

GOVERNMENT CODE

TITLE 10. GENERAL GOVERNMENT

SUBTITLE A. ADMINISTRATIVE PROCEDURE AND PRACTICE

CHAPTER 2008. NEGOTIATED RULEMAKING

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 2008.001. SHORT TITLE. This chapter may be cited as the Negotiated Rulemaking Act.

Added by Acts 1997, 75th Leg., ch. 1315, Sec. 1, eff. Sept. 1, 1997.

Sec. 2008.002. DEFINITIONS. In this chapter:

(1) "State agency" means an officer, board, commission, department, or other agency in the executive branch of state government with statewide jurisdiction that makes rules. The term includes:

(A) the attorney general;

(B) an institution of higher education as defined by Section 61.003, Education Code; and

(C) the State Office of Administrative Hearings.

(2) The terms "party," "person," and "rule" have the meanings assigned by Section 2001.003.

Added by Acts 1997, 75th Leg., ch. 1315, Sec. 1, eff. Sept. 1, 1997.

Sec. 2008.003. COSTS OF PARTICIPATING IN NEGOTIATED RULEMAKING. (a) A member of a negotiated rulemaking committee established under Subchapter B is responsible for the member's own costs in serving on the committee, except as provided by Subsection (b).

(b) The state agency that established the negotiated rulemaking committee may pay a member's technical assistance expenses and reasonable travel and per diem costs related to the member's service on the committee at the rate set in the General Appropriations Act for state employees and may provide a reasonable rate of compensation to the member if:

(1) the member certifies that the member lacks sufficient financial resources to participate as a member of the

committee; and

(2) the agency determines that the member's service on the committee is necessary for the adequate representation of an affected interest.

(c) The state agency that established the negotiated rulemaking committee shall provide appropriate administrative support to the committee.

Added by Acts 1997, 75th Leg., ch. 1315, Sec. 1, eff. Sept. 1, 1997.

#### SUBCHAPTER B. PROCEDURES FOR NEGOTIATED RULEMAKING

Sec. 2008.051. AUTHORITY FOR NEGOTIATED RULEMAKING. A state agency may engage in negotiated rulemaking to assist it in drafting a proposed rule by following the procedures prescribed by this chapter.

Added by Acts 1997, 75th Leg., ch. 1315, Sec. 1, eff. Sept. 1, 1997.

Sec. 2008.052. APPOINTMENT AND DUTIES OF CONVENER. (a) A state agency that proposes to engage in negotiated rulemaking shall appoint a convener to assist the agency in determining whether it is advisable to proceed.

(b) The state agency may appoint an agency employee or contract with another individual to serve as the convener. The convener may not have a financial or other interest in the outcome of the rulemaking process that would interfere with the person's impartial and unbiased service as the convener.

(c) The convener shall assist the agency in identifying persons who are likely to be affected by the proposed rule, including persons who oppose the issuance of a rule. The convener shall discuss with those persons or their representatives:

(1) whether they are willing to participate in negotiated rulemaking;

(2) whether the agency should engage in negotiated rulemaking to develop the proposed rule;

(3) which issues that a negotiated rulemaking committee should address; and

(4) whether there are other persons the convener needs

to identify who may be affected by the proposed rule.

(d) The convener shall then recommend to the agency whether negotiated rulemaking is a feasible method to develop the proposed rule and shall report to the agency on the relevant considerations, including:

(1) the number of identifiable interests that would be significantly affected by the proposed rule;

(2) the probability that those interests would be adequately represented in a negotiated rulemaking;

(3) the probable willingness and authority of the representatives of affected interests to negotiate in good faith;

(4) the probability that a negotiated rulemaking committee would reach a unanimous or a suitable general consensus on the proposed rule;

(5) the probability that negotiated rulemaking will not unreasonably delay notice and eventual adoption of the proposed rule;

(6) the adequacy of agency and citizen resources to participate in negotiated rulemaking;

(7) the probability that the negotiated rulemaking committee will provide a balanced representation between public and regulated interests; and

(8) the willingness of the agency to accept the consensus of a negotiated rulemaking committee as the basis for the proposed rule.

Added by Acts 1997, 75th Leg., ch. 1315, Sec. 1, eff. Sept. 1, 1997.

Sec. 2008.053. NOTICE REQUIREMENTS FOR NEGOTIATED RULEMAKINGS. (a) After considering the convener's recommendation and report, a state agency that intends to engage in negotiated rulemaking shall publish timely notice of its intent in appropriate media and file timely notice of its intent with the secretary of state for publication in the Texas Register. The notice must include:

(1) a statement that the agency intends to engage in negotiated rulemaking;

(2) a description of the subject and scope of the rule

to be developed;

(3) a description of the known issues to be considered in developing the rule;

(4) a list of the interests that are likely to be affected by the proposed rule;

(5) a list of the individuals the agency proposes to appoint to the negotiated rulemaking committee to represent the agency and affected interests;

(6) a request for comments on the proposal to engage in negotiated rulemaking and on the proposed membership of the negotiated rulemaking committee; and

(7) a description of the procedure through which a person who will be significantly affected by the proposed rule may, before the agency establishes the negotiated rulemaking committee, apply to the agency for membership on the committee or nominate another to represent the person's interests on the committee.

(b) A state agency that intends to proceed with the rulemaking process after receiving the report of the negotiated rulemaking committee shall announce in a statement accompanying the notice of a proposed rule required by Subchapter B, Chapter 2001, that:

(1) negotiated rulemaking was used in developing the proposed rule; and

(2) the report of the negotiated rulemaking committee is public information and the location at which the report is available to the public.

