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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendations

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Administrative Conference of the United States adopted two recommendations at its Sixty-seventh Plenary Session. The appended recommendations are titled: Adjudication Materials on Agency Websites; and Negotiated Rulemaking and Other Options for Public Engagement.

FOR FURTHER INFORMATION CONTACT: For Recommendation 2017-1, Daniel Sheffner; and for Recommendation 2017-2, Cheryl Blake. For both of these actions the address and telephone number are: Administrative Conference of the United States, Suite 706 South, 1120 20th Street, NW, Washington, DC 20036; Telephone 202-480-2080.

SUPPLEMENTARY INFORMATION: The Administrative Conference Act, 5 U.S.C. 591-596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements (5 U.S.C. 594(1)). For further information about the Conference and its activities, see www.acus.gov. At its Sixty-seventh Plenary Session, held June 16, 2017, the Assembly of the Conference adopted two recommendations.

Recommendation 2017-1, *Adjudication Materials on Agency Websites.* This recommendation provides guidance regarding the online dissemination of administrative

adjudication materials. It offers best practices and factors for agencies to consider as they seek to increase the accessibility of adjudication materials on their websites and maintain comprehensive, representative online collections of adjudication materials, consistent with the transparency objectives and privacy considerations of the Freedom of Information Act and other relevant laws and directives.

Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*. This recommendation offers best practices to agencies for choosing among several possible methods—among them negotiated rulemaking—for engaging the public in agency rulemakings. It also offers best practices to agencies that choose negotiated rulemaking on how to structure their processes to enhance the probability of success.

The Appendix below sets forth the full texts of these two recommendations. The Conference will transmit them to affected agencies, Congress, and the Judicial Conference of the United States. The recommendations are not binding, so the entities to which they are addressed will make decisions on their implementation.

The Conference based these recommendations on research reports that are posted at: https://www.acus.gov/67thPlenary.

Dated: June 29, 2017

David M. Pritzker,

Deputy General Counsel.

APPENDIX--RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2017-1

Adjudication Materials on Agency Websites

Adopted June 16, 2017

In contrast to federal court records, which are available for download from the judiciary's Public Access to Court Electronic Records (PACER) program (for a fee), or records produced during notice-and-comment rulemaking, which are publicly disseminated on the rulemaking website www.regulations.gov, there exists no single, comprehensive online clearinghouse for the public hosting of decisions and other materials generated throughout the course of federal administrative adjudication.[1] Instead, to the extent a particular adjudication record is digitally available, it is likely to be found on the relevant agency's website.

This recommendation is confined to records issued or filed in adjudicative proceedings in which a statute, executive order, or regulation mandates an evidentiary hearing.[2] Specifically, this recommendation applies to (a) "[a]djudication that is regulated by the procedural provisions of the Administrative Procedure Act (APA) and usually presided over by an administrative law judge" and (b) "[a]djudication that consists of legally required evidentiary hearings that are not regulated by the APA's adjudication provisions in 5 U.S.C. §§ 554 and 556–557 and that is presided over by adjudicators who are often called administrative judges."[3]

[1] The Administrative Conference currently takes no position in this recommendation as to whether there should be such a tool, but will consider whether the issue merits attention in the future. In the meantime, the research underlying this recommendation is limited to an examination of agencies' existing websites.

[2] *See* Administrative Conference of the United States, Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016).

[3] *Id.* (referring to these two types of proceedings as "Type A" and "Type B" adjudication, respectively).

Federal administrative adjudication affects an enormous number of individuals and businesses engaged in a range of regulated activities or dependent on any of the several government benefits programs. The many orders, opinions, pleadings, motions, briefs, petitions, and other records generated by agencies and parties involved in adjudication bespeak the procedural complexities and sophistication of many proceedings.

Many federal laws and directives mandate or encourage the online disclosure of important government materials, including certain adjudication records. The Freedom of Information Act (FOIA) requires that agencies make available in an electronic format "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases."[4] The prevailing interpretation of this provision limits its ambit to "precedential" decisions.[5] Nonetheless, other laws and policies, including most recently the FOIA Improvement Act of 2016,[6] encourage more expansive online disclosure of federal records.[7]

When, as is often the case, adjudicative proceedings involve the application of governmental power to resolve disputes involving private parties, the associated records are of public importance. Further, administrative adjudication records can serve as ready-made models

[4] 5 U.S.C. § 552(a)(2)(A).

