



Memorandum

To: Committee on Rulemaking
From: Emily S. Bremer (Staff Counsel)
Date: April 3, 2014
Re: Ex Parte Communications in Informal Rulemaking: Draft Recommendation

The following draft recommendation is based on Esa Sferra-Bonistalli’s report “Ex Parte Communications in Informal Rulemaking” and the Committee’s discussion at its February 27, 2014 public meeting. This draft is intended to facilitate the Committee’s discussion at its next public meeting, and not to preempt the Committee’s discussion and consideration of the draft recommendations. In keeping with the Conference’s past practice, a draft preamble has been included. The aim of the preamble is to explain the problem or issue the recommendation is designed to address, and the Committee should feel free to revise it as appropriate.

Draft Preamble

Informal communications between agency personnel and individual members of the public have traditionally been an important and valuable aspect of informal rulemaking proceedings conducted under section 553 of the Administrative Procedure Act (APA).¹ Borrowing terminology from the judicial context, these communications are often referred to as “ex parte” contacts.² The APA prohibits ex parte contacts in formal adjudications and formal rulemakings conducted under the trial-like procedures of sections 556 and 557.³ Section 553, however, imposes no comparable restriction in the context of informal rulemaking. In this context, “ex parte communication” refers to written or oral communications regarding an anticipated or ongoing rulemaking that are received from members of the public but are not submitted to the public rulemaking docket. The term “ex parte,” though commonly used here, does not fit comfortably, because such communications in this context “are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness.”⁴

¹ See 5 U.S.C. § 553.

² In the judicial context, “ex parte” contacts are those that occur between just one of the parties involved in a lawsuit and the presiding judge, usually “without notice to or argument from the adverse party.” Black’s Law Dictionary (9th ed. 2009). Such contacts are generally viewed as highly unethical outside the procedural protections provided by applicable court rules.

³ See 5 U.S.C. § 557(d).

⁴ Home Box Office, Inc. v. Federal Comm’n, 567 F.2d 9, 57 (D.C. Cir. 1977). For this reason, some agencies do not use the term “ex parte” at all, but instead refer to “off-the-record communications” or “communications with the public.” Other agencies use the term, but define it in various ways. This



In Recommendation 77-3, the Conference expressed the view that a general prohibition on ex parte communications in the context of informal rulemaking proceedings would be undesirable, as it would tend to undermine the flexible and non-adversarial procedural framework established by section 553.⁵ At the same time, the Conference concluded, certain restraints on ex parte communications may be warranted to prevent potential or perceived harm to the integrity of informal rulemaking proceedings. Although the law has evolved since Recommendation 77-3 was adopted, these basic principles remain valid.⁶ Over the past several decades, agencies have implemented Recommendation 77-3 by experimenting with procedures designed to capture the benefits of ex parte communications while reducing or eliminating their potential harm. This recommendation draws on this substantial experience to identify best practices for managing ex parte communications received in connection with informal rulemakings.

Ex parte communications, which may be oral or written, convey a variety of benefits to both agencies and the public. Although the rulemaking process has largely transitioned to electronic platforms in recent years, most ex parte contacts continue to take the form of oral communications during face-to-face meetings. These meetings can facilitate a more candid and potentially interactive dialogue of key issues and may satisfy the natural desire of regulated and other interested parties to feel heard. In addition, if an agency regulates in an area that implicates sensitive information, ex parte communications may be an indispensable avenue for agencies to obtain the information necessary to develop sound, workable policies.⁷

On the other hand, ex parte communications can threaten several different kinds of harm (both real and perceived) to the integrity of the rulemaking process. One difficulty is that certain people or groups may have, or be perceived to have, greater access to agency personnel than others. This unfairness, whether real or perceived, may be exacerbated if agency personnel do

recommendation uses the term “ex parte” because it is widely understood and defines it broadly so as to capture the full spectrum of agency practice.

⁵ See Admin. Conf. of the United States, [Recommendation 77-3](#), *Ex Parte Communications in Informal Rulemaking Proceedings*, 42 Fed. Reg. 54,253 (Oct. 5, 1977).

⁶ Recommendation 77-3 emerged from a select committee the Conference convened in response to the D.C. Circuit’s groundbreaking decision in *Home Box Office*. See Nathaniel L. Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 ADMIN. L. REV. 377, 377 (1978). Following the recommendation’s adoption, the Supreme Court decided *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978), admonishing federal courts not to impose on administrative agencies procedural requirements beyond those contained in the APA. See Nathanson, 30 ADMIN. L. REV. at 406-08.