Added by Acts 1997, 75th Leg., ch. 1315, Sec. 1, eff. Sept. 1, 1997.

Sec. 2008.054. APPOINTMENT AND DURATION OF NEGOTIATED RULEMAKING COMMITTEE. (a) After considering comments it receives in response to the notice of proposed negotiated rulemaking, a state agency that intends to proceed shall establish a negotiated rulemaking committee and appoint the members of the committee.

(b) A state agency shall consider the appropriate balance between representatives of affected interests in appointing the negotiated rulemaking committee.

(c) The state agency shall appoint individuals to the

committee to represent the agency and appoint other individuals to the committee to represent the interests identified by the agency that are likely to be affected by the proposed rule. Article 6252-33, Revised Statutes, does not apply to the size or composition of the committee or to the agency's ability to reimburse expenses of committee members under Section 2008.003(b).

(d) The committee is automatically abolished on the adoption of the proposed rule, unless the committee or the state agency after consulting the committee specifies an earlier abolition date.

Added by Acts 1997, 75th Leg., ch. 1315, Sec. 1, eff. Sept. 1, 1997.

Sec. 2008.055. APPOINTMENT OF FACILITATOR. (a) Concurrently with its establishment of the negotiated rulemaking committee, a state agency shall appoint a facilitator. The agency may appoint an agency employee, subject to Subdivision (b)(3), or contract with another state employee or private individual to serve as the facilitator. The agency's appointment of the facilitator is subject to the approval of the negotiated rulemaking committee and the facilitator serves at the will of the committee.

(b) The facilitator:

(1) must possess the qualifications required for an impartial third party under Section 154.052(a) and (b), Civil Practice and Remedies Code;

(2) is subject to the standards and duties prescribed by Section 154.053(a) and (b), Civil Practice and Remedies Code, and has the qualified immunity prescribed by Section 154.055, Civil Practice and Remedies Code, if applicable;

(3) shall not be the person designated to represent the agency on the negotiated rulemaking committee on substantive issues related to the rulemaking; and

(4) shall not have a financial or other interest in the outcome of the rulemaking process that would interfere with the person's impartial and unbiased service as the facilitator.

Added by Acts 1997, 75th Leg., ch. 1315, Sec. 1, eff. Sept. 1, 1997.

Sec. 2008.056. DUTIES OF NEGOTIATED RULEMAKING COMMITTEE

AND FACILITATOR. (a) The facilitator shall preside over meetings of the negotiated rulemaking committee and assist the members of the committee:

(1) to establish procedures for conducting negotiations; and

(2) to discuss, negotiate, mediate, and employ other appropriate alternative dispute resolution processes to arrive at a consensus on the proposed rule.

(b) It is presumed that the committee has reached a consensus on a matter only if the consensus is unanimous, unless the committee unanimously:

(1) agrees to define a consensus to mean a general rather than a unanimous consensus; or

(2) agrees to define the term in another manner.

(c) The facilitator shall encourage the members of the committee to reach a consensus but may not compel or coerce the members to do so.

(d) At the conclusion of the negotiations, the committee shall send a written report to the agency that:

(1) contains the text of the proposed rule, if the committee reached a consensus on the proposed rule; or

(2) specifies the issues on which the committee reached consensus, the issues that remain unsolved, and any other information, recommendations, or materials that the committee considers important, if the committee did not reach a consensus on the proposed rule.

Added by Acts 1997, 75th Leg., ch. 1315, Sec. 1, eff. Sept. 1, 1997.

Sec. 2008.057. CONFIDENTIALITY OF CERTAIN RECORDS AND COMMUNICATIONS. (a) Sections 154.053 and 154.073, Civil Practice and Remedies Code, apply to the communications, records, conduct, and demeanor of the facilitator and the members of the negotiated rulemaking committee as if the negotiated rulemaking were a dispute being resolved in accordance with Chapter 154, Civil Practice and Remedies Code.

(b) In the negotiated rulemaking context the attorney general, subject to review by a Travis County district court,

decides in accordance with Section 154.073(d), Civil Practice and Remedies Code, whether a communication or material subject to Section 154.073(d) is confidential, excepted from required disclosure, or subject to required disclosure.

(c) Notwithstanding Section 154.073(e), Civil Practice and Remedies Code:

(1) a private communication and a record of a private communication between a facilitator and a member or members of the committee are confidential and may not be disclosed unless the member or members of the committee, as appropriate, consent to the disclosure; and

(2) the notes of a facilitator are confidential except to the extent that the notes consist of a record of a communication with a member of the committee who has consented to disclosure in accordance with Subdivision (1).

(d) The report and recommendations of a convener and a negotiating committee are public information and available on request to any member of the public.

Added by Acts 1997, 75th Leg., ch. 1315, Sec. 1, eff. Sept. 1, 1997.

Amended by Acts 1999, 76th Leg., ch. 1352, Sec. 4, eff. Sept. 1, 1999.

Sec. 2008.058. ADMINISTRATIVE PROCEDURE ACT REQUIREMENTS UNAFFECTED. (a) This chapter does not affect the rulemaking requirements prescribed by Chapter 2001.

(b) A state agency that intends to proceed with the rulemaking process after receiving the report of the negotiated rulemaking committee shall proceed in accordance with the requirements prescribed by Subchapter B, Chapter 2001.

Added by Acts 1997, 75th Leg., ch. 1315, Sec. 1, eff. Sept. 1, 1997.