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ACHIEVING REGULATORY REFORM BY ENCOURAGING CONSENSUS

Richard Seamon
Joan Callahan

Government regulation poses a dilemma: We need regulation of private activity to protect public health and safety and to administer public lands and resources responsibly. Yet regulation can stifle economic growth and impair a business's ability to compete with businesses in jurisdictions that impose lower regulatory burdens. Worse yet, ineffective regulation can have these adverse effects without achieving significant public benefits. Consider all of the resources consumed to generate governmentally mandated disclosure forms — in health care settings and consumer transactions, for example — that almost no one reads.

Recognizing the dilemma posed by government regulation, the Idaho Legislature enacted new legislation in 2012 to make the regulatory process more responsive to competing public and private interests, with the aim of producing more effective, less burdensome regulations. The legislation amends the Idaho Administrative Procedure Act to require Idaho agencies to use negotiated rulemaking whenever it is feasible to do so.¹

This article discusses the 2012 Amendments.² The article begins by summarizing the process by which Idaho agencies make rules, then explains how the 2012 Amendments alter that process. Thereafter, the article focuses on how the changes will enable attorneys to advocate more effectively for clients whose interests are affected by state regulations.

The rulemaking process before the 2012 amendments

To understand the 2012 Amendments, you must understand the rulemaking process it affected. The rulemaking process in Idaho is prescribed in the Idaho Administrative Procedure Act (Idaho APA). The Idaho APA ensures public input by prescribing three required steps that Idaho agencies must follow when making rules, and a fourth optional step. The 2012 Amendments affect the fourth, optional step.

With certain exceptions, an Idaho agency must follow three steps to promulgate a rule. First, the agency must publish a notice of proposed rulemaking in an official publication called the Administrative Bulletin. The agency must include in this notice the text of the rule that the agency proposes to promulgate,

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so the public knows what the agency has in mind. Second, the agency must give the public at least 21 days to submit written comments on the proposed rule. Third, after considering the public input and making any changes to the rule that the agency considers appropriate, the agency must publish what is called a “pending rule,” to signify that the rule is not final until the legislature has reviewed it. The legislature can approve, modify, or reject the pending rule by concurrent resolution.

In addition to these three required steps, before 2012 the Idaho APA provided a fourth, optional step, to be taken *before* the agency published its notice of proposed rulemaking (the first step described above). The Idaho APA said that before formally proposing a rule, an agency could publish a notice of its intent to promulgate a rule. The purpose of the notice of intent, the Idaho APA explained, was “to facilitate negotiated rulemaking.” The Idaho APA added that agencies were “encouraged” to use negotiated rulemaking “whenever it is feasible to do so.” Thus, the pre-2012 Idaho APA gave agencies the option of using negotiated rulemaking to devise a proposed rule and encouraged them to use that option whenever possible.

Background on negotiated rulemaking

Negotiated rulemaking is described in the Idaho APA as “a process in which all interested persons and the agency seek consensus on the content of a rule.”³ The negotiated rulemaking process became popular in the 1990s as an informal, non-adversarial way of achieving smarter regulations.⁴ Congress enacted the Negotiated Rulemaking Act in 1990 to encourage federal agencies to use the process.⁵ The Idaho legislature first added analogous provisions to the Idaho APA in 1992.⁶ Idaho was one of several states, including

Washington and Montana, that enacted laws encouraging negotiated rulemaking.⁷

Negotiated rulemaking has several potential benefits for the agency and the public. Negotiated rulemaking can benefit the agency by fleshing out important issues and information before the agency devotes time and effort to drafting a proposed rule. Equipped with that knowledge, the agency should be able to draft a better proposed rule. If the proposed rule can be reached through consensus, it will presumably have buy-in from those whose interests will be affected by it, making the rule easier to enforce and less likely to face a judicial challenge. Negotiated rulemaking can benefit the public by creating an opportunity for public participation before the agency has invested time and effort into — and accordingly begins to get entrenched in favor of — a particular regulatory approach. Furthermore, the opportunity for public participation in negotiated rulemaking can be more informal and personalized by providing more opportunity for give-and-take discussions than the usual process, under which members of the public submit written comments on a proposed rule.

