

# STATE OF NEW YORK

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5777--A

2017-2018 Regular Sessions

## IN ASSEMBLY

February 15, 2017

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Introduced by M. of A. SIMOTAS, HAWLEY -- read once and referred to the Committee on Governmental Operations -- recommitted to the Committee on Governmental Operations in accordance with Assembly Rule 3, sec. 2 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the state administrative procedure act, in relation to negotiated rule making

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Short title. This act shall be known and may be cited as  
2 the "small business negotiated rule making act of 2018".

3 § 2. Legislative intent. The legislature hereby finds that providing  
4 additional opportunities for direct small business and public partic-  
5 ipation in the development of potentially controversial rules can  
6 enhance the ability of the agency to develop the most appropriate and  
7 effective regulatory language, and can reduce the time and expense occa-  
8 sioned by litigation over the rule. Negotiated rule making provides a  
9 means of improving the substance and increasing the acceptability of  
10 rules, by affording to the agency, regulated small businesses and the  
11 public the opportunity for face-to-face negotiations over a rule making  
12 proposal which is under development by the agency. The opportunity for  
13 representatives of the various persons and small businesses interested  
14 in a rule to meet and communicate with each other provides a framework  
15 for the sharing of information, knowledge and expertise in order to  
16 develop a consensus on the most effective and appropriate rule making  
17 proposal. Fair representation of all interested parties and a skilled  
18 facilitator are essential elements of a successful negotiated rule  
19 making process.

20 Therefore, the legislature declares it to be in the public interest to  
21 set forth a statutory process for negotiated rule making in the state

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[-] is old law to be omitted.

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1 administrative procedure act as an alternative means of developing  
2 appropriate and effective proposed rules.

3 § 3. The state administrative procedure act is amended by adding a new  
4 article 2-A to read as follows:

5 ARTICLE 2-A  
6 NEGOTIATED RULE MAKING

7 Section 250. Purpose of article.

8 251. Definitions.

9 252. Determination of the need for negotiated rule making.

10 253. Notice of proposed committee formation.

11 254. Committee establishment.

12 255. Conduct of committee activities.

13 256. Committee termination.

14 257. Services, facilities and payment of expenses of committee  
15 members.

16 258. Judicial review.

17 § 250. Purpose of article. The purpose of this article is to establish  
18 a statutory framework for the selection of appropriate subjects for  
19 negotiated rule making, and for the conduct of negotiated rule making.  
20 Nothing in this article is intended to limit other innovative rule  
21 making procedures otherwise authorized by statute.

22 § 251. Definitions. As used in this article:

23 1. "Consensus" means unanimous concurrence among the interests repres-  
24 ented on a negotiated rule making committee established pursuant to this  
25 article, unless such committee by unanimous concurrence (a) agrees to  
26 define such term to mean a general but not unanimous concurrence; or (b)  
27 agrees upon another specified definition.

28 2. "Facilitator" means a person who impartially aids in the  
29 discussions and negotiations among the members of a negotiated rule  
30 making committee in developing a proposed rule.

31 3. "Interest" means, with respect to an issue or matter, multiple  
32 parties which have a similar point of view or which are likely to be  
33 affected in a similar manner.

34 4. "Negotiated rule making" means rule making through the use of a  
35 negotiated rule making committee.

36 5. "Negotiated rule making committee" or "committee" means an advisory  
37 committee established by an agency in accordance with the provisions of  
38 this article to consider and discuss issues for the purpose of reaching  
39 a consensus in the development of a proposed rule.

40 § 252. Determination of the need for negotiated rule making. 1. An  
41 agency may propose to establish a negotiated rule making committee to  
42 negotiate and develop a proposed rule, if the head of the agency deter-  
43 mines that the use of negotiated rule making is appropriate and in the  
44 public interest. In making this determination the head of the agency  
45 shall consider whether:

46 (a) there is a need for a rule;

47 (b) there are a limited number of identifiable interests or small  
48 businesses that will be significantly affected by the rule;

49 (c) there is a reasonable likelihood that such a committee can be  
50 convened with balanced representation of persons who can adequately  
51 represent the interest identified under paragraph (b) of this subdivi-  
52 sion and who are willing to negotiate in good faith to reach a consensus  
53 on a proposed rule;

1 (d) there is reasonable likelihood that such a committee will reach a  
2 consensus on the proposed rule within a fixed period of time;

3 (e) use of negotiated rule making will not unreasonably delay the  
4 notice of proposed rule making and the issuance of a final rule;

5 (f) the agency has adequate resources and is willing to commit such  
6 resources as may be needed, including technical assistance, to a negoti-  
7 ated rule making committee;

8 (g) the negotiated rule making will not impose a disadvantage on  
9 persons whose participation is essential but who lack the resources to  
10 participate, or, if participation would impose such disadvantage, it is  
11 likely that the agency may obtain and make available such resources in a  
12 manner consistent with section two hundred fifty-seven of this article;  
13 and

14 (h) the agency will use the consensus of the committee with respect to  
15 the proposed rule as the basis for a rule proposed by the agency for  
16 notice and comment.

