



Request for Proposals—May 23, 2013
Ex Parte Communications in Informal Rulemaking

The Administrative Conference is seeking a consultant to undertake a research project that will study administrative procedures and management techniques related to ex parte communications in informal rulemaking. Proposals are due by 6:00 p.m. Eastern Time on Monday, July 8, 2013.

Background

Ex parte communications, *see* 5 U.S.C. § 551(14), between interested parties and agency decisionmakers have long been controversial because they raise the possibility, or at least the appearance, of undue influence and parallel nonpublic dockets in administrative decisionmaking. The Administrative Procedure Act (APA), as amended by the Sunshine Act, generally prohibits ex parte communications during formal adjudication and rulemaking. *See* 5 U.S.C. §§ 556, 557(d)(1)(A), (B). In informal rulemaking conducted under Section 553, however, ex parte communications are permitted so long as agencies act to preserve transparency, ensure due process of law, and develop an administrative record adequate for judicial review.

The seminal decision articulating minimum procedural requirements for ex parte communications in informal rulemaking is *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977). *Home Box Office* banned ex parte communications between interested parties and agency decisionmakers after an agency issued a notice of proposed rulemaking (NPRM). It further held that, if proscribed communications nonetheless occur, the agency must disclose the nature and substance of those communications to the public and afford an opportunity to respond. The decision was swiftly criticized and narrowed in *Action for Children's Television v. FCC*, 564 F.2d 458, 474 (D.C. Cir. 1977).

In 1977, shortly after the D.C. Circuit decided *Home Box Office* and *Action for Children's Television*, the Administrative Conference adopted Recommendation 77-3, *Ex Parte Communications in Informal Rulemaking Proceedings*. The recommendation discouraged a blanket prohibition on ex parte communications in informal rulemaking, *see id.* ¶ 1, while acknowledging that agencies, Congress, or the courts might find it appropriate to restrict such communications in particular proceedings, *see id.* ¶ 5. The recommendation further urged agencies to promptly make available for public inspection any written, substantive ex parte communication received after an NPRM has issued, *see id.* ¶ 2, and to experiment with procedures designed to make oral ex parte communications available to the public, *see id.* ¶ 3.

The law changed yet again following the Conference's adoption of Recommendation 77-3. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978), the Supreme Court held that the courts may not impose on agencies rulemaking procedures beyond those required under the APA. This important doctrine shaped the D.C. Circuit's subsequent landmark decision on ex parte communications in rulemaking, *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).



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The time is ripe for the Conference to revisit the subject of ex parte communications in informal rulemaking, for three reasons. First, changes in applicable law since 1977 have created some uncertainty regarding what ex parte procedures are required as a matter of law. Second, revised guidance is needed to accommodate the recent transition to electronic communication, docketing, and rulemaking. Finally, in response to *Home Box Office* and in the wake of Recommendation 77-3, a number of agencies adopted ex parte procedures. Sufficient time has now passed to evaluate the effectiveness of those procedures and identify best practices.

Project

The Conference seeks to study procedures and best practices for managing ex parte contacts in the informal rulemaking process. The goal of the project is to identify relevant issues, define applicable legal and policy constraints on ex parte communications in informal rulemaking, resolve legal uncertainty to the greatest extent possible, and encourage agencies to adopt identified best practices that will improve both public engagement and transparency. A detailed scope of work follows, but the Conference encourages prospective consultants to comment on the scope of work in their project proposals, and identify/include any additional research subjects related to this topic that the Conference may wish to consider.

Scope of Work

The study should include consideration of the following issues and questions:

1. *Legal Parameters.* Examine the propriety of ex parte communications during various stages of the rulemaking process and clarify the agencies' legal obligations to preserve public participation rights and facilitate judicial review.
2. *Issues and Challenges.* What challenges and issues, actual or potential, arise when agencies engage in ex parte communications? Why do ex parte communications occur? Are they valuable and, if so, how? Have technological changes created new challenges? New opportunities?
3. *Agency Policies.* How should agencies decide who to meet with during the informal rulemaking process? What policies and procedures do agencies currently employ to manage ex parte communications? Do they work? What best practices can be identified?
4. *Useful Comparisons.* Do independent boards and commissions use different ex parte procedures than executive agencies? If so, why? Can we learn anything from agency experiences with ex parte communications in the informal adjudication context?