[5] *See* U.S. DEP'T OF JUSTICE, OFFICE OF INFORMATION POLICY, GUIDE TO THE FREEDOM OF INFORMATION ACT, PROACTIVE DISCLOSURES 10 (2009 ed.); U.S. Dep't of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, at 15 (Aug. 17, 1967).

[6] Pub. L. No. 114-185, 130 Stat. 538 (2016). The Act, for instance, amended the Federal Records Act, 44 U.S.C. § 3101 *et seq.*, by adding a requirement that agencies' records management programs provide "procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format." *Id.* § 3102(2).

[7] *See, e.g.*, Office of Mgmt. & Budget Circular A-130, § 5.e.2.a (directing agencies to publish "public information online in a manner that promotes analysis and reuse for the widest possible range of purposes, meaning that the information is publicly accessible, machine-readable, appropriately described, complete, and timely").

for private parties (especially those who are self-represented)[8] in drafting their own materials and may provide insight into the relevant substantive law and procedural requirements. Easy availability of these materials can save staff time or money through a reduction in the volume of FOIA requests or printing costs, or an increase in the speed with which agency staff will be able to respond to remaining FOIA requests. In addition, there may also be more intangible benefits engendered by increased public trust and website user satisfaction.

In the absence of a comprehensive, government-wide platform akin to PACER or www.regulations.gov, agencies generally rely on their individual websites to comply with online transparency laws and initiatives, disclosing the binding orders, opinions, and, in some cases, supporting records produced during adjudicative proceedings. Some agencies host relatively accessible, comprehensive libraries of decisions and supporting adjudication materials. Not all agency websites, however, are equally navigable or robust. Additionally, in providing online access to adjudication materials, agencies utilize navigational and organizational tools and techniques in various ways.

This recommendation offers best practices and factors for agencies to consider as they seek to increase the accessibility of adjudication materials on their websites and maintain comprehensive, representative online collections of adjudication materials, consistent with a balancing of the transparency objectives and privacy considerations of FOIA and other relevant

[8] The Conference recently adopted a recommendation that offers best practices for agencies to consider in assisting self-represented parties in administrative hearings. *See* Administrative Conference of the United States, Recommendation 2016-6, *Self-Represented Parties in Administrative Hearings*, 81 Fed. Reg. 94,319 (Dec. 23, 2016).

laws and directives.[9] It is drafted with recognition that all agencies are subject to unique programming and financial constraints, and that the distinctiveness of agencies' respective adjudicative schemes limits the development of workable standardized practices. To the extent agencies are required to expend additional resources in implementing this recommendation, any upfront costs incurred may be accompanied by offsetting benefits.

Recommendation

Affirmative Disclosure of Adjudication Materials

1. Agencies should consider providing access on their websites to decisions and supporting materials (e.g., pleadings, motions, briefs) issued and filed in adjudicative proceedings in excess of the affirmative disclosure requirements of the Freedom of Information Act (FOIA). In determining which materials to disclose, agencies should ensure that they have implemented appropriate safeguards to protect relevant privacy interests implicated by the disclosure of adjudication materials. Agencies should also consider the following factors in deciding what to disclose:
    a. the interests of the public in gaining insight into the agency's adjudicative processes;
    b. the costs to the agency in disclosing adjudication materials in excess of FOIA's requirements;
    c. any offsetting benefits the agency may realize in disclosing these materials; and
    d. any other relevant considerations, such as agency-specific adjudicative practices.

[9] For the report undergirding this recommendation, see Daniel J. Sheffner, Adjudication Materials on Agency Websites (April 10, 2017) (report to the Admin. Conf. of the U.S.), *available at* https://www.acus.gov/report/adjudication-materials-agency-websites-final-report-0.

2. Agencies that adjudicate large volumes of cases that do not vary considerably in terms of their factual contexts or the legal analyses employed in their dispositions should consider disclosing on their websites a representative sampling of actual cases and associated adjudication materials.

