

***Ex Parte* Communications in Informal Rulemaking**

DRAFT Outline<sup>1</sup> – November 2013

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OVERVIEW

The following is a draft outline of a report for the Administrative Conference addressing *Ex Parte* Communications in Informal Rulemaking. The outline is based on a review of relevant case law, statutes, agency regulations, scholarly articles, and anticipated information to be gathered during interviews with parties typically involved in *ex parte* communications during agency informal rulemaking.

Research Methodology: In addition to legal research, the primary research methodology for this report will be interviews with agency personnel and public stakeholders. Agency personnel will include agency attorneys, technical experts, and some leadership at a sampling of agencies that will account for agency type, agency policy, and agency practices regarding *ex parte* communications. The sampling will include:

- Executive departments and independent agencies;
- Agencies that have a policy regarding *ex parte* communications, whether contained in specific regulations, in written policy, or in practice only;
- Agencies with a range of practices regarding *ex parte* communication limitations and disclosure requirements.

Public stakeholders will include representatives from a sampling of organizations directly regulated by agency rules or interested in the process and outcomes of agency rulemakings. The sampling will account for the type of interest represented, as well the size and resources of the organization. The sampling will include:

- Corporations regulated by agency rules in areas such as consumer products, healthcare, and technology;
- Nonprofit organizations that represent public interests that may be a counterpoint to corporate interests; and
- Small businesses.

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<sup>1</sup> Organization and substance of material presented in this outline is subject to change as the project progresses.

## DRAFT OUTLINE

### **I. Introduction**

In 1978, the Supreme Court stated: “Agencies are free to grant additional procedural rights in the exercise of their discretion [in conducting rulemakings under the Administrative Procedure Act (“APA”)<sup>2</sup>], but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.”<sup>3</sup> This decision was the result of several D.C. Circuit decisions<sup>4</sup> adding procedures governing *ex parte* communications in rulemaking conducted under the “informal” rulemaking procedures of the APA.<sup>5</sup> The Supreme Court’s statement in *Vermont Yankee* was intended to rein in the D.C. Circuit’s judicial innovations in informal rulemakings under the APA, even though the Court did not specifically address *ex parte* communications.<sup>6</sup> The Court did, however, caution: “This is not to say necessarily that there are no circumstances which would ever justify a court in overturning agency action because of a failure to employ procedure beyond those required by statute. But such circumstances, if they exist, are extremely rare.”<sup>7</sup>

This report considers whether such rare circumstances now exist regarding *ex parte* communications in informal rulemaking and, if they do exist, what procedures may be required or, if not required, may constitute best practices for agencies to consider in dealing with *ex parte* practices.

### **II. Background**

#### a. Ex Parte Communications

This section will define *ex parte* communications and discuss why they occur. It will draw on the cases dealing with *ex parte* communications since *Vermont Yankee* to evaluate the

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<sup>2</sup> 5 U.S.C. § 551 et seq.

<sup>3</sup> *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 524 (1978).

<sup>4</sup> *Home Box Office, Inc. v. Federal Commc’ns Comm’n*, 567 F.2d 9 (D.C. Cir. 1977); *Action for Children’s Television, v. Fed. Commc’ns Comm’n*, 564 F.2d 458 (D.C. Cir. 1977); *see also Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959); *Courtaulds (Alabama) Inc. v. Dixon*, 294 F.2d 899 (D.C. Cir. 1961).

<sup>5</sup> Section 553 of 5 U.S.C. (APA sec. 4) sets forth procedures for rulemaking commonly referred to as “informal” rulemaking. *See* JEFFERY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 58 (4th ed. 2006).

<sup>6</sup> *See e.g.*, Glenn T. Carberry, *Ex parte Communications in Off-the-Record Administrative Proceedings: A Proposed Limitation on Judicial Innovation*, 1980 DUKE L. J. 65, 69 (1980); Sidney A. Shapiro, *Two Cheers for HBO: The Problem of the Nonpublic Record*, 54 ADMIN. L. REV. 853, 858 (2002).