Despite its potential benefits, negotiated rulemaking was not universally embraced by agencies, including agencies in Idaho, in the wake of laws encouraging it. At least three reasons appear to account for many agencies' lack of enthusiasm: First, negotiated rulemaking takes extra agency time and effort, compared to the time and effort needed for an agency to draft a proposed rule with limited public participation. Second, some agencies may believe negotiated rulemaking forces the agency to give up too much control over the regulatory process. That is because to reach consensus, the agency may feel pressure to agree to a proposed rule that, from the agency's perspective, is less than

optimal. Third, agencies often have informal ways to get input from affected interests when drafting a proposed rule, and the agencies may regard these informal methods as less cumbersome, equally effective alternatives to negotiated rulemaking. Whatever the reasons, negotiated rulemaking did not become prevalent, despite legislative encouragement.

The 2012 Amendments were the result of efforts by private industry groups dissatisfied with Idaho agencies' overall response to the 1992 Idaho APA provisions encouraging negotiated rulemaking. Those groups included the Idaho Waters Users Association and the Idaho Association of Commerce and Industry.⁸ Those private interests perceived a lack of consistency among Idaho agencies in (1) their willingness to use negotiated rulemaking and (2) their agency-specific procedures for doing so. In addition, the private interests believed that some agencies went through the motions of negotiated rulemaking without really considering or meaningfully responding to private input. A bill to promote negotiated rulemaking passed the Idaho House in 2008 but failed in the Idaho Senate because of opposition from some Idaho agencies, including the Idaho Department of Health and Welfare and the Idaho Transportation Department.⁹ The same private interests behind the unsuccessful 2008 proposal finally succeeded in obtaining the 2012 Amendments, in large part because they drafted the later legislative proposal after consulting eight Idaho agencies and addressing those agencies' concerns.

2012 amendments

Recall that, before the 2012 Amendments, the Idaho APA made negotiated rulemaking largely optional: It "encouraged" Idaho agencies, "whenever . . . feasible," to use negotiated rulemaking to devise proposed rules. The Idaho APA did not, however, require agencies to explain why negotiated rulemaking was, or was not, feasible for a particular, contemplated rule. Consequently, an Idaho agency arguably could comply with the letter of the Idaho APA, if not the spirit, by deciding — as a general matter and without any formal announcement — that negotiated rulemaking was not feasible for its process of making rules. Furthermore, Idaho agencies that *did* conduct negotiated rulemaking did not have to explain how they responded to the information and comments they received from the public during the negotiated rulemaking process. There was, in other words, no agency "output"

In short, negotiated rulemaking is no longer just encouraged when feasible; it is required, when feasible, for every rule that an Idaho agency is considering promulgating.

that meaningfully responded to the public input.

The 2012 Amendments preclude this laissez-faire approach by establishing three requirements. First, an Idaho agency must now determine — for each and every rule that the agency is contemplating — whether or not negotiated rulemaking is feasible. Second, if the agency decides that negotiated rulemaking is *not* feasible, the agency must publish a written explanation of that decision in the notice of proposed rulemaking. Third, if the agency determines that negotiated rulemaking *is* feasible, the agency *must* use it.¹⁰ In short, negotiated rulemaking is no longer just encouraged when feasible; it is required, when feasible, for every rule that an Idaho agency is considering promulgating, and an agency must explain all determinations of infeasibility.