Access to Adjudication Materials

3. Agencies that choose to post all or nearly all decisions and supporting materials filed in adjudicative proceedings should endeavor to group materials from the same proceedings together, for example, by providing a separate docket page for each adjudication.
4. Subject to considerations of cost, agencies should endeavor to ensure that website users are able to locate adjudication materials easily by:
    a. displaying links to agency adjudication sections in readily accessible locations on the website;
    b. maintaining a search engine and a site map or index, or both, on or locatable from the homepage;
    c. offering relevant filtering and advanced search options in conjunction with their main search engines that allow users to specify with greater detail the records or types of records for which they are looking, such as options to sort, narrow, or filter searches by record type, action or case type, date, case number, party, or specific words or phrases; and
    d. offering general and advanced search and filtering options specifically within the sections of their websites that disclose adjudication materials to sort, narrow, or filter searches in the ways suggested in subparagraph (c).

Administrative Conference Recommendation 2017-2

Negotiated Rulemaking and Other Options for Public Engagement

Adopted June 16, 2017

Since the enactment of the Administrative Procedure Act (APA) in 1946, public input has been an integral component of informal rulemaking. The public comment process gives agencies access to information that supports the development of quality rules and arguably enhances the democratic accountability of federal agency rulemaking. As early as the 1960s, however, many agencies reported that notice-and-comment rulemaking "had become increasingly adversarial and formalized."[1]

Starting in the late 1970s, as legal reform advocates sought to expand the use of alternative dispute resolution (ADR) to reduce the incidence of litigation in the civil courts, administrative law scholars began to consider whether importing ADR norms into the rulemaking process might promote a more constructive, collaborative dynamic between agencies and those persons interested in or affected by agency rules. Eventually, the Administrative Conference conducted a study and recommended an alternative procedure that came to be known as "negotiated rulemaking." Negotiated rulemaking brings together an advisory committee[2] composed of representatives of identifiable affected interests,[3] agency officials, and a "neutral"[4]

[1] Administrative Conference of the United States, Recommendation 85-5, *Procedures for Negotiating Proposed Regulations*, 50 Fed. Reg. 52,893, 52,895 (Dec. 27, 1985).

[2] Negotiated rulemaking committees are advisory committees that must comply with the Federal Advisory Committee Act (FACA), unless otherwise provided by statute. 5 U.S.C § 565(a).

[3] The Negotiated Rulemaking Act provides that an agency, when determining the need for negotiated rulemaking, should among other factors consider whether "there are a limited number of identifiable interests that will be significantly affected by the rule." *Id.* § 563(a)(2). The Act further defines an "interest" to mean "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." *Id.* § 562(5).

trained in mediation and facilitation techniques who would meet to try to reach consensus on a proposed rule.[5] The Administrative Conference twice issued recommendations supporting the use of negotiated rulemaking in appropriate circumstances. The first, Recommendation 82-4, *Procedures for Negotiating Proposed Regulations*, represented an early effort to articulate the steps agencies should take to use the process successfully.[6] The second, Recommendation 85-5, which had the same title, identified suggested practices based on agency experience with negotiated rulemaking in the preceding years.[7]

Congress formally authorized the use of regulatory negotiation where it would enhance rulemaking by enacting the Negotiated Rulemaking Act of 1990.[8] Congress had found that traditional informal rulemaking "may discourage the affected parties from meeting and

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[4] Here, a "neutral" refers to an expert with experience in ADR techniques who actively supports the negotiation and consensus-building process, without taking a position on the substantive outcome. Both convenors and facilitators are neutrals who may support the process at various stages. As defined by the Negotiated Rulemaking Act of 1996, a convenor is "a person who impartially assists an agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate in a particular rulemaking," whereas a facilitator is "a person who impartially aids in the discussions and negotiations among the members of a negotiated rulemaking committee to develop a proposed rule." *Id.* § 562.

