



## “Ex Parte” Communications in Informal Rulemaking

### Committee on Rulemaking

Proposed Recommendation | June 5-6, 2014

#### Proposed Amendments

**This document displays manager’s amendments (with no marginal notes) and additional amendments from Conference members (with the source shown in the margin).**

1 Informal communications between agency personnel and individual members of the  
2 public have traditionally been an important and valuable aspect of informal rulemaking  
3 proceedings conducted under section 4 of the Administrative Procedure Act (APA), 5 U.S.C. 553.  
4 Borrowing terminology from the judicial context, these communications are often referred to as  
5 “ex parte” contacts.<sup>1</sup> ~~Although the~~ APA prohibits ex parte contacts in formal adjudications and  
6 formal rulemakings conducted under the trial-like procedures of 5 U.S.C. § 556 and 557.<sup>2</sup> 5  
7 U.S.C. § 553, ~~however,~~ imposes no comparable restriction in the context of informal rulemaking.  
8 The term “ex parte” does not entirely fit in this non-adversarial context, and some agencies do  
9 not use it. This recommendation uses the term because it is commonly used and widely  
10 understood in connection with informal rulemaking. As used in this recommendation, “ex parte  
11 communications” means: (i) written or oral communications; (ii) regarding the substance of an  
12 anticipated or ongoing rulemaking; (iii) between the agency or its staff and interested persons;  
13 and (iv) that are not placed in the rulemaking docket at the time they occur. It bears emphasizing

<sup>1</sup> In the judicial context, “ex parte” contacts are those that are related to the subject of a lawsuit and 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.

<sup>2</sup> See 5 U.S.C. § 557(d).



14 that such communications “are completely appropriate so long as they do not frustrate judicial  
15 review or raise serious questions of fairness.”<sup>3</sup>

16 In Recommendation 77-3,<sup>4</sup> the Conference expressed the view that a general prohibition  
17 on ex parte communications in the context of informal rulemaking proceedings would be  
18 undesirable, as it would tend to undermine the flexible and non-adversarial procedural  
19 framework established by 5 U.S.C. § 553.<sup>5</sup> At the same time, the Conference concluded, it may  
20 be appropriate for agencies to impose certain restraints on ex parte communications to prevent  
21 potential or perceived harm to the integrity of informal rulemaking proceedings. Although the  
22 law has evolved since Recommendation 77-3 was adopted, these basic principles remain valid.  
23 Over the past several decades, agencies have implemented Recommendation 77-3 by  
24 experimenting with procedures designed to capture the benefits of ex parte communications  
25 while reducing or eliminating their potential harm. This recommendation draws on this  
26 substantial experience to identify best practices for managing ex parte communications received  
27 in connection with informal rulemakings.

28 Ex parte communications, which may be oral or written, convey a variety of benefits to  
29 both agencies and the public. Although the rulemaking process has largely transitioned to  
30 electronic platforms in recent years, most ex parte contacts continue to take the form of oral  
31 communications during face-to-face meetings. These meetings can facilitate a more candid and  
32 potentially interactive dialogue of key issues and may satisfy the natural desire of interested  
33 persons to feel heard. In addition, if an agency engages in rulemaking in an area that implicates

<sup>3</sup> *Home Box Office, Inc. v. Federal Comm’n’s Comm’n*, 567 F.2d 9, 57 (D.C. Cir. 1977).

<sup>4</sup> 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.

<sup>5</sup> 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).



34 sensitive information, ex parte communications may be an indispensable avenue for agencies to  
35 obtain the information necessary to develop sound, workable policies.<sup>6</sup>

36 On the other hand, ex parte communications can pose several different kinds of harm  
37 (both real and perceived) to the integrity of the rulemaking process. One difficulty is that certain  
38 people or groups may have, or be perceived to have, greater access to agency personnel than  
39 others. This unfairness, whether real or perceived, may be exacerbated if agency personnel do  
40 not have the time and resources to meet with everyone who requests a face-to-face meeting.  
41 Another concern is that agency decisionmakers may be influenced by information that is not in  
42 the public rulemaking docket. The mere possibility of non-public information affecting  
43 rulemaking creates problems of perception and undermines confidence in the rulemaking  
44 process. When it becomes reality, it creates different and more serious problems. Interested  
45 persons may be deprived of the opportunity to vet the information and reply to it effectively.  
46 And reviewing courts may be deprived of information that is necessary to fully and meaningfully  
47 evaluate the agency's final action.

48 Best practices for preventing the potential harms of ex parte communications may vary  
49 depending on the stage of the rulemaking process during which the communications occur.  
50 Before an agency issues a Notice of Proposed Rulemaking (NPRM), few if any restrictions on ex  
51 parte communications are desirable.<sup>7</sup> Communications during this early stage of the process are  
52 less likely to pose the harms described above and can help an agency gather essential

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<sup>6</sup> In such areas, interested persons 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.

<sup>7</sup> 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.