<sup>7</sup> *Vermont Yankee*, 435 U.S. at 524.

pros and cons of *ex parte* communications. For example, in *HBO* and *Sierra Club v. Costle*,<sup>8</sup> the court recognized that *ex parte* communications have the potential to benefit agency rulemaking, while also frustrating transparency and judicial review.<sup>9</sup>

This section will also rely on interviews with agency personnel and public stakeholders to identify potential benefits and harms of *ex parte* communications. The purpose of the interviews is to gain an accurate, real-world understanding of how and why any *ex parte* communications in the 21<sup>st</sup> Century occur, and how they may impact agency rulemaking.

Potential information to be drawn from interviews will include:

- Examples of *ex parte* communications;
- Types of stakeholders that tend to initiate *ex parte* communications;
- Motives (known at the time or afterwards) for *ex parte* communications;
- Results or intended purposes (in the form of information, publicity, outreach, public buy-in, etc.) of *ex parte* communications;
- Types of information most likely to be the subject of *ex parte* communications (*e.g.*, substance v. procedure);
- Types of *ex parte* communications agencies find useful and why;
- Whether and why an agency may initiate *ex parte* communications;
- Uses of digital technology to make *ex parte* communications; and
- *Ex parte* communication issues on which agencies may desire guidance.

#### b. Legal Parameters

This section will set out the historical and existing (or persisting) legal parameters, beginning with the APA and following through relevant case law, recognizing the APA is silent regarding *ex parte* communications under its procedures for informal rulemaking. This section will then discuss the Conference's previous work on this topic, Recommendation 77-3, *Ex parte Communications in Informal Rulemaking*,<sup>10</sup> which focused on the disclosure of *ex parte* communications, but also recognized, foreshadowing the Supreme Court's caution in *Vermont Yankee*, that "special circumstances" may necessitate restrictions on *ex parte* communications.

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<sup>8</sup> 657 F.2d 298 (D.C. Cir.1981).

<sup>9</sup> The *HBO* court stated: "[W]e recognize that informal contacts between agencies and the public are the 'bread and butter' of the process of administration and are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness." *HBO*, 567 F.2d at 57. The *Costle* court stated: "Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and share their plans for the future, and spur the provision of information which the agency needs. . . . The possibility of course exists that in permitting *ex parte* communication with rulemakers we create the danger of 'one administrative record for the public and this court and another for the Commission.'" *Costle*, 657 F.2d at 401 (internal quotation marks and footnotes omitted).

<sup>10</sup> 42 Fed. Reg. 54,253 (Oct. 5, 1977) ("ACUS Recommendation 77-3").

This section will discuss the relevant case law, starting with *Van Curler Broadcasting Corporation v. United States*,<sup>11</sup> and progressing through the flurry of activity surrounding *ex parte* communications in the late 1970s and early 1980s with *HBO*,<sup>12</sup> *ACT*,<sup>13</sup> and *Costle*.<sup>14</sup> This section will then discuss more recent cases addressing *ex parte* contacts, such as *Board of Regents of the University of Washington v. Environmental Protection Agency*<sup>15</sup> and *Electric Power Supply Association v. Federal Energy Regulatory Commission*.<sup>16</sup>

The D.C. Circuit's cases dealing with *ex parte* contacts seem to agree that *HBO*'s application is limited and does not impose a general prohibition on or specific procedures for addressing *ex parte* contacts in informal rulemaking.<sup>17</sup> However, that is the only agreement among the D.C. Circuit's cases because the result reached in each case and the reasons for reaching that result vary from case to case, and seem to rely on factors specific to each case. This section will identify the key factors that may provide agencies with guidance as to the circumstances in which *ex parte* contacts in informal rulemaking should be addressed, as well as the kind of procedures that may be prudent. This discussion will provide a foundation for Section IV, which will distill the possible circumstances in which *ex parte* procedures are required or recommended.

### III. Current Agency Practices

This section will explore current agency practices, noting which agencies have regulations or policies regarding *ex parte* contacts. It will also identify the differences, if any, between the practices and policies of executive departments and independent agencies.

