

to encourage agencies to use the process when it enhances the informal rulemaking process. Nothing in this subchapter 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.

(Added Pub. L. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4970, §581; renumbered §561, Pub. L. 102-354, §3(a)(2), Aug. 26, 1992, 106 Stat. 944.)

AMENDMENTS

1992—Pub. L. 102-354 renumbered section 581 of this title as this section.

EFFECTIVE DATE OF REPEAL; SAVINGS PROVISION

Pub. L. 101-648, §5, Nov. 29, 1990, 104 Stat. 4976, as amended by Pub. L. 102-354, §5(a)(2), Aug. 26, 1992, 106 Stat. 945, which provided that subchapter III of chapter 5 of title 5 and the table of sections corresponding to such subchapter, were repealed, effective 6 years after Nov. 29, 1990, except for then pending proceedings, was repealed by Pub. L. 104-320, §11(a), Oct. 19, 1996, 110 Stat. 3873.

SHORT TITLE OF 1992 AMENDMENT

Pub. L. 102-354, §1, Aug. 26, 1992, 106 Stat. 944, provided that: "This Act [amending sections 565, 568, 569, 571, 577, 580, 581, and 593 of this title, section 10 of Title 9, Arbitration, and section 173 of Title 29, Labor, renumbering sections 571 to 576, 581 to 590, and 581 to 593 as 591 to 596, 561 to 570, and 571 to 583, respectively, of this title, and amending provisions set out as notes under this section and section 571 of this title] may be cited as the 'Administrative Procedure Technical Amendments Act of 1991'."

SHORT TITLE OF 1990 AMENDMENT

Pub. L. 101-648, §1, Nov. 29, 1990, 104 Stat. 4969, provided that: "This Act [enacting this subchapter] may be cited as the 'Negotiated Rulemaking Act of 1990'."

CONGRESSIONAL FINDINGS

Pub. L. 101-648, §2, Nov. 29, 1990, 104 Stat. 4969, provided that: "The Congress makes the following findings:

"(1) Government regulation has increased substantially since the enactment of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].

"(2) Agencies currently use rulemaking procedures that may discourage the affected parties from meeting and communicating with each other, and may cause parties with different interests to assume conflicting and antagonistic positions and to engage in expensive and time-consuming litigation over agency rules.

"(3) 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.

"(4) Negotiated rulemaking, in which the parties who will be significantly affected by a rule participate in the development of the rule, can provide significant advantages over adversarial rulemaking.

"(5) Negotiated rulemaking can increase the acceptability and improve the substance of rules, making it less likely that the affected parties will resist enforcement or challenge such rules in court. It may also shorten the amount of time needed to issue final rules.

"(6) Agencies have the authority to establish negotiated rulemaking committees under the laws establishing such agencies and their activities and under

the Federal Advisory Committee Act (5 U.S.C. App.). Several agencies have successfully used negotiated rulemaking. The process has not been widely used by other agencies, however, in part because such agencies are unfamiliar with the process or uncertain as to the authority for such rulemaking."

AUTHORIZATION OF APPROPRIATIONS

Pub. L. 101-648, §4, Nov. 29, 1990, 104 Stat. 4976, as amended by Pub. L. 102-354, §5(a)(1), Aug. 26, 1992, 106 Stat. 945, authorized additional appropriations to Administrative Conference of the United States to carry out Pub. L. 101-648 in fiscal years 1991, 1992, and 1993.

§ 562. Definitions

For the purposes of this subchapter, the term—

(1) "agency" has the same meaning as in section 551(1) of this title;

(2) "consensus" means unanimous concurrence among the interests represented on a negotiated rulemaking committee established under this subchapter, unless such committee—

(A) agrees to define such term to mean a general but not unanimous concurrence; or

(B) agrees upon another specified definition;

(3) "convener" means a person who impartially assists an agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate in a particular rulemaking;

(4) "facilitator" means a person who impartially aids in the discussions and negotiations among the members of a negotiated rulemaking committee to develop a proposed rule;

(5) "interest" means, with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner;

(6) "negotiated rulemaking" means rulemaking through the use of a negotiated rulemaking committee;

(7) "negotiated rulemaking committee" or "committee" means an advisory committee established by an agency in accordance with this subchapter and the Federal Advisory Committee Act to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule;

(8) "party" has the same meaning as in section 551(3) of this title;

(9) "person" has the same meaning as in section 551(2) of this title;

(10) "rule" has the same meaning as in section 551(4) of this title; and

(11) "rulemaking" means "rule making" as that term is defined in section 551(5) of this title.

