

STATE OF NEW YORK

1048

2019-2020 Regular Sessions

IN ASSEMBLY

January 14, 2019

Introduced by M. of A. SIMOTAS, HAWLEY -- read once and referred to the
Committee on Governmental Operations

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 Assem-
bly, 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 2019".

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
22 administrative procedure act as an alternative means of developing
23 appropriate and effective proposed rules.

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

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

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ARTICLE 2-A
NEGOTIATED RULE MAKING

Section 250. Purpose of article.

251. Definitions.

252. Determination of the need for negotiated rule making.

253. Notice of proposed committee formation.

254. Committee establishment.

255. Conduct of committee activities.

256. Committee termination.

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

258. Judicial review.

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

§ 251. Definitions. As used in this article:

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

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

3. "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.

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

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

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

(a) there is a need for a rule;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

49 3. Persons who would be significantly affected by a proposed rule and
50 who believe that their interests would not be adequately represented by
51 any person proposed by the agency to represent their interests, or who
52 believe that the proposed representation of interests on the committee
53 will not be fair and balanced, may apply for or nominate another person
54 for membership on the committee to represent such interests or to
55 achieve such balance. Each application or nomination shall include:

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

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

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

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

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

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

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

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

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

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

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

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

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

54 3. The agency shall nominate a person to serve as a facilitator for
55 the negotiations of the committee, subject to the approval of the
56 committee by consensus. If the committee does not approve the nominee of

1 the agency as facilitator, the committee shall select by consensus a
2 person to serve as the facilitator. A person designated to represent the
3 agency in negotiation of substantive issues shall not serve as facilita-
4 tor or chair of the committee.

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

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

7 (b) impartially assist the members of the committee in conducting
8 discussions and negotiations;

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

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

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

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

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

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

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

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

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

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

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

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

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

11 § 5. This act shall take effect immediately.