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<sup>11</sup> 236 F.2d 727 (D.C. Cir. 1956). This case found that *ex parte* communications during an independent agency's informal rulemaking addressing television channel assignment did not invalidate the agency's action because the communications were not about the rulemaking.

<sup>12</sup> *HBO* required the disclosure of relevant *ex parte* communications prior to publication of a notice of proposed rulemaking ("NPRM") and urged that *ex parte* communications should be prohibited post-NPRM and disclosed if received despite the prohibition.

<sup>13</sup> *ACT* found that an independent agency's informal rulemaking at issue was not the kind "susceptible to poisonous *ex parte* influence" because "[p]rivate groups were not competing for a specific valuable privilege" and the "case d[id] not raise serious questions of fairness." *ACT*, 564 F.2d. at 477.

<sup>14</sup> Here, the court declined to apply *HBO* to a case involving an independent agency's informal rulemaking under procedures specified in an authorizing statute for that agency, and noting that the court has declined to apply *HBO* generally to "informal rulemakings of the general policymaking sort involved here." *HBO*, 567 F.2d at 402.

<sup>15</sup> 83 F.3d 1214 (D.C. Cir. 1996). This case reinforced that there is no *ex parte* contact prohibition under APA informal rulemaking in a case addressing an independent agency's informal rulemaking.

<sup>16</sup> 391 F.3d 1255 (D.C. Cir. 2004). Here, the court addressed *ex parte* contacts with an independent agency under the Sunshine Act, 5 U.S.C. § 557(d), and did not reach the issue under the APA, but cited the seminal cases and noted the *HBO*'s limited application.

<sup>17</sup> See *Sierra Club v. Costle*, 657 F.2d 298, 402 (D.C. Cir. 1981); *Electric Power Supply Association v. FERC*, 391 F.3d 1255, 1263 (noting the limitation of Act and Sierra on *HBO*).

a. Agency Regulations and Policies

This section will explore agency-specific rules addressing *ex parte* communications in informal rulemaking<sup>18</sup> and agency-specific policies regarding *ex parte* communications.<sup>19</sup> The current agency rules and policies seem to focus on ensuring disclosure of *ex parte*

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<sup>18</sup> Department of Interior (DOI): 43 C.F.R. § 4.27(b): Applies to all Departmental proceedings, and prohibits all *ex parte* contacts unless all parties are present for oral communications and written communications are provided to all parties. Issued in 1971, see 36 Fed. Reg. 7186 (April 15, 1971).

Department of Justice (DOJ): 28 C.F.R. § 50.17 is an almost verbatim adoption of the ACUS Recommendation 77-3, and the Department specifically noted at promulgation that it was implementing the ACUS recommendation. 43 Fed. Reg. 43,297 (September 25, 1978).

Federal Aviation Administration (FAA): 14 C.F.R. Appendix 1 to part 11 requires disclosure generally per DOT's Order. Issued in response to President Clinton's June 1, 1998 memorandum on plain language, the FCC updated its rules to align with DOT's policy on *ex parte* communications and removed an older rule addressing *ex parte* communications in a very specific rulemaking context in favor of the comprehensive Appendix. 65 Fed. Reg. 50,863 (August 21, 2000).

Federal Communication Commission (FCC): 47 C.F.R. § 1.1206 specifies that *ex parte* communications in informal rulemakings are permitted but must be disclosed. The Commission has rules addressing *ex parte* communications in all Commission proceedings and separate them into three categories: Unrestricted, Permitted but disclosure required (such as for informal rulemakings), and Prohibited. These were issued in 1987 and updated in 1997 "[t]o ensure the fairness and integrity of its decision-making". 62 Fed. Reg. 15,856 (Apr. 3, 1997). Note that the Commission rules at 47 C.F.R. § 1.415, which were promulgated in 1963 and were in place during the proceedings involved in *HBO* and *ACT*, did not permit additional comments after the close of the comment period, although a note to that rule explains: "In some (but not all) rulemaking proceedings, interested persons may also communicate with the Commission and its staff on an *ex parte* basis, provided certain procedures are followed. See 47 C.F.R. §§ 1.420 and 1.1200 *et seq.*"

Federal Election Commission (FEC): 11 C.F.R. § 201.4 requires disclosure of *ex parte* contacts from the time a petition for rulemaking or NPRM is circulated to the Commission until final Commission action on the issue. Issued in 1993, noting "[t]he Commission believes that these rules are necessary to avoid the possibility of prejudice, real and apparent, to the public interest." 58 Fed. Reg. 59,642 (Nov. 10, 1993).