⁷ In such areas, regulated and other interested parties may be willing to share essential information with the agency only through face-to-face, private conversations, and agency personnel may be subject to severe penalties for not keeping the information shared with them confidential. See, e.g., 26 U.S.C. § 6103 (addressing confidentiality and disclosure of tax returns and tax return information). Of course, agencies may protect information from disclosure only to the extent permitted or required by law.



not have the time and resources to meet with everyone who requests a face-to-face meeting. Another concern is that agency decisionmakers may be influenced by information that is not in the public rulemaking docket. The mere possibility of non-public information affecting rulemaking creates problems of perception and undermines confidence in the rulemaking process. When it becomes reality, it creates different and more serious problems. Regulated and other interested parties may be deprived of the opportunity to vet the information and reply to it effectively. And reviewing courts may be deprived of information that is necessary to fully and meaningfully evaluate the agency's final action.

Although disclosure remains the best approach to preventing the potential harms of ex parte communications, best practices may vary depending on the stage of the rulemaking process during which the communications occur. Before an agency issues a Notice of Proposed Rulemaking (NPRM), few if any restrictions on private and informal communications are necessary or desirable.⁸ Communications during this early stage of the process threaten little or no harm and can help an agency gather essential information, craft better regulatory proposals, and promote consensus building among regulated and other interested parties.⁹ After an NPRM has been issued and during the comment period, there may be a heightened expectation that information submitted to the agency will be made available to the public. Indeed, during this time period, an agency's comment policy and its policy addressing ex parte communications may both apply.¹⁰ Finally, once the comment period closes, the dangers associated with agency reliance on privately-submitted information become more acute. At the same time, regulated and other interested parties may be particularly keen during this stage to discuss with agency personnel information provided in comments filed at or near the close of the comment period. Agencies can prevent the most serious harms of this potentiality by disclosing such information and reopening the comment period. This solution is not costless, however, and has the potential to significantly delay a proceeding.

This recommendation focuses on how agencies can best manage ex parte communications in the context of informal rulemaking proceedings. It does not address several related or peripheral issues. First, it does not evaluate formal or hybrid rulemakings or proceedings in which agencies voluntarily use notice-and-comment procedures to develop

⁸ Recognizing these principles, the Clinton Administration directed agencies "to review all . . . administrative ex parte rules and eliminate any that restrict communication prior to the publication of a proposed rule," with the limited exception of "rules requiring the simple disclosure of the time, place, purpose, and participants of meetings." See Memorandum for Heads of Departments and Agencies, Regulatory Reinvention Initiative (Mar. 4, 1995), available at [http://www.dot.gov/sites/dot.dev/files/docs/Presidential%20Memorandum%20-%20Regulatory%20Reinvention%20\(1995\).txt](http://www.dot.gov/sites/dot.dev/files/docs/Presidential%20Memorandum%20-%20Regulatory%20Reinvention%20(1995).txt) (last visited Mar. 10, 2014). This memorandum, which has never been revoked, continues to inform agency practice.

⁹ See *id.*

¹⁰ The Conference recently addressed agency comment policies. See Admin. Conf. of the United States, [Recommendation 2011-2](#), *Rulemaking Comments*, 76 Fed. Reg. 48,791 (Aug. 9, 2011).



reliance documents or non-binding guidance documents. Second, it does not address issues related to ex parte communications in the executive review process, including before the Office of Information and Regulatory Affairs (OIRA).¹¹ Nor does it examine ex parte issues that may arise in the contexts of interagency review and communications or intraagency interactions between an agency's staff and its decisionmakers.¹² Finally, it does not address unique issues that may arise in connection with communications between agencies and members of Congress, foreign governments, or state and local governments.

Draft Recommendation

1. The Administrative Conference reaffirms Recommendation 77-3, *Ex Parte Communications in Informal Rulemaking Proceedings*.

Ex Parte Policies

2. Each agency that conducts informal rulemaking under 5 U.S.C. § 553 should have a written policy explaining how the agency handles ex parte communications.
3. Agency ex parte policies should:
 - a. Provide guidance to agency personnel on how to respond to requests from regulated and other interested parties for private meetings to discuss issues related to a rulemaking.
 - b. Exclude non-substantive communications involving only non-substantive inquiries, such as those regarding the status of a rulemaking or the agency's procedures.
 - c. Establish procedures for ensuring that, after an NPRM has been issued, the occurrence and content of all substantive oral communications, whether planned or unplanned, are included in the appropriate rulemaking docket.
 - d. Establish procedures for ensuring that, after an NPRM has been issued, all written communications are included in the appropriate rulemaking docket.
 - e. Establish procedures for responding to significant new information submitted after the comment period has closed.
 - f. Identify deadlines for all required disclosures.

