The Secretariat will inform IA of who is approved to serve as committee members.

## COMMITTEE MEMBERSHIP

IA will publish a FRN of Membership that:

- Proposes representatives for the committee that are federal, Tribal, and non-Tribal by role (primary or alternate member);
- Provides an opportunity to:
  - Comment on the proposed committee members; and

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- Nominate other persons for membership on the committee.

In the meantime, the IA program prepares meeting materials for the initial meeting, to:

- Introduce the mission, goals, and objectives of the committee;
- Provide an overview of the process of negotiated rulemaking and FACA;
- Understand committee's purpose as described in the Charter;
- Understand the timeline and key milestones expected of the Committee;
- Agree to a meeting schedule for the year; and
- Identify subcommittees.

## ESTABLISHMENT OF COMMITTEE

IA will publish a FRN to announce establishment of Committee that:

- Lists the names of the final federal, Tribal, and non-Tribal committee members and their roles on committee (primary or alternate member);
- Provides the date and location of the first scheduled meeting(s) with a proposed agenda; and
- Publishes in the Federal Register at least 15 calendar days before the Charter is filed.

The Secretariat will coordinate with the DOI Secretary to:

- Sign the Charter;
- Send appointment letters for primary and alternate Committee members; and
- File the Charter with GSA.

The Charter must be signed and filed before the committee can commence first meeting.

## PHASE 2: COMMITTEE MEETINGS

All meetings are open to the public. Meetings must commence with DFO and facilitator.

- Meetings should be reasonably accessible and at convenient locations and times;
  - Meetings can be in-person, virtual, or a combination of both;
- The FRN announcing the date and location of upcoming meetings must be published in the Federal Register at least 15 days in advance of the meeting;
- Meetings are open to the public with some exceptions of the "Government in the Sunshine Act; and
- Papers and records, including detailed minutes of each meeting, are available for public inspection, subject to the Freedom of Information Act.



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- An IA webpage should be established, if possible, to allow the public to view the work of the committee.

## SUBCOMMITTEES

A FRN for preparatory and administration work is not required. A committee can break up the work by creating subcommittees:

- Amending a regulation, can break up sections for subcommittee work;
- Facilitator and DFO must be at each subcommittee meeting (teleconference, virtual or combination); and
- IA program member should participate to ensure consensus.

Subcommittees advise the full committee of the subcommittee's recommendations:

- Meeting minutes for each meeting; and
- Subcommittee consensus on recommendations.

## PHASE 3: COMMITTEE NEGOTIATIONS

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The Facilitator assists members with discussions and negotiations to:

- Reach consensus on the text of a proposed rule or main features of a rule; and
- Develop a Committee report with recommendations for the proposed rule.

## RECORDS

In compliance with FACA for committee and subcommittees, minutes of each meeting must be recorded.

Public access to full committee information may be provided via website:

- Generally includes the meeting agenda, meeting packet and minutes for each meeting; and
- IA does not need to post the work of subcommittees.

Annual reporting into GSA FACA database

<https://www.facadatabase.gov/FACA/FACAPublicPage>

- Identify each full committee meeting;
- Identify each subcommittee meeting;
- Track funding spent for each meeting, including the amount of time each IA person works on committee activity; and
- Where meeting minutes can be located.



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## COMPLETION OF THE COMMITTEE'S WORK

Work is complete as indicated in the Charter -

- Usually culminates in a report that has recommendations for the proposed rule.

Charter will specify the committee will be terminated when the stated objectives of the committee have been accomplished, such as upon:

- Publication of the final rule; or
- Other work to be completed by the committee such as a report (i.e., to the DOI Secretary).

## PHASE 4: IA RULEMAKING PROCESS

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The following documents may be used as a reference for an overview of the rulemaking process—

The Reg Map

- <https://www.reginfo.gov/public/reginfo/Regmap/regmap.pdf>

Drafting Regulations

- <https://www.federalregister.gov/reader-aids/understanding-the-federal-register/drafting-research>

### IA DRAFTS PROPOSED RULE

Determine if proposed regulation will require new Information Collection under the Paperwork Reduction Act or affect existing OMB approved collection (coordinate with RACA);

- <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/PRA%20Process.pdf>

IA uses proposed regulatory language from the committee to prepare draft:

- Preamble
  - Provide background - proposed rule was in coordination with a negotiated rulemaking committee, number of meetings, description of regulatory provisions, etc.;
  - Executive Order 12866 established 60-days as the standard for the comment period;
    - 30-days advance notice for Tribal consultations;

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- Identify number of Tribal consultation and consultations with “Interested Parties” (separate from Tribal leaders); and
- Use Plain Language.