In addition to these requirements, the 2012 Amendments prescribe new procedures for negotiated rulemaking. The procedures will make the process more consistent across agencies and require the agency to document the substance of the process and not just the procedures. Under the new procedures, when the agency publishes its notice of intent to promulgate a rule, the agency must "state that interested persons have the opportunity to participate with the agency in negotiated rulemaking."¹¹ (Previously, the Idaho APA did not require the notice of intent expressly to mention negotiated rulemaking, though the Attorney General's rules on negotiated rulemaking did impose such a requirement.¹²) Thereafter, the agency has additional responsibilities. "[A]t a minimum," the agency must:

- Give "interested persons" a reasonable amount of time to respond to the notice of intent.
- Give, to all interested persons who respond to the notice of intent, notice of any meetings where interested persons will have an opportunity to discuss the contemplated rule.

- Give to those interested persons who attend the meetings "all information that is considered by the agency in connection with the formulation of the proposed rule," except information exempt from disclosure under the Public Records Act.

- Also give to interested persons who attend the meetings a regularly updated schedule of the negotiated rulemaking and a list of all documents and information pertinent to the proposed rule.

- Summarize in writing "unresolved issues, key information considered and conclusions reached during and as a result of the negotiated rulemaking."

- Make that summary available to people who attended the meetings.

The 2012 Amendments do not define the term "interested persons." Nor do they require the agency to seek out people whose interests may be affected by the contemplated rule. Rather, a person effectively self-identifies as "interested" by responding to the agency's notice of intent. The person apparently must then attend the meetings to be entitled to the information that the 2012 Amendments require the agency to make available. Thus, the 2012 Amendments do not create obligations owed by the agency to the public at large, but only to those who take affirmative steps to demonstrate their interest in a particular contemplated rule.

The official Statement of Purpose for the bill creating the 2012 Amendments makes clear that negotiated rulemaking involves not just negotiation but also the exchange of information. The Statement begins:

Negotiated rulemaking is often a critically important step for state agencies to take in developing rules based on consensus and the best information and expertise available from the private and public sectors.

This statement expresses a rather radical idea. The growth of the administrative

state in the New Deal era reflected the idea that agencies would be repositories of expertise on the social problems with which they were created to deal. Negotiated rulemaking, however, reflects that agencies are not the sole repositories of expertise. To the contrary, vital information and expertise exists outside the agency. Negotiated rulemaking enables (forces) the agency to tap into that information and expertise.

As a whole, the 2012 Amendments restrict Idaho agencies' discretion to avoid negotiated rulemaking. In this sense, you might say that the agencies were the "losers." By the same token, groups affected by regulation are winners: The 2012 Amendments should make it more possible for people whose interests will be affected by an agency regulation (and those people's attorneys) to advocate for those interests from the very beginning of the rulemaking process, when a regulation is little more than a gleam in the agency's eye.

Enforcement of the 2012 Amendment's negotiated rulemaking mandate

Although the 2012 Amendments restrict Idaho agencies' discretion to avoid negotiated rulemaking, the 2012 Amendments also made one big concession to the agencies: The 2012 Amendments bar judicial review of an agency's determination that negotiated rulemaking is not feasible.¹³ Does this bar on judicial review enable an agency to use invalid excuses to avoid negotiated rulemaking? The answer is probably not. In the absence of judicial review, Idaho's executive and legislative branches nevertheless have ways to prevent an agency from evading the negotiated rulemaking mandate.

The governor has a constitutional duty to ensure that the laws are faithfully executed and has many ways to ensure Idaho agencies faithfully execute the 2012 Amendments. For one thing, an Idaho agency cannot promulgate a rule without approval from the office of the governor, which signifies approval (or disapproval) using the Proposed/Temporary Administrative Rules Form (PARF).¹⁴ Thus, the governor's office could refuse to approve an agency's PARF for a rule that the agency improperly refused to use negotiated rulemaking to devise. No doubt the governor has many other informal ways of ensuring agency compliance with the 2012 Amendments.

The legislature can also ensure agency compliance with the 2012 Amendments.