[5] In practice, negotiated rulemaking committees may work to reach consensus on the text of a proposed rule or may instead seek consensus on a term sheet or other document covering the major issues of the rulemaking. Although negotiated rulemaking committees meet to seek consensus on proposed rules, they may remain constituted until the promulgation of the final rule. *Id.* § 567. Some agencies have used committee meetings to obtain further feedback during the development of the final rule.

[6] Administrative Conference of the United States, Recommendation 82-4, *Procedures for Negotiating Proposed Regulations*, 47 Fed. Reg. 30,701 (July 15, 1982). These recommendations were based on Professor Philip Harter's report to the Administrative Conference (Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982)). The procedural steps proposed in Recommendation 82-4 formed the basis of the Negotiated Rulemaking Act.

[7] Recommendation 85-5, *supra* note 1. The present recommendation is intended to supplement, rather than supersede, the Conference's prior recommendations on negotiated rulemaking.

[8] Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified as amended by Pub. L. No. 104-320, 110 Stat. 3870 (1996) at 5 U.S.C §§ 561–70).

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."[9] Congress found that negotiated rulemaking could "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" and that negotiation could "shorten the amount of time needed to issue final rules."[10]

Executive Order 12,866, signed by President Clinton and retained by subsequent presidents, directs agencies to "explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking."[11] In addition, Congress has occasionally mandated the use of negotiated rulemaking when passing new legislation that directs agencies to address certain problems.[12] However, negotiated rulemaking was never

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[9] 5 U.S.C § 561.

[10] *Id.*

[11] Exec. Order 12,866, § 6(a)(1), 58 Fed. Reg. 51,735 (Oct. 4, 1993). In addition, President Clinton directed each agency to identify at least one rulemaking to develop through negotiated rulemaking or to explain why negotiated rulemaking would not be feasible. *See* Presidential Memorandum for Exec. Dept's & Selected Agencies, Administrator, Office of Info. & Reg. Affairs, Negotiated Rulemaking (Sept. 30, 1993), *available at* http://govinfo.library.unt.edu/npr/library/direct/memos/2682.html.

[12] Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1256, 1268 (1997) [hereinafter Coglianese, *Assessing Consensus*]. Over a dozen such statutes were passed before 1997, including the Student Loan Reform Act of 1993 (Pub. L. No. 103-66, § 4021, 107 Stat. 341, 353) and the Native American Housing Assistance and Self-Determination Act of 1996 (Pub. L. No. 104–330, § 106(b), 110 Stat. 4016, 4029). Congress has continued to mandate that agencies use negotiated rulemaking under some programs. For a list of statutes mandating or strongly encouraging negotiated rulemaking, see Cary Coglianese, *Is Consensus an Appropriate Basis for Regulatory Policy?*, *in* ENVIRONMENTAL CONTRACTS: COMPARATIVE APPROACHES TO REGULATORY INNOVATION IN THE UNITED STATES AND EUROPE 93–113 (Eric Orts & Kurt Deketeaere eds., 2001). More recent examples include the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. No. 108-458, § 7212, 118 Stat. 3638, 2829) and the Patient Protection and Affordable Care Act (Pub. L. No. 111-148, § 5602, 124 Stat. 119, 677). For a case study of the congressionally mandated use of negotiated rulemaking by the U.S. Department of Education, see Jeffrey S. Lubbers, *Enhancing the Use of Negotiated Rulemaking by the U.S. Department of Education* (Dec. 5, 2014), *in* RECALIBRATING REGULATION OF COLLEGES

designed to be used by agencies in the vast majority of agency rulemaking.[13] By the early 2000s, negotiated rulemaking was being used less frequently than anticipated.[14] Over the past few years, the process appears to have received a modest increase in attention and use by some agencies.

In part, the infrequent use of negotiated rulemaking may be due to the availability of alternative public engagement options, such as advance notices of proposed rulemaking, requests for input, technical workshops, or listening sessions, that allow agencies to gain many of the benefits of direct feedback early in the policymaking process while retaining greater procedural flexibility. Indeed, such alternatives can effectively elicit public input while avoiding the delays and procedural complexities associated with chartering a negotiated rulemaking committee under the Federal Advisory Committee Act (FACA).[15] In addition, over the years, some criticisms about the effectiveness of negotiated rulemaking in practice have been raised. For example, agencies need to ensure that representatives of affected interests can be selected in a way that

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AND UNIVERSITIES, REPORT OF THE TASK FORCE ON FEDERAL REGULATION OF HIGHER EDUCATION 90 (2015), *available at* http://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf.