## PROPOSED RULE REVIEW AND ANALYSIS

OMB review of proposed rule under Executive Order 12866 –

- Only rulemaking actions OMB determines to be “significant”

Specific Analyses (drafted in proposed rule):

- Regulatory Planning and Review (E.O. 12866);
- Regulatory Flexibility Act (5 U.S.C. 601-612);
- Paperwork Reduction Act (44 U.S.C. 3501-3520);
- Unfunded Mandates Reform Act (2 U.S.C. Chs. 17A, 25);
- Federalism (E.O. 13132);
- Indian Tribal Governments (E.O. 13175);
- National Environmental Policy Act (42 U.S.C. 4321-4347);
- Governmental Actions and Interference with Constitutionally Protected Property Rights (E.O. 12630); and
- Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (E.O. 13211)

## PUBLICATION OF PROPOSED RULE AND CONSULTATION

The proposed rule is published for 60-day comment period.

- Consultation
  - IA prepares consultation material (presentation, handouts, etc.) in advance.
  - IA ensures that each session is recorded or transcribed.

After close of comment period, IA:

- Determines if comments substantively affect the proposed rule and evaluates:
  - Verbal comments provided at consultation (transcript from court reporter);
  - Written comments submitted; and
  - If virtual consultation, comments submitted via Chat; and
- Provide explanation in preamble of final rule for how comments were addressed.

## DRAFT FINAL RULE

IA drafts a preamble to the final rule to:

- Indicate the number of comments received;

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- Address comments in general;
- Address comments affecting the proposed rule with IA's response; and
- Indicate what has changed from the proposed to final rule.

OMB reviews the final rule under Executive Order 12866 - only if it determines the rule to be "significant"

## PUBLICATION OF FINAL RULE

Final rule generally will become effective 30 days after publication. IA will determine if any Policies or Handbooks will need to be created or amended based on final rule and coordinate with RACA.

## OVERALL TIMELINE FOR NEGOTIATED RULEMAKING

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- Consult with the Secretariat – 30+ days;
- Publish FRN of Intent to Establish a Negotiated Rulemaking Committee – 30-day comment period;
- Publish FRN of Extension of Solicitation of Nominations – 30 days (if needed);
- Review of Nominations – minimum of 5 days;
- White House Vetting of Selected Nominees – 60+ days;
- Publish FRN of Committee Membership – minimum of 15 days;
- Publish FRN of Establishment – minimum of 15 days;
- Filing of Charter – 5 days;
- Publish FRN of Meetings – minimum of 15 days in advance;
- Committee Meetings – determined by the number of meetings over course of 12-24 months (up to 2 years);
- Committee issues report with recommendations; and
- IA uses recommendations to begin rulemaking process (publish proposed rule).

NOTE: does not include time for internal IA review.

## CONTACT INFORMATION

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The Office of Regulatory Affairs and Collaborative Action –

- Negotiated Rulemaking and Advisory Committees
  - Regina Gilbert [regina.gilbert@bia.gov](mailto:regina.gilbert@bia.gov)
- Rulemaking in general
  - Elizabeth Appel [elizabeth.appel@bia.gov](mailto:elizabeth.appel@bia.gov)



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- The Paperwork Reduction Act
  - Ashley Fry [ashley.fry@bia.gov](mailto:ashley.fry@bia.gov)
- Policy and Handbook
  - Shannon Simpson [shanon.simpson@bia.gov](mailto:shanon.simpson@bia.gov)
  - Amanda Begay [amanda.begay@bia.gov](mailto:amanda.begay@bia.gov)

## COMPLIANCE

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Negotiated Rulemaking Act - 5 U.S.C. Subchapter III §§ 561-570.

Federal Advisory Committee Act - 5 U.S.C. App.

- 41 CFR Part 102-3 Federal Advisory Committee Management

Accessibility - section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794

Records

- Section 10(b) and (c) of the FACA
- Committee Final Report – 5 U.S.C. 552 – filed with the Library of Congress as required by section 13 of the Act for public inspection
- Advisory committee records – Federal Records Act (FRA) 44 U.S.C. Chapters 21, 29-33, and regulations issued by the National Archives and Records Administration (see 36 CFR parts 1220, 1222, 1228, and 1234).
- Annual comprehensive review of FACA committees – section 7(b) of the Act.