Rethinking Negotiated Rulemaking

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Hannah J. Wiseman, *Negotiated Rulemaking and New Risks: A Rail Safety Case Study*, **Wake Forest J.L. & Pol'y** (forthcoming 2017), available at **SSRN**.

Hannah Wiseman's insightful case study has forced me to rethink my views both on negotiated rulemaking and, more broadly, on all forms of notice and comment rulemaking. Negotiated rulemaking (Reg-Neg) adds one important step—negotiation—to the familiar notice and comment process. Reg-Neg got a lot of attention, both positive and negative, a quarter of a century ago. Many agencies experimented with the process. The D.C. Circuit expressed its approval of Reg-Neg in its 1988 opinion in *NRDC v. EPA*, 859 F. 2d 156, and Congress legitimated the process by enacting the Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561-570.

After attracting an initial flurry of scholarship—pro and con—and after an initial period in which many agencies tried the process, Reg-Neg seemed to disappear both from the scholarly literature and from agency practice. Professor Wiseman has found, and studied, an important context in which Reg-Neg continues to be used, with results that do not fit well with either the views of its supporters or its detractors.

The Federal Railroad Administration (FRA) and the Pipeline and Hazardous Materials Safety Administration (PHMSA) have used Reg-Neg on a regular basis for over two decades. Most recently, FRA and PHMSA used Reg-Neg to issue rules governing the safe transport of crude oil and ethanol by rail and pipeline. As Professor Wiseman points out, this is a new risk, in the important sense that the combination of large increases in the amount of crude oil and ethanol transported have combined with the significantly increased volatility and toxicity of crude oil from some new sources to create risks that differ from, and are much larger than, the risks that the transporters and the regulators confronted in the past.

In this context, Professor Wiseman found that use of the Reg-Neg process had important advantages over traditional notice and comment rulemaking. Use of Reg-Neg in this situation, combined with the unusually close relationship between the agencies and the regulated firms that was created by the agencies' regular use of Reg-Neg in the past, allowed the agencies to issue rules rapidly and to obtain an unusually high degree of voluntary cooperation from the regulated firms both in expediting the rulemaking process and in complying with the new rules. The agencies' regular use of Reg-Neg in the past allowed them to develop a good baseline technical knowledge of the regulated industry and encouraged the regulated firms to be particularly forthcoming with the information, analysis and expertise that were critical to the process of issuing effective rules.

Professor Wiseman also identified serious disadvantages to the Reg-Neg process, however. They included: (1) little involvement of representatives of interests other than those of the regulated firms in the negotiation process; (2) lack of attention to the potential for broader harms, like long-term environmental damage, that accidents can cause; and (3) reluctance to question the opinions offered by regulated firms.

Professor Wiseman also emphasized the important roles that the National Transportation Safety Board (NTSB) played in the rulemaking process. NTSB prodded FRA and PHMSA to act rapidly and effectively to address the new risks, provided valuable expert knowledge of those risks, and "serve[d] as an important counterweight to the strong influence of industry and labor stakeholders who repeatedly interact with the rulemaking agency, whose interests do not always align with those of the broader public." Professor Wiseman questioned whether the Reg-Neg process would have produced effective and expeditious results without the active involvement of an assertive expert agency that does not

have the cozy relationship with regulated firms that characterizes FRA and PHMSA.

I have long shared the view of Reg-Neg that Judge Posner expressed in *USA Group Loan Services v. Riley*, 82 F.3d 708, 714 (1996): Reg-Neg represents "the final confirmation of the 'capture' theory of administrative regulation." Professor Wiseman's important contribution to the literature has not caused me to change that view. She has forced me to think about the merits and demerits of Reg-Neg in a different way, however.

Recent studies have found that regulated firms have "captured" the traditional notice and comment rulemaking process. *See* Elizabeth Warren, *Corporate Capture of the Rulemaking Process*, RegBlog (June 14, 2016); Richard Pierce, *The Administrative Conference and Empirical Research*, 83 Geo. Wash. L. Rev. 1564 (2015). Given large information asymmetries and systemic differences between the incentives of regulated firms and beneficiaries of regulation to devote significant resources to the decision-making process, we may have to choose between two forms of capture of the decision-making process. Professor Wiseman has persuaded me to consider the possibility that Reg-Neg may be a more benign form of capture in at least some important circumstances.

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