

101: NEGOTIATED RULEMAKING



higher learning
ADVOCATES

A QUIRK OF FEDERAL HIGHER EDUCATION POLICY: NEGOTIATED RULEMAKING

The Higher Education Act (HEA) requires the U.S. Department of Education (ED) to use a process called “negotiated rulemaking” in order to make any changes to programs authorized under HEA’s Title IV, the section that houses federal financial aid programs and affects more than \$130 billion annually in federal funding.

NEGOTIATED RULEMAKING: NUTS AND BOLTS

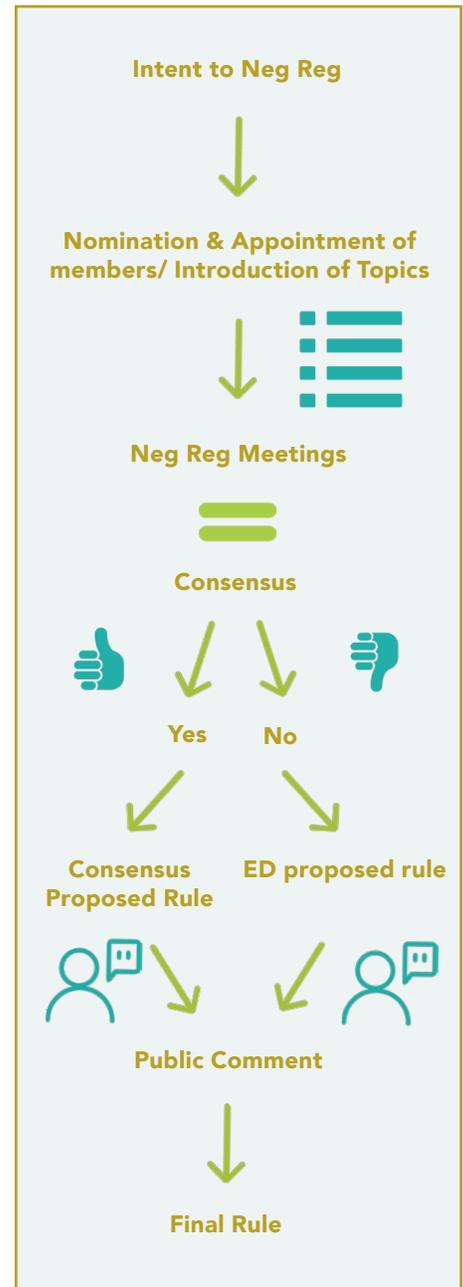
The negotiated rulemaking process — colloquially known as “Neg Reg” — uses a neutral facilitator and a balanced negotiating committee comprised of representatives of all interests. The goal of negotiated rulemaking is to have the committee reach consensus, but if the committee does not reach consensus, ED may formulate their own rule.

STARTING NEG REG: A PROCESS WITHIN A PROCESS

The negotiated rulemaking process starts with collecting public comments on what issues the Neg Reg process should focus on, then seeks nominations for negotiators representing different constituencies to participate in the Neg Reg committee, and finally conducts committee meetings with negotiators to determine if consensus by all negotiators (including those representing ED) on a regulatory approach to the issues can be reached.

STEP 1 ► INTENT TO CONDUCT NEGOTIATED RULEMAKING:

Every Neg Reg effort begins with a notice in the Federal Register declaring the Department’s intent and interest in issuing a regulation on a certain issue or set of issues and their express intent to use negotiated rulemaking to develop those regulations. The notice requests public comment on the issues proposed and whether any additional topics should be considered as part of Neg Reg. ED often also seeks input on this notice through several public forums where comment can be provided to agency officials in person. Typically, public comment connected to this notice must be submitted within 30 days of the notice’s issuance.



STEP 2 ► THE NOMINATIONS PROCESS:

After ED considers public comment on the intent notice, the agency publishes a final issue list and requests nominations from the public to serve as representatives of various constituency groups, such as financial aid administrators, institutional representatives, students, researchers and experts. This notice also establishes the locations, dates and times for meetings of the Neg Reg committee. While the Higher Education Act (HEA) provides some direction to ED on what constituencies should be represented on a Neg Reg committee, ultimately ED is the arbiter of what constituency groups are selected. Typically, ED provides a period of 30 days for nominations to be submitted.

STEP 3 ► SELECTION ANNOUNCEMENT OF COMMITTEE MEMBERS:

After soliciting nominations, ED announces who has been selected as negotiators on a main Neg Reg committee. Typically, ED selects one primary negotiator and one alternate for each constituency category. ED may also seek to establish formal subcommittees on certain issues with different individuals representing constituency groups than the main committee. Often, the alternate can fully debate matters before the committee, but only the primary negotiator can vote for or against consensus on a matter (unless the primary negotiator is absent). Also, only the main committee negotiators can determine consensus on an issue; subcommittee members cannot grant approval toward consensus on any issues, but rather work as a resource, or set of subject matter experts, for the main committee.

NEG REG MEETINGS: A PRIMER

In the notice requesting nominations, ED establishes a meeting schedule, likely consisting of three to four sessions of meetings, with each session lasting several days. Sessions will take place generally four weeks apart, or about one session per

month. In past Neg Reg efforts, the first session has provided an opportunity for ED to provide background information on each of the issues and allow negotiators to discuss their views. The second and subsequent sessions typically center around a regulatory proposal put forward by Department of Education officials. During these sessions, negotiators debate the provisions in the ED document and have the opportunity offer changes and additions. Still, ED has the authority to move forward with a draft proposal for negotiation at any time.

Members of the public may observe meetings of the negotiating committee but cannot speak unless recognized by the committee. Typically, at the end of each day's meeting, the committee provides an opportunity for the public to comment.

CONSENSUS-BASED NEGOTIATION

Negotiated rulemaking is a consensus-based process. Ultimately, the Neg Reg committee process concludes with a vote of negotiators on consensus on a final product. If consensus on a final product is reached by all primary negotiators (including ED), then the Department is largely bound by the committee product as it develops the NPRM. Failure to gain consensus allows ED to develop a regulation as they see fit. If the Department decides to proceed with regulations, it may use regulatory language developed during the negotiations as the basis for its NPRM, or develop new regulatory language for all or a portion of its NPRM.

THE RESULT: A PROPOSED NEW RULE

Typically, ED takes two-to-four months to produce a Notice of Proposed Rulemaking (NPRM) after the Neg Reg committee completes its meetings. The NPRM is subject to the normal public review and comment procedures of any other proposed regulation.

For more information about Higher Learning Advocates' work on Neg Reg policy, please contact **Emily Bouck West**, Deputy Executive Director, at ebouckwest@higherlearningadvocates.org, and visit www.higherlearningadvocates.org to learn more about our work.