17 2. An agency which determines that the proposal of a negotiated rule  
18 making proceeding is appropriate and in the public interest shall  
19 propose such action to the committee. Such proposal shall indicate the  
20 basis for the agency's determination, and shall list the interests which  
21 the agency believes to be necessary for representation in the negotiated  
22 rule making proceeding and the basis for determining that the proposed  
23 list of interests is fair and balanced. The agency's proposal shall be  
24 made available to the public on request.

25 § 253. Notice of proposed committee formation. 1. If an agency  
26 approves the proposal to conduct a negotiated rule making proceeding,  
27 then the agency shall publish in the state register and such trade and  
28 other specialized publications, and by such electronic means as it deems  
29 appropriate a notice which shall include:

30 (a) an announcement that the agency intends to establish a negotiated  
31 rule making committee to negotiate and develop a proposed rule;

32 (b) a description of the subject and scope of the rule to be devel-  
33 oped, and the issues to be considered;

34 (c) a list of small businesses and other interests which have been  
35 determined to be likely to be significantly affected by the rule;

36 (d) a list of the persons proposed to represent such interests and the  
37 person or persons proposed to represent the agency;

38 (e) a proposed agenda and schedule for completing the work of the  
39 committee, including a target date for publication by the agency of a  
40 proposed rule for notice and comment;

41 (f) a description of administrative support to be provided to the  
42 committee by the agency;

43 (g) a solicitation of comments on the proposal to establish a commit-  
44 tee, and the proposed membership of the committee; and

45 (h) an explanation of how a person may apply to nominate another  
46 person for membership on the committee, as provided in subdivision three  
47 of this section.

48 2. Special efforts shall be made by the agency to solicit partic-  
49 ipation by small businesses, residents of rural areas, inner-city urban  
50 areas, minority and disadvantaged groups, and other interests who may  
51 otherwise not be represented or may be underrepresented in the negoti-  
52 ated rule making proceeding.

53 3. Persons who would be significantly affected by a proposed rule and  
54 who believe that their interests would not be adequately represented by  
55 any person proposed by the agency to represent their interests, or who  
56 believe that the proposed representation of interests on the committee

1 will not be fair and balanced, may apply for or nominate another person  
2 for membership on the committee to represent such interests or to  
3 achieve such balance. Each application or nomination shall include:

4 (a) the name of the applicant or nominee and a description of the  
5 interests such person shall represent;

6 (b) information that the applicant or nominee is qualified to repre-  
7 sent such interests;

8 (c) a written commitment that the applicant or nominee shall actively  
9 participate in good faith in the development of the rule under consider-  
10 ation; and

11 (d) the reasons for believing that any person or persons proposed to  
12 represent interests in the notice published pursuant to subdivision one  
13 of this section would not adequately represent the interests of the  
14 person submitting the application or nomination.

15 4. The agency shall provide for a period of at least thirty calendar  
16 days for the submission of comments and applications under this section.

17 5. Any small business or person who is dissatisfied with an agency  
18 decision that:

19 (a) it is not necessary to provide for representation of the interest  
20 which such business or person proposes to represent; or

21 (b) an individual is not the best qualified person to represent an  
22 interest, may appeal such decision to the agency. Such business or  
23 person shall advise the agency of such appeal and shall provide the  
24 committee and agency with a statement of the basis for such appeal. In  
25 making a decision on representation of an interest, evidence that an  
26 organization has authorized a person to represent it shall be sufficient  
27 to demonstrate that such individual is best qualified to represent that  
28 organization. The agency shall notify the proposed committee members of  
29 the appeal. The decision by the agency shall be issued within thirty  
30 days and shall be final.

31 § 254. Committee establishment. 1. After considering comments and  
32 applications submitted pursuant to section two hundred fifty-three of  
33 this article, the agency shall determine whether a negotiated rule  
34 making committee can adequately represent, in a fair and balanced  
35 manner, all interests that will be significantly affected by the  
36 proposed rule, and whether it would be feasible and appropriate to  
37 establish a committee for a particular rule making. In establishing and  
38 administering a committee, the agency shall comply with the intent of  
39 this article.