¹¹ See Admin. Conf. of the United States, [Recommendation 88-9](#), *Presidential Review of Agency Rulemaking*, 54 Fed. Reg. 5207 (Feb. 2 1989).

¹² See Admin. Conf. of the United States, [Recommendation 80-6](#), *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86,407 (Dec. 31, 1980).



- g. Explain how the agency will treat sensitive information submitted in an ex parte communication.
 - h. Explain how the agency's ex parte communications policy interacts with its comment policy.
- 4. In formulating policies governing ex parte communications in informal rulemaking proceedings, agencies should consider the following factors:
 - a. The stage of the rulemaking proceeding during which oral or written communications may be received.
 - b. The need to ensure that access to agency personnel is provided in a balanced, viewpoint-neutral manner.
 - c. Limitations on agency resources, including staff time, that may affect the ability of agency personnel to accept requests for face-to-face meetings or prepare summaries of such meetings.
 - d. The likelihood that protected information will be submitted to the agency through oral or written ex parte communications.
 - e. The possibility that, even if an agency discourages ex parte communications during specified stages of the rulemaking process, such communications may nonetheless occur.
 - f. The potential need to give agency personnel guidance about whether or to what extent to provide information to persons not employed by the agency during a face-to-face meeting.

Quasi-Adjudicatory Rulemakings

- 5. If an agency conducts quasi-adjudicatory rulemakings, its ex parte communications policy should clearly and distinctly articulate the principles and procedures that will be followed in those rulemakings.
- 6. Agencies should explain whether, how, and why they are prohibiting or restricting ex parte communications in quasi-adjudicatory rulemakings.
- 7. Agencies should explain and provide a rationale for any additional procedures applicable to ex parte communications received in quasi-adjudicatory rulemakings.



Pre-NPRM Communications

8. Agencies should not impose restrictions on ex parte communications before an NPRM is issued.
9. Agencies may, however, require disclosure, in accordance with ¶ 11 of this recommendation, of the occurrence or content of ex parte communications received before an NPRM is issued.
 - a. Such disclosures may be made in the preamble of the later-issued NPRM or other rulemaking document.
 - b. Alternatively, agencies may post pre-NPRM written submissions and/or a summary of pre-NPRM oral communications in the appropriate rulemaking docket once it is opened.

Post-NPRM Communications

10. If an agency cannot accommodate all requests for in-person meetings after an NPRM has been issued, it should consider holding a public meeting (which may be informal) in lieu of individual, private meetings.
11. After an NPRM has been issued, agencies should ensure the:
 - a. Disclosure to the public of the occurrence of all oral ex parte communications, including the identity of those involved in the discussion and the date and location of the meeting.
 - b. Disclosure to the public of the content of all oral ex parte communications through a written summary filed in the appropriate rulemaking docket. Agencies may either:
 - i. Require their own personnel to prepare and submit the necessary summary; or
 - ii. Require private parties to prepare and submit the necessary summary of meetings in which they have participated, although it remains the agency's responsibility to ensure adequate disclosure.
 - c. Posting of all written submissions in the appropriate rulemaking docket.

Communications after the Comment Period Has Closed

12. If an agency receives, through a written or oral ex parte communication, any significant new information upon which its decisionmakers may rely, it should disclose the information and reopen the comment period, to provide the public with an opportunity to respond.



13. When an agency receives a large number of requests for ex parte meetings after the comment period has closed, it should consider using a reply comment period or offering other opportunities for receiving public input on submitted comments.¹³

Accommodating Digital Technology

14. Agencies should consider how digital technology may aid the management or disclosure of ex parte communications. For example, agencies may be able to use technological tools such as video teleconferencing as a cost effective way to engage with regulated and other interested parties.
15. Agencies should avoid inadvertently excluding ex parte communications made via digital technologies from their policies by using limited or outdated nomenclature.
16. Agencies should state clearly whether they consider social media communications to be ex parte communications and how they plan to treat such communications. Agencies should ensure consistency between policies governing ex parte communications and the use of social media, respectively.

¹³ See also Admin. Conf. of the United States, [Recommendation 2011-2](#), *Rulemaking Comments* ¶ 6, 76 Fed. Reg. 48,791 (Aug. 9, 2011) (encouraging the use of reply comment periods and other methods of receiving public input on previously submitted comments).