[13] Coglianese, *Assessing Consensus*, *supra* note 12, at 1276.

[14] Documentation of the early use, decline, and recent uptick in the use of negotiated rulemaking can be found in Cheryl Blake & Reeve T. Bull, Negotiated Rulemaking (June 5, 2017), 3–12, *available at* https://www.acus.gov/sites/default/files/documents/Negotiated%20Rulemaking_Final%20Report_June%205%202017.pdf. *See also* Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 1001 (2008); Peter H. Schuck & Steven Kochevar, *Reg Neg Redux: The Career of a Procedural Reform*, 15 THEORETICAL INQUIRIES IN LAW 417, 439 (2014); Reeve T. Bull, *The Federal Advisory Committee Act: Issues and Proposed Reforms* 52 & app. A (Sept. 12, 2011), *available at* https://www.acus.gov/sites/default/files/documents/COCG-Reeve-Bull-Draft-FACA-Report-9-12-11.pdf.

[15] Agencies have cited FACA's chartering and other procedural requirements as a challenge to undertaking negotiated rulemaking. See Lubbers, *supra* note 14, at 1001; Blake & Bull, *supra* note 14, at 28–31. Of course, agencies should be aware that even alternative public input forums that are not formally designated as advisory committees could nevertheless become subject to FACA should the dynamic of any meetings with members of the public trend toward "group advice" rather than individual input. Blake & Bull, *supra* note 14, at 21.

does not give unequal power to one or more members.[16] There are clearly instances in which negotiated rulemaking should not be used. Nevertheless, where an agency concludes that its goals would best be served by developing a consensus-based proposed rule—or where the relevant policy issues, or relationships with interested persons or groups, are suitably complex—negotiated rulemaking may very well be a worthwhile procedural option to consider.

To guide agencies in choosing among the various kinds of public engagement methods they may use to meet their goals, and to offer suggestions on how agencies might enhance the probability of success when choosing to undertake negotiated rulemaking, the Administrative Conference recommends the considerations and practices outlined below.[17] These recommendations begin with the initial choice agencies confront—namely selecting from among various public engagement options and deciding when to use negotiated rulemaking—before turning to recommendations for those occasions when agencies use negotiated rulemaking.

Recommendation

Selecting the Optimal Approach to Public Engagement in Rulemaking

1. Negotiated rulemaking is one option of several that agencies should consider when seeking input from interested persons on a contemplated rule. In addition to negotiated rulemaking, agencies should consider the full range of public engagement options to best meet their objectives. For example:

[16] Blake & Bull, *supra* note 14, at 8–11.

[17] When gathering input outside of the notice-and-comment process, agencies should consider the best practices outlined in Administrative Conference of the United States, Recommendation 2014-4, *"Ex Parte" Communications in Informal Rulemaking*, 79 Fed. Reg. 35,988 (June 25, 2014).

a. Notice-and-comment rulemaking by itself is often effective to obtain documentary information and other input from a wide array of interested persons.

b. When seeking to facilitate a two-way exchange of information or ideas, agencies should consider meeting with a variety of interested persons reflecting a balance of perspectives.

c. In situations in which an agency is interested in input from various interested persons or entities but does not seek collective advice or a consensus position, the agency should consider gathering groups of interested persons to provide individual input through more than one public or private meeting, dialogue session, or other forum.

d. Where an agency seeks collective advice, the agency should use an advisory committee, observing all applicable requirements prescribed by FACA.

Deciding When to Use Negotiated Rulemaking

2. An agency should consider using negotiated rulemaking when it determines that the procedure is in the public interest, will advance the agency's statutory objectives, and is consistent with the factors outlined in the Negotiated Rulemaking Act. Specifically, such factors include whether:

    - "there are a limited number of identifiable interests that will be significantly affected by the rule;"[18]
    - "there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who (a) can adequately represent the [identifiable and

[18] 5 U.S.C. § 563(a)(2).

significantly affected] interests and (b) are willing to negotiate in good faith to reach a consensus on the proposed rule;"[19]

- there is adequate time to complete negotiated rulemaking and the agency possesses the necessary resources to support the process;[20] and
- "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."[21]

3. In light of the broad range of highly specific factors that need to be considered when determining whether to use negotiated rulemaking, the choice should generally reside within the agency's discretion.