As mentioned earlier, the legislature reviews pending rules before they become final. During the legislative review process of a pending rule, the legislature can review an agency's decision not to engage in negotiated rulemaking. The legislature's review will be aided by the written explanation of infeasibility that the agency is required to publish under the 2012 Amendments. Moreover, if the agency has engaged in negotiated rulemaking, the legislature can determine whether the agency did so in good faith. This determination will be aided by the written summary that the 2012 Amendments require the agency to prepare and distribute to interested persons. As described above, the summary must identify unresolved issues, key information considered, and conclusions reached in the negotiated rulemaking. Interested persons (and their representatives) may decide to appear before the legislature if they dispute the agency's infeasibility determination or its written summary.

Opportunities for advocates

The 2012 Amendments increase the opportunity for public input by people whose interests will be affected by a rule that an Idaho agency is contemplating, and by lawyers who represent those people. That increased opportunity arises when the potential for such input to matter is at its greatest — namely, before the agency puts pen to paper and begins drafting a proposed rule. The lawyer who wants to avail him- or herself of this opportunity most effectively will begin by monitoring agencies' notices of intent to promulgate a rule because those notices provide information for participating in the negotiated rulemaking process as an "interested person."¹⁵ The attorney who participates in the process should remember that effective advocacy requires a high-quality presentation of relevant information and discussion of relevant laws and policies. If despite the lawyer's best efforts the agency does not participate in good faith in the negotiated rulemaking process, the lawyer must determine what sources outside the agency can be brought to bear on the recalcitrant agency. For reasons discussed in this article, the most effective outside sources may very well reside in the governor's office and the Idaho legislature.

In any event, the 2012 Amendments have the potential to achieve meaningful regulatory reform. But that depends on the future efforts of Idaho agencies, ad-

vocates for people whose interests are affected by agency regulation, and existing political controls on agency action.

Endnotes

- ¹ Special thanks to Brian Kane, Assistant Chief Deputy, Idaho Attorney General's Office and Senator Curt McKenzie for their time and sharing their knowledge and perspectives on the legislation and negotiated rulemaking requirements.
- ² 2012 Idaho Sess. Laws, chapter 310, at 856–858 (approved Apr. 5, 2012), codified at Idaho Code (I.C.) §§ 67-5220 & 67-5221.
- ³ I.C. § 67-5220(2).
- ⁴ See generally Philip Harter, *Negotiating Regulations: A Cure for Malaise*, 71 Geo. L.J. 1 (1982).
- ⁵ 5 U.S.C. §§ 561–570 (2012).
- ⁶ 1992 Idaho Sess. Laws 793 (Ch. 263, § 9).
- ⁷ Minn. Stat. Ann. § 14.101; Mont. Code Ann. § 2-4-304; Neb. Rev. Stat. Ann. §§ 84-921–84-932; Tex. Gov't Code §§ 2008.001–2008.058; Wash. Rev. Code Ann. § 34.05.310; Wis. Stat. Ann. 227.13; see also 2010 Model State APA § 303; 1981 Model State APA § 3-101.
- ⁸ See Minutes of Senate State Affairs Comm., Idaho Legislature, at 3 (Mar. 7, 2012) (testimony on S. 1366).
- ⁹ See Minutes of Senate State Affairs Comm., Idaho Legislature, at 5–6 (Mar. 12, 2008) (testimony on H. 531a).
- ¹⁰ I.C. § 67-5220(1).
- ¹¹ I.C. § 67-5220(1).
- ¹² IDAPA 04.11.01.812.
- ¹³ I.C. § 67-5220(1).
- ¹⁴ State of Idaho, Office of the Administrative Rules Coordinator, *The Idaho Rule Writer's Manual 16*, available at http://adminrules.idaho.gov/rulemaking_templates/rule_draftmanual.pdf.
- ¹⁵ The Idaho Office of the Administrative Rules Coordinator has set up a web page listing all current notices of intent published by Idaho agencies: http://adminrules.idaho.gov/Negotiated_Notices/index.html.

About the Authors

Richard Seamon is a professor at the University of Idaho College of Law and is currently working, with several co-authors, on a book for practitioners on Idaho administrative law.



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