

US Department of Energy’s Regulatory Negotiations Convening on Commercial Certification for Heating, Ventilating, Air-Conditioning, and Refrigeration Equipment Public Information for Convening Interviews

I. What are the substantive issues DOE seeks to address?

- Strategies for grouping various basic models for purposes of certification;
- Identification of non-efficiency attributes, which do not impact the measured consumption of the equipment as tested by DOE’s test procedure;
- The information that is certified to the Department;
- The timing of when the certification should be made relative to distribution in commerce; and
- Alterations to a basic model that would impact the certification.

II. What is a negotiated rulemaking and the convening process?

Negotiated rulemaking (often called “reg neg”) is a consensus process governed by the Negotiated Rulemaking Act (NRA)(5 USC §§ 562-570). In a reg neg, a balanced group of stakeholders, chartered as a committee under the Federal Advisory Committee Act (FACA), works with the agency to negotiate text of a notice of proposed rulemaking (NPR). If a consensus emerges from negotiations, all committee members, including the agency, would agree to support it. Next, a regular notice-and-comment process takes place under the Administrative Procedure Act. While many fewer public comments would likely be received than in an ordinary rulemaking, since most interested entities would have participated in developing the proposal, the agency nevertheless would be required to address any comments in the same manner as with a standard NPR process.

Prior to deciding to move forward with a reg neg, an agency must determine whether the subject of the rulemaking is appropriate for a reg neg (NRA§ 563). A convening, conducted by a neutral party, the convener, is a feasibility assessment of the likelihood a consensus process can be successful, and it identifies and recommends the key parties to invite to join the committee. Specifically, as provided by the NRA, the convener identifies parties that will be “significantly affected” by the NPR and assists the agency to determine whether establishing a committee is “feasible and appropriate” (NRA § 563). The convener synthesizes the interviews in a convening report without attribution, to ensure the parties’ views can remain confidential. The parties interviewed, however, will be listed in an appendix to the report.

III. What assurances do I have that the convener is a neutral party that will maintain the confidentiality of our communications?

Under the NRA and other legal authorities, confidentiality of the information gathered during the convening is a key cornerstone to ensure success of the process. The convening is a candid exchange between the convener and interested parties, including the agency. The goal of convening is to provide the best data upon which the agency can decide whether and how to proceed with a reg neg.

DOE's policy on the confidentiality of communications with a neutral convener in a reg neg, regardless of whether they are a private contractor or federal employee, is based on the Administrative Dispute Resolution Act (ADRA)(5 USC §§ 571-584). Under the ADRA, the convener of a reg neg is prohibited from disclosing, and cannot be forced to disclose, communications related to the reg neg, with limited exceptions. The ADRA also includes an exception that protects documents held by the convener from disclosure under the Freedom of Information Act. Consequently, based on the ADRA, it is DOE's policy that the convener's notes and other communications with the parties will not be disclosed to DOE or the public. In addition, as required by the NRA, parties must trust the convener is impartial and independent. In fact, the NRA requires DOE to determine that a neutral convener has "no financial or other interest that would preclude [him] from serving in an impartial and independent manner" (NRA § 568). Based on the desire to ensure the confidentiality of communications with the convener and that the convener is indeed impartial and independent, DOE has chosen to utilize Alan Strasser as the convener. This selection is based on Mr. Strasser's proven experience in the private sector as a neutral convener on several negotiated rulemakings, including an effort in 1999 on residential central air conditioners. Mr. Strasser is currently a regulatory attorney at the Department of Transportation working on detail at DOE. For his detail, Mr. Strasser primarily supports DOE's General Counsel's Office advising on regulatory programs, and on a limited basis has advised on enforcement matters. DOE has determined that Mr. Strasser has "no financial or other interest that would preclude [him] from serving in an impartial and independent manner" (NRA § 568).

In addition to safeguards outlined above and adopted in DOE's policy based on the NRA and ADRA, DOE has established rigorous communication protocols to ensure Mr. Strasser does not communicate with, nor will be contacted by, any DOE employees regarding the content of the discussions with stakeholders; instead, he will only be able to disclose information presented in the convening report, and only then, in a manner that protects the anonymity of interviewees. Furthermore, DOE has ensured that Mr. Strasser is not assigned to work on any matters regarding the residential or commercial air conditioning industry or the residential or commercial refrigeration equipment industry, and will not work on this rulemaking beyond the convening stage. Finally, DOE has required Mr. Strasser to follow detailed protocols regarding documentation developed or received in the course of the convening. First, he will destroy all personal notes developed during the convening interviews once the convening report is issued to DOE and the public. Second, if federal law requires that Mr. Strasser maintains federal records, they will be maintained in a manner that will ensure that they will not be disclosed. Third, if parties provide documents to Mr. Strasser during the convening process, he will return them upon request once the convening report is issued to DOE and the public. A contractor for the Department of Energy will serve as an assistant to Mr. Strasser in the convening process, and is similarly considered a neutral convener; therefore, s/he is also governed under all the laws and safeguards as described above.

Mr. Strasser's role in the convening process is prescribed by the NRA. He will ask each party questions in order to determine the likelihood the parties can converge on the issues. Beyond attempting to gauge the feasibility of moving forward, Mr. Strasser's questions will also be aimed at defining the subject and scope of the negotiations. Once the issues are identified, Mr. Strasser will ask participants what persons are qualified to "represent the significantly impacted

interests” (NRA § 563). Should he recommend to DOE that a reg neg is feasible, he will provide a list of recommended parties who would be empanelled in a committee. Following the interviews, Mr. Strasser will provide a convening report to DOE, all parties that were interviewed, and the public. If DOE wants to move forward with a reg neg, it must then publish a Notice of Intent, which includes an opportunity for comment on membership of the proposed committee and allows any person to apply to be nominated as a committee member. DOE must also file a charter under FACA before it formally establishes a negotiating committee.

IV. Who do I contact for more information?

For questions about the convening process, contact Mr. Strasser, the convener, at 202-586-8269. For legal questions, contact Daniel Cohen, Assistant General Counsel for Legislation, Regulation and Energy Efficiency, at 202-586-9523.