Structuring a Negotiated Rulemaking Committee to Maximize the Probability of Success

4. As a general matter, agency officials should clearly define the charge of the negotiated rulemaking committee at the outset. This involves explicitly managing expectations and stating any constraints on the universe of options the committee is authorized to consider, including any legal prohibitions or non-negotiable policy positions of the agency. Agency officials should inform the committee members of the use to which the information they provide will be put and should notify them that negotiated rulemaking committee meetings

[19] *Id.* § 563(a)(3).

[20] *See id.* §§ 563(a)(4)–(6) (providing that "there is a reasonable likelihood that the committee will reach consensus on the proposed rule within a fixed period of time"; "the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule"; and "the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee").

[21] *Id.* § 563(a)(7).

will be made open to the public and documents submitted in connection therewith generally will be made available to the public.

5. Agencies should appoint an official with sufficient authority to speak on behalf of the agency to attend all negotiated rulemaking committee meetings and to participate in them to the extent the agency deems suitable.

6. Agencies should work with convenors or facilitators to define clearly the roles they should play in negotiated rulemakings.[22] Generally, agencies should draw upon the convenor's expertise in selecting committee members, defining the issues the committee will address, and setting the goals for the committee's work. Similarly, agencies should use a facilitator to assist the negotiation impartially and to make that impartiality clear to the members of the committee.

7. Agencies should keep in mind the role of the Office of Information and Regulatory Affairs (OIRA) in the rulemaking process when conducting negotiated rulemaking and inform committee members of that role. An agency should notify its OIRA desk officer of the opportunity to observe the committee meetings and, upon request, provide him or her with briefings on the meetings. An agency should also discuss whether or how the committee process might be used to support the development of the elements needed to comply with relevant analytical requirements, including the rule's regulatory impact analysis.

Considerations Associated with FACA

[22] Notably, while such neutrals may be hired by an agency, they support the overall process impartially (rather than on behalf of, or in favor of, the agency). For more details on the roles of convenors and facilitators, see Recommendation 85-5, *supra* note 1, at recommendations 5–8 and the discussion in note 4, *supra*. The roles may be filled by the same person or by two different individuals, who may be agency employees or external professionals.

8. Congress should exempt negotiated rulemaking committees from FACA's chartering and reporting requirements.[23] If Congress exempts negotiated rulemaking committees from FACA entirely, it should amend the Negotiated Rulemaking Act to require comparable transparency, such as by requiring that negotiated rulemaking committee meetings be noticed in advance and open to the public.

9. For greater flexibility within the framework of FACA, agencies should consider maintaining standing committees from which a negotiated rulemaking subcommittee or working group can be formed on an as-needed basis to obviate the need to charter a new committee each time the agency undertakes a negotiated rulemaking.[24] Regardless of whether Congress exempts negotiated rulemaking from certain FACA requirements, agencies should strive to minimize unnecessary procedural burdens associated with the advisory committee process.

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[23] Administrative Conference of the United States, Recommendation 2011-7, *The Federal Advisory Committee Act – Issues and Proposed Reforms*, 77 Fed. Reg. 2257 (Jan. 17, 2012).

[24] Both the Department of Energy and Department of Transportation (Federal Aviation Administration and Federal Railroad Administration) have standing committees that at times have been used to support negotiated rulemaking or other rulemaking activities. When seeking to negotiate a proposed rule, these agencies will form subcommittees or working groups (sometimes wholly comprising standing committee members, while other times comprising both standing committee and new members). For more details on the structure of these arrangements and their potential benefits, see Blake & Bull, *supra* note 14, at 29–30. Note, however, that some components in the Department of Transportation do prepare FACA charters for each new negotiated rulemaking committee, rather than using the standing committee/subcommittee model just described.

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