

## **BILL ANALYSIS**

Senate Research Center

S.B. 882  
By: Brown  
State Affairs  
3-18-97  
As Filed

### **DIGEST**

Currently, negotiated rulemaking, also known as regulatory negotiation, is an alternative model for rulemakings and similar government decision-making. It is a consensus-based process which complements the traditional notice-and-comment and public hearings requirements with a preliminary intensive negotiation effort. Negotiated rulemaking has been used extensively by federal agencies and is increasingly utilized by state agencies. Fourteen federal agencies and departments have used the process since 1980, as well as at least 15 states. In addition, negotiated rulemaking has been used twice in Texas and is consistent with Texas law.

This legislation authorizes the use of negotiated rulemaking by state agencies in drafting proposed rules, and defines the requirements of the procedure. The negotiated rulemaking process is supplemental to all existing rulemaking requirements, and the final draft of the rule remains the responsibility of the agency, while the requirements of public notice of adoption of the final rule remain the same as under current practice.

### **PURPOSE**

As proposed, S.B. 882 establishes the use of negotiated rulemaking by state agencies.

### **RULEMAKING AUTHORITY**

This bill does not grant any additional rulemaking authority to a state officer, institution, or agency.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Title 10A, Government Code, by adding Chapter 2008, as follows:

#### **CHAPTER 2008. NEGOTIATED RULEMAKING**

##### **SUBCHAPTER A. GENERAL PROVISIONS**

Sec. 2008.001. SHORT TITLE: Negotiated Rulemaking Act.

Sec. 2008.002. DEFINITIONS. Defines "state agency," "party," "person," and "rule."

Sec. 2008.003. COSTS OF PARTICIPATING IN NEGOTIATED RULEMAKING. Provides that a member of a negotiated rulemaking committee is responsible for the member's own costs in serving the committee, except as provided by Subsection (b). Sets forth the terms by which the state agency that established the negotiated rulemaking committee is authorized to pay a member's technical assistance expenses, travel and per diem costs, and compensation at a certain rate, provided certain conditions exist. Requires the state agency to provide appropriate administrative support to the committee.

##### **SUBCHAPTER B. PROCEDURES FOR NEGOTIATED RULEMAKING**

Sec. 2008.051. AUTHORITY FOR NEGOTIATED RULEMAKING. Authorizes a state agency to engage in negotiated rulemaking to assist it in drafting a proposed rule.

Sec. 2008.052. APPOINTMENT AND DUTIES OF CONVENOR. Establishes the conditions under which a state agency that proposes to engage in negotiated rulemaking is required to appoint a convenor to assist the agency in determining whether it is advisable to proceed. Prohibits the convenor from having a financial or other interest in the outcome of the rulemaking process. Requires the convenor to assist the agency in identifying persons likely to be affected by the proposed rule, and to discuss certain issues with those persons or their representatives. Requires the convenor to then recommend to the agency whether negotiated rulemaking is a feasible method, and report to the agency on certain relevant considerations.

Sec. 2008.053. NOTICE OF PROPOSED NEGOTIATED RULEMAKING. Sets forth the terms by which a state agency that intends to engage in negotiated rulemaking is required to file with the secretary of state and publish in appropriate media notice of its intent. Sets forth the contents of the notice.

Sec. 2008.054. APPOINTMENT AND DURATION OF NEGOTIATED RULEMAKING COMMITTEE. Establishes the conditions under which a state agency that intends to proceed with negotiating rulemaking is required to establish a negotiated rulemaking committee and appoint members of the committee such that the committee is balanced between public and regulated interests. Provides that the committee is automatically abolished on the adoption of the proposed rule, unless the committee or the state agency specifies an earlier abolition date.

Sec. 2008.055. APPOINTMENT OF FACILITATOR. Sets forth the terms under which a state agency is required to appoint a facilitator subject to the approval of, and at the will of, the committee. Establishes the qualifications and qualified immunity of the facilitator, and the standards and duties to which a facilitator is subject. Prohibits the facilitator from being the person designated to represent the agency on the committee on substantive issues relating to rulemaking, and from having a financial or other interest in the outcome of the rulemaking process.

Sec. 2008.056. DUTIES OF NEGOTIATED RULEMAKING COMMITTEE AND FACILITATOR. Requires the facilitator to preside over meetings and assist the members in establishing procedures for conducting negotiations and employing appropriate alternative dispute resolution processes to arrive at a consensus on the proposed rule. Sets forth the terms under which it is presumed that the committee has reached a consensus on a matter. Requires the facilitator to encourage the members to reach a consensus, but prohibits the facilitator from compelling or coercing the members. Requires the committee to send a written report to the agency containing certain information at the conclusion of the negotiations.

Sec. 2008.057. CONFIDENTIALITY OF CERTAIN RECORDS AND COMMUNICATIONS. Establishes the conditions under which Sections 154.053 and 154.073, Civil Practice and Remedies Code, apply to the communications, records, and conduct of the facilitator and members of the committee. Provides that the attorney general, subject to review by the Travis County district court, decides whether a communication or material is confidential or subject to required disclosure, and makes exceptions. Provides that the report and recommendations of a convenor and committee are public information and available on request.

Sec. 2008.058. ADMINISTRATIVE PROCEDURE ACT REQUIREMENTS UNAFFECTED. Provides that this chapter does not affect the rulemaking requirements prescribed by Chapter 2001. Requires a state agency that intends to proceed with the rulemaking process after receiving the report of the committee to proceed in accordance with the requirements prescribed by Chapter 2001B.

SECTION 2. Effective date: September 1, 1997.

SECTION 3. Emergency clause.