Federal Emergency Management Agency ("FEMA"): 44 C.F.R. § 1.6 contains language that mirrors ACUS Rec. 77-3 and requiring disclosure. FEMA added this section in response to comments from the Conference requesting that *ex parte* communications be included in FEMA's rulemaking procedure regulations. 46 Fed. Reg. 32584 (June 24, 1981).

Federal Trade Commission ("FTC"): 16 C.F.R. § 1.13(c)(6) prohibits agency personnel from consulting the public on any fact at issue unless notice and an opportunity to participate is given to all in rulemaking. A separate section, 16 C.F.R. § 1.18(c)(2), provides for disclosure of written and oral *ex parte* comments received. Both sections were added in 1980, see 25 Fed. Reg. 78628, (Nov. 26, 1980) and 45 Fed. Reg. 36,341, (May 29, 1980), respectively.

<sup>19</sup> See, e.g. Department of Transportation ("DOT") Order 2100.2 "Policies for Public Contacts in Rule Making" (Oct. 5, 1979) (setting forth specific procedure for dealing with *ex parte* contacts in rulemaking including encouraging agency personnel to engage in *ex parte* contacts that "will be helpful in resolution of question of substance and justification" and be receptive of "proper contact"; requiring disclosure of such contacts and a format in which to report them; and discouraging *ex parte* contacts after the close of the comment period and prohibiting providing information to only a select group or individual).

communications. Two agencies, one being the parent agency of the other,<sup>20</sup> prohibit *ex parte* communications, but only during the public comment period.<sup>21</sup>

This section will also explain the impetus for agency rules and policies on *ex parte* communications, including whether they were adopted in response to the *ex parte* case law in the late 1970s and early 1980s. Interestingly, two agencies' rules are direct results of ACUS Recommendation 77-3,<sup>22</sup> and two agencies issued their *ex parte* communication procedures shortly after the *HBO* and *ACT* decisions.<sup>23</sup> The most recently issued rule, in 2000, responded to a presidential memorandum regarding plain language and did not address any of the historical case law regarding *ex parte* communications.<sup>24</sup>

The discussion will also note other agency's written *ex parte* policies, as well as additional information gathered during interviews with agency personnel and public stakeholders. The purpose is to provide an overview of current agency policy and practice regarding *ex parte* communications and to categorize these policies and practices by looking for commonalities, such as the focus on disclosure. Another purpose is to identify best practices that may serve as the basis of possible recommendations.

Potential information to be drawn from interviews may include:

- Agency-specific restrictions on *ex parte* communications and any factors triggering the restrictions, such as rulemaking stage, type of information, type of rulemaking subject matter;
- Agency requirements for disclosing or retaining *ex parte* communications and any specific procedural requirements;
- Policies or other operational-type information on *ex parte* communications;
- Use of digital technology to address *ex parte* communications; and
- The basis or rationale for any agency restrictions or requirements regarding *ex parte* communications.

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<sup>20</sup> DOT and FAA.

<sup>21</sup> 14 C.F.R. Appendix 1 to part 11 and DOT Order 2100.2

<sup>22</sup> DOJ in 1978 and FEMA in 1980. *See supra* note 16.

<sup>23</sup> DOT in 1979 and FTC in 1980, however, FTC's rules were prompted by amendments to an authorizing statute. *See* Public Law 96-252 adding 15 U.S.C. § 57a(j), which requires the FTC to promulgate a rule prohibiting the use of information not in the public record in rulemaking). *See supra* note 16.