40 2. The agency shall promptly publish notice of its determination and  
41 the reasons therefor in the state register, in such trade or other  
42 specialized publications, or by electronic means as it deems appropri-  
43 ate. In addition, a copy of such notice shall be sent to any person who  
44 applied for or nominated another person for membership on such commit-  
45 tee.

46 3. The agency shall provide appropriate administrative support to the  
47 committee, including technical assistance.

48 § 255. Conduct of committee activities. 1. Each negotiated rule making  
49 committee established pursuant to this article shall consider the  
50 matters proposed for consideration by the agency and shall attempt to  
51 reach consensus on a proposed rule with respect to such matters.

52 2. The person or persons representing the agency on a committee shall  
53 participate in the deliberations and activities of the committee with  
54 the same rights and responsibilities as the other members of the commit-  
55 tee, and shall be authorized to fully represent the agency in the  
56 discussions and negotiations of the committee.

1     3. The agency shall nominate a person to serve as a facilitator for  
2 the negotiations of the committee, subject to the approval of the  
3 committee by consensus. If the committee does not approve the nominee of  
4 the agency as facilitator, the committee shall select by consensus a  
5 person to serve as the facilitator. A person designated to represent the  
6 agency in negotiation of substantive issues shall not serve as facilita-  
7 tor or chair of the committee.

8     4. A facilitator approved or selected by a committee shall:

9     (a) chair the meetings of the committee in an impartial manner;

10    (b) impartially assist the members of the committee in conducting  
11 discussions and negotiations;

12    (c) manage the keeping of committee minutes, except that any personal  
13 notes and materials of the facilitator or members of the committee shall  
14 not be subject to this section; and

15    (d) at the conclusion of the proceeding, provide the agency with his  
16 or her observations and comments on the usefulness and effectiveness of  
17 the negotiated rule making proceeding, and such other comments as he or  
18 she deems pertinent.

19    5. A committee established pursuant to this article may adopt proce-  
20 dures governing its operation not inconsistent with the law.

21    6. (a) If a committee reaches a consensus on a proposed rule, at the  
22 conclusion of negotiations the committee shall transmit to the agency  
23 which established the committee a report containing such proposed rule,  
24 which shall be proposed for adoption by the agency within sixty days of  
25 receipt of the report. If the committee does not reach consensus on a  
26 proposed rule, the committee may transmit to the agency a report speci-  
27 fying any areas in which the committee reached a consensus. The commit-  
28 tee may include in the report and other information, recommendations or  
29 materials that the committee considers appropriate. Any committee member  
30 may include as an addendum to the report additional information, recom-  
31 mendations or materials.

32    (b) Any report transmitted pursuant to this section shall be provided  
33 to the committee at the same time such report is provided to the agency.

34    7. In addition to the report required by subdivision six of this  
35 section, a committee shall submit to the agency the records, materials  
36 and reports that were used to arrive at its recommendations. All such  
37 records shall be made available to the public for inspection and copy-  
38 ing.

39    8. All records and reports made pursuant to this section, except for  
40 any personal notes and materials of the facilitator or members of the  
41 committee, shall be open and accessible to the public for inspection and  
42 copying.

43    § 256. Committee termination. A negotiated rule making committee shall  
44 terminate upon promulgation of the final rule under consideration,  
45 unless the committee's charter contains an earlier termination date.

46    § 257. Services, facilities and payment of expenses of committee  
47 members. 1. An agency may employ or enter into contracts for the  
48 services of an individual or organization to serve as the facilitator  
49 for a negotiated rule making committee under this article, or may use  
50 the services of a state employee to act as the facilitator for such a  
51 committee.

52    2. For the purposes of this section, an agency may use the services  
53 and facilities of other state agencies, and public and private agencies  
54 and instrumentalities, with the consent of such agencies and instrumen-  
55 talities, and may receive and accept voluntary and uncompensated  
56 services from them.

1     3. Members of a committee shall be responsible for their own expenses  
2     of participation on such committee.

3     § 258. Judicial review. Any action relating to establishing, assisting  
4     or terminating a negotiated rule making committee pursuant to this arti-  
5     cle shall not be subject to judicial review. Nothing in this section  
6     shall bar judicial review of a rule if such judicial review is otherwise  
7     provided by law. A rule which is the product of negotiated rule making  
8     and is subject to judicial review shall not be accorded any greater  
9     deference by a court than a rule which is the product of other rule  
10    making procedures.

11    § 4. The provisions of this act shall preempt and supersede any incon-  
12    sistent executive order relating to negotiated rule making.

13    § 5. This act shall take effect immediately.