The study should exclude consideration of the following issues:

1. *Executive Review.* Issues related to ex parte communications in the executive review process, including the practices and procedures employed by the Office of Information and Regulatory Affairs (OIRA). See Recommendation 88-9, *Presidential Review of Agency Rulemaking*.



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2. *Intragovernmental Communications.* Ex parte issues that may arise in the contexts of interagency commenting and interagency communications, including interactions between an agency's staff and its decisionmakers. See Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*.

How to Submit a Proposal

Proposals are invited from qualified persons who would like to serve as a research consultant on this project. All responses will be considered by the Conference staff and the Chairman.

A consultant's study should result in a report that is delivered first for review by the Conference staff and Chairman and then forwarded to a committee of the Conference membership for consideration. The report should provide proposed recommendations. The consultant works with Conference staff and the committee to refine and further shape the report and may work with Conference staff to revise the recommendations. Recommendations approved by the committee are then forwarded to the Council of the Conference for consideration, and the Council forwards the recommendations (with its views) to the full Conference membership meeting in plenary session. If approved at the plenary session, a recommendation becomes an official recommendation of the Administrative Conference. (For a general understanding of how the Conference is organized and operates, see 5 U.S.C. §§ 591-596, and <http://www.acus.gov>.)

The Conference will provide a consulting fee for this study plus a budget for related expenses. The Conference also typically encourages its consultants to publish the results of their studies in journals or other publications. Thus, working as a Conference consultant provides some compensation, a publication opportunity, and the opportunity to work with Conference members from federal agencies, academia, the private sector, and public interest organizations to help shape and improve administrative law, procedure, and practice.

Those submitting proposals should understand that, in addition to the work involved in researching and writing the consultant's report, the consultant will (in most cases) need to work with Conference staff and committees as the Conference develops a recommendation based on the report. The consulting fee is not designed to match a consultant's normal consulting rates. It is a significant public service to serve as a consultant to the Conference.

To submit a proposal to serve as the Conference's consultant on this project, you must:

- Send an e-mail to Emily S. Bremer, Attorney Advisor at ebremer@acus.gov. *Proposals must be submitted by e-mail.*
- Include the phrase "ACUS Project Proposal" in the subject line of your e-mail.

In the body of your e-mail or in an attachment, please:

- State the name of the project for which you are submitting a proposal (Ex Parte Communications in Informal Rulemaking).
- Explain why you would be well qualified to work on the project. Include your *curriculum vitae* or other summary of relevant experience.



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- Explain your research methodology and how you would develop recommendations based on the research. There is no required format, and 2-3 pages should probably be sufficient for this section.
- State how much funding you would need for the project, keeping in mind that a typical Conference research contract includes a consulting fee of \$12,000 - \$15,000 plus travel expenses of \$1,000, and research assistance expenses of \$1,000. There may be some flexibility in the budget based on factors relating to the proposal (*e.g.*, the consultant's location relative to Washington, DC, and the need for research assistance and empirical or interviewing work), so your proposal should suggest any special needs in this regard. The amount of the consulting fee and expenses will not be a critical factor in the award of the contract; the quality of the proposal and of the consultant's ability to carry out the study will be the most important factors.
- Propose a schedule for the project. The Conference's research projects typically call for submission of an outline, a draft report, and a final report. Multiple draft reports may be necessary based on input from the Chairman, staff, or committee. The draft report should be substantially complete and ready for consideration by the committee. Proposals for this project should target the submission of the draft report so that the recommendation can be targeted for completion at a plenary session of the Conference held in June 2014. A Fall or Winter 2013 submission date for the draft report is preferred, but high quality research leading to a well-written report will be the prime consideration.

Submit your proposal by 6:00 p.m. Eastern Time on Monday, July 8, 2013. Only proposals submitted by the stated deadline are guaranteed to receive consideration. Proposals may also be submitted or amended at any time until the award of the contract, and the Conference may consider any proposals or amended proposals received at any time before the award of the contract.

Proposals will be evaluated based on:

- The qualifications and experience of the researcher(s), and knowledge of literature in the field (if applicable);
- The quality and clarity of the proposal;
- The timeline of the proposal, and the ability of the researcher to perform the research in a timely manner;
- The likelihood that the research will contribute to greater understanding of the subject matter studied and lead to an Administrative Conference recommendation that will improve administrative procedures in the federal government; and
- The cost of the proposal (although the other factors are more important)

Failure to follow the above instructions may result in your proposal not being considered. Including the phrase "ACUS Project Proposal" in the subject line of your e-mail is important so that your proposal can be easily identified.