<sup>24</sup> *See* previous discussion of FAA's rule, *supra* note 16.

b. Executive Departments and Independent Agencies

This section will compare and contrast executive department and independent agency rules and policies. Although the independent agencies were involved in the seminal cases addressing *ex parte* communications, of the seven agencies with promulgated rules, only three are independent agencies<sup>25</sup> and five are executive departments or agencies within an executive department.<sup>26</sup> This section will also look for differences in agency structure that affect rulemaking and possible *ex parte* communications. For example, open-meeting requirements under the Government in the Sunshine Act of 1976<sup>27</sup> may make some independent agencies more sensitive to the impact of *ex parte* communications in informal rulemaking,<sup>28</sup> or the nature of independent agency rulemaking proceedings may make these agencies more subject to *ex parte* communications.<sup>29</sup>

**IV. Best Practices For *Ex Parte* Communication Procedures**

This section will provide an overview of possible procedures for *ex parte* communications and their basis in case law and current agency practice. It will distill the differentiating factors evident in case law that may inform recommendations for *ex parte* procedures or best practices. Such factors include rulemakings that involve policymaking compared to rulemakings that are considered “quasi-judicial”<sup>30</sup> or ones that implicate secrecy, or the appearance of secrecy, versus transparency of government actions.<sup>31</sup>

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<sup>25</sup> FCC, FEC, and FTC. *See generally* discussion in note 16 above.

<sup>26</sup> DOI, DOJ, DOT, FAA (within DOT) and FEMA (a component of the Department of Homeland Security (DHS), although FEMA’s *ex parte* communications rules were promulgated long before becoming part of DHS). *See generally* discussion in note 16 above.

<sup>27</sup> Codified at 5 U.S.C. § 522b (requiring agencies headed by a collegial body of two or more individuals, the majority of whom are appointed by the President with the advice and consent of the Senate, make the deliberations of such individuals, with certain exceptions, open to public observation).

<sup>28</sup> *See* Jeffery S. Lubbers, *A Guide to Federal Agency Rulemaking*, 4<sup>th</sup> Ed. p. 342

<sup>29</sup> *See* Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L. J. 1671, 1727 (2012) (“independent agencies are supposed to stand above the political fray. Yet although independent agencies have never been entirely immune to politics, it appears that they are even less so in the context of high-impact rulemaking . . . .” (internal citations omitted)); *see also* discussion of case law noting that the seminal cases involved independent agencies.

<sup>30</sup> *See Sangamon*, 269 F.2d at 224, for the first discussion of quasi-judicial agency powers in rulemaking under Section 553. *See also Morgan v. United States*, 304, U.S. 1 (1938), which is credited with having coined the term “quasi-judicial” in discussing such administrative proceedings pre-APA. Gregory Richards, *Ex parte Contacts in Informal Rulemaking Under the Administrative Procedure Act*, 52 TENN. L. REV. 67, 85 (1984).

<sup>31</sup> *See Costle*, 657 F.2d at 401 (“The possibility of course exists that in permitting *ex parte* communication with rulemakers we create the danger of ‘one administrative record for the public and this court and another for the Commission.’” (quoting *HBO*, 567 F.2d at 54)).

This section will identify any best practices and suggest recommendations to modify and improve current agency practices. For example, agency practice now seems to focus on disclosure, which may suggest certain best practices. The discussion will be further defined by the information gained from interviews with agency personnel and public stakeholders discussed above.

#### **V. *Ex Parte* Communications in the Digital Age**

The final section will look at the facts and circumstances in the context of the digital age, since much of the judicial and scholarly discussion happened over 30 years ago. It will consider whether technology provides any special benefits or obstacles for addressing *ex parte* contacts. Interviews with agency personnel and public stakeholders will be relied upon to identify how technology, especially e-mail and other digital communications, as well as electronic docketing, may impact communications between agency decision-makers, staff, and the public. This section will likely consider the ease of communicating with agencies in the digital age and the burdens or monetary costs for agency communications with the public via digital means, both of which may impact the ease of making *ex parte* communications and disclosing them.