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State Agency Rulemaking: Beyond Minimum Compliance

Go-To Guide

- Massachusetts Supreme Judicial Court invalidates agency guidelines for non-compliance with Administrative Procedures Act.
- Strict adherence to state administrative procedures is crucial for enforceable regulations.
- Negotiated rulemaking (“Reg-Neg”) offers potential benefits beyond minimum compliance requirements.
- Agencies should consider balancing speed, compliance, and stakeholder engagement in the regulatory rulemaking process.

On Jan. 8, 2025, in *Attorney General v. Town of Milton*, SJC-13580, the Massachusetts Supreme Judicial Court (SJC) refused to enforce certain “guidelines” promulgated by the Massachusetts Executive Office of Housing and Livable Communities (HLC), which the MBTA Communities Act explicitly called for. According to the SJC, the guidelines were ineffective because the HLC failed to strictly follow the statutory procedures in the Massachusetts Administrative Procedures Act (MA APA) when adopting the guidelines. As a result, if the HLC wants to enforce the guidelines, they “must be repromulgated in accordance with [the MA APA].”

As the SJC explained, the MA APA establishes minimum standards of fair procedure that agencies must follow when promulgating rules that satisfy the MA APA’s definition of a “regulation” (relying on *Carey v. Comm. Of Correction*, 479 Mass. 367 (2018)). Although it appears HLC performed several of the activities

called for in the MA APA (such as receiving comment), the SJC found that HLC did not strictly comply with all required procedures.

Following the SJC decision, HLC adopted emergency regulations substantially similar to the initial guidelines that will remain in effect for 90 days. HLC has indicated that it intends to adopt permanent regulations following a public comment period before the emergency regulations expire.

The SJC's decisions in *Town of Milton* and *Carey* highlight that the regulatory landscape has become increasingly complex. State agencies face the challenge of creating regulations that balance multiple interests while complying with legal mandates of the MA APA and other statutes and acting with the speed policymakers expect. Although the MA APA's minimum requirements must be followed, under certain circumstances state agencies may want to consider doing more than the minimum to build public trust and diminish the likelihood of their rulemaking being challenged. This is particularly true in the case of complex, industry-specific regulations where the insights of experts and knowledgeable stakeholders add value to the regulatory rulemaking process.

One effective method to achieve those goals is through “negotiated rulemaking” (known as “Reg-Neg” and outlined in the federal Negotiated Rulemaking Act of 1996, 5 U.S.C. § 561-570a). Through a Reg Neg process, an agency works with an independent “convener” who helps the agency decide whether a negotiated rulemaking process may feasibly result in a consensus agreement on the contemplated regulatory language. To do so, the convener works with the agency first to identify all relevant stakeholders or stakeholder groups that may be affected or have an interest in the regulations. Then, the convener works with the agency and stakeholders to understand joint and competing interests, concerns, and needs underlying the proposed regulations. Also, the convener identifies industry experts needed for the proposed rulemaking negotiation. After the initial investigation and analysis, the convener then prepares a comprehensive convening assessment report, which determines whether achieving consensus through a negotiated rulemaking process is feasible.

If feasible and if the agency and stakeholders agree to pursue a Reg Neg process, the convener meets with the agency and stakeholders to help the parties select a Reg Neg Committee, which consists of appointed agency personnel and stakeholder representatives. The Reg Neg Committee then retains a facilitator (which often is the convener) to establish and oversee the Reg Neg process. Importantly, the facilitator is *independent* and focused on making sure the Reg Neg Committee reaches consensus on the proposed regulations within the proper timeframe required by governing law, as well as satisfies all relevant interests. In Massachusetts, like other states, the MA APA permits such a Reg Neg process, so long as it also satisfies the MA APA's minimum requirements.

If the Reg Neg Committee follows an appropriate Reg Neg process, the hallmark of which is transparency and collaboration, the proposed regulations generally are easier to implement and less likely to be challenged administratively or through litigation (*see Administrative Conference of the United States “Negotiated Rulemaking and Other Options for Public Engagement”*). That is because, based on the convening assessment, the facilitator is generally better able to prevent impasse and help the parties reach consensus in a collaborate way. Bringing together diverse stakeholders, giving them a seat at the table, and including them in the regulation drafting and approval process helps create ownership among the agency's constituents and helps build public trust. In essence, stakeholders who help draft regulations may be more likely to accept and follow those regulations, while regulations that stakeholders believe are foisted upon them over their public comments and objections may find new forums to continue those objections. By involving agreed-to industry experts, enacted regulations themselves are generally of greater quality. Finally, doing more than the minimum may result in a more efficient rulemaking process,

may reduce costs due to avoiding regulatory starts and stops and may preemptively avoid disputes and unnecessary litigation costs.

For these reasons, adopting a Reg Neg process to adopt or revise regulations in Massachusetts or other jurisdictions may be a powerful tool for agencies looking to craft well-balanced, sustainable, and effective regulations that enjoy broad support and are easier to implement.

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