(Added Pub. L. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4970, §582; renumbered §562, Pub. L. 102-354, §3(a)(2), Aug. 26, 1992, 106 Stat. 944.)

REFERENCES IN TEXT

The Federal Advisory Committee Act, referred to in par. (7), is Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 770, as amended, which is set out in the Appendix to this title.

AMENDMENTS

1992—Pub. L. 102-354 renumbered section 582 of this title as this section.

§ 563. Determination of need for negotiated rule-making committee

(a) DETERMINATION OF NEED BY THE AGENCY.—An agency may establish a negotiated rule-making committee to negotiate and develop a proposed rule, if the head of the agency determines that the use of the negotiated rulemaking procedure is in the public interest. In making such a determination, the head of the agency shall consider whether—

- (1) there is a need for a rule;
- (2) there are a limited number of identifiable interests that will be significantly affected by the rule;
- (3) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who—
 - (A) can adequately represent the interests identified under paragraph (2); and
 - (B) are willing to negotiate in good faith to reach a consensus on the proposed rule;
- (4) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;
- (5) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;
- (6) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and
- (7) the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.

(b) USE OF CONVENERS.—

(1) PURPOSES OF CONVENERS.—An agency may use the services of a convener to assist the agency in—

- (A) identifying persons who will be significantly affected by a proposed rule, including residents of rural areas; and
- (B) conducting discussions with such persons to identify the issues of concern to such persons, and to ascertain whether the establishment of a negotiated rulemaking committee is feasible and appropriate in the particular rulemaking.

(2) DUTIES OF CONVENERS.—The convener shall report findings and may make recommendations to the agency. Upon request of the agency, the convener shall ascertain the names of persons who are willing and qualified to represent interests that will be significantly affected by the proposed rule, including residents of rural areas. The report and any recommendations of the convener shall be made available to the public upon request.

(Added Pub. L. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4970, §583; renumbered §563, Pub. L. 102-354, §3(a)(2), Aug. 26, 1992, 106 Stat. 944.)

AMENDMENTS

1992—Pub. L. 102-354 renumbered section 583 of this title as this section.

NEGOTIATED RULEMAKING COMMITTEES

Pub. L. 104-320, §11(e), Oct. 19, 1996, 110 Stat. 3874, provided that: “The Director of the Office of Management and Budget shall—

“(1) within 180 days of the date of the enactment of this Act [Oct. 19, 1996], take appropriate action to expedite the establishment of negotiated rulemaking committees and committees established to resolve disputes under the Administrative Dispute Resolution Act [Pub. L. 101-552, see Short Title note set out under section 571 of this title], including, with respect to negotiated rulemaking committees, eliminating any redundant administrative requirements related to filing a committee charter under section 9 of the Federal Advisory Committee Act (5 U.S.C. App.) and providing public notice of such committee under section 564 of title 5, United States Code; and

“(2) within one year of the date of the enactment of this Act, submit recommendations to Congress for any necessary legislative changes.”

§ 564. Publication of notice; applications for membership on committees

(a) PUBLICATION OF NOTICE.—If, after considering the report of a convener or conducting its own assessment, an agency decides to establish a negotiated rulemaking committee, the agency shall publish in the Federal Register and, as appropriate, in trade or other specialized publications, a notice which shall include—

- (1) an announcement that the agency intends to establish a negotiated rulemaking committee to negotiate and develop a proposed rule;
- (2) a description of the subject and scope of the rule to be developed, and the issues to be considered;
- (3) a list of the interests which are likely to be significantly affected by the rule;
- (4) a list of the persons proposed to represent such interests and the person or persons proposed to represent the agency;
- (5) a proposed agenda and schedule for completing the work of the committee, including a target date for publication by the agency of a proposed rule for notice and comment;
- (6) a description of administrative support for the committee to be provided by the agency, including technical assistance;
- (7) a solicitation for comments on the proposal to establish the committee, and the proposed membership of the negotiated rulemaking committee; and
- (8) an explanation of how a person may apply or nominate another person for membership on the committee, as provided under subsection (b).

(b) APPLICATIONS FOR MEMBERSHIP OR¹ COMMITTEE.—Persons who will be significantly affected by a proposed rule and who believe that their interests will not be adequately represented by any person specified in a notice under subsection (a)(4) may apply for, or nominate another person for, membership on the negotiated rulemaking committee to represent such interests with respect to the proposed rule. Each application or nomination shall include—

- (1) the name of the applicant or nominee and a description of the interests such person shall represent;
- (2) evidence that the applicant or nominee is authorized to represent parties related to the interests the person proposes to represent;
- (3) a written commitment that the applicant or nominee shall actively participate in good

¹ So in original. Probably should be “on”.