53 information, craft better regulatory proposals, and promote consensus building among  
54 interested persons.<sup>8</sup> After an NPRM has been issued and during the comment period, there may  
55 be a heightened expectation that information submitted to the agency will be made available to  
56 the public. Indeed, during this time period, an agency’s comment policy and its policy addressing  
57 ex parte communications may both apply.<sup>9</sup> Finally, once the comment period closes, the dangers  
58 associated with agency reliance on privately-submitted information become more acute. ~~At the~~  
59 ~~same time, i~~nterested persons may be particularly keen ~~during this stage~~ to discuss with the  
60 agency information provided in comments ~~by other persons~~ filed at or near the close of the  
61 comment period. ~~To prevent the most serious harms of this potentiality, a~~gencies have in some  
62 circumstances disclosed ~~such significant new~~ information ~~received through such communications~~  
63 and reopened the comment period. This solution is not costless, however, and has the potential  
64 to significantly delay a proceeding.

65 This recommendation focuses on how agencies can best manage ex parte  
66 communications in the context of informal rulemaking proceedings, including those that involve  
67 “quasi-adjudication among ‘conflicting private claims to valuable privilege.’”<sup>10</sup> It does not  
68 address several related or peripheral issues. First, it does not evaluate formal or hybrid  
69 rulemakings or proceedings in which agencies voluntarily use notice-and-comment procedures  
70 to develop guidance documents. Second, it does not address ~~issues related to~~ ex parte  
71 communications in the executive review process, including before the Office of Information and  
72 Regulatory Affairs (OIRA).<sup>11</sup> ~~Third, it does not examine interagency communications outside the~~

<sup>8</sup> See *id.*

<sup>9</sup> 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).

<sup>10</sup> *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981) (quoting *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959)). In such “quasi-adjudicatory” rulemakings, due process considerations may justify insulating the decisionmaker from ex parte contacts. See *id.*

<sup>11</sup> See Admin. Conf. of the United States, Recommendation 88-9, *Presidential Review of Agency Rulemaking*, 54 Fed. Reg. 5207 (Feb. 2, 1989); Admin. Conf. of the United States, Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86,407 (Dec. 31, 1980).



73 [process of executive review. Fourth, it does not address interagency interactions between an](#)  
74 [agency’s staff and its decisionmakers.<sup>12</sup>Nor does it examine ex parte issues that may arise in the](#)  
75 [contexts of interagency review and communications or intraagency interactions between an](#)  
76 [agency’s staff and its decisionmakers.<sup>13</sup>](#) Finally, it does not address unique issues that may arise  
77 in connection with communications between agencies and members of Congress, foreign  
78 governments, or state and local governments.

### RECOMMENDATION

79 1. The Administrative Conference reaffirms [the principles established in](#)  
80 Recommendation 77-3, *Ex Parte Communication in Informal Rulemaking Proceedings*.

#### 81 “Ex Parte” Policies

82 2. Each agency that conducts informal rulemaking under 5 U.S.C. § 553 should have a  
83 written policy explaining how the agency handles what this recommendation refers to as  
84 nongovernmental “ex parte” communications, even if the agency does not use that term.

85 3. Agency ex parte policies should:

86 (a) Provide guidance to agency personnel on how to respond to requests from interested  
87 persons for private meetings to discuss issues related to a rulemaking.

88 (b) ~~Not apply to~~[Exclude](#) communications involving only non-substantive inquiries, such as  
89 those regarding the status of a rulemaking or the agency’s procedures.

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<sup>12</sup> See 5 U.S.C. § 557(d).

<sup>13</sup> See Admin. Conf. of the United States, Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86,407 (Dec. 31, 1980).



- 90 (c) Establish procedures for ensuring that, after an NPRM has been issued, the occurrence  
91 and content of all substantive oral communications, whether planned or unplanned, are  
92 included in the appropriate rulemaking docket.
- 93 (d) Establish procedures for ensuring that, after an NPRM has been issued, all [substantive](#)  
94 written communications are included in the appropriate rulemaking docket.
- 95 (e) Explain how the agency will treat significant new information submitted to the agency  
96 after the comment period has closed.
- 97 (f) Identify deadlines for all disclosures of ex parte communications required or requested  
98 under the agency's policy.
- 99 (g) Explain how the agency will treat sensitive information submitted in an ex parte  
100 communication.
- 101 (h) Explain how the agency's ex parte communications policy interacts with its comment  
102 policy.
- 103 4. In formulating policies governing ex parte communications in informal rulemaking  
104 proceedings, agencies should consider the following factors:
- 105 (a) The stage of the rulemaking proceeding during which oral or written communications  
106 may be received.
- 107 (b) The need to ensure that access to agency personnel is provided in a balanced,  
108 viewpoint-neutral manner.
- 109 (c) Limitations on agency resources, including staff time, that may affect the ability of  
110 agency personnel to accept requests for face-to-face meetings or prepare summaries of  
111 such meetings.



112 (d) The likelihood that protected information will be submitted to the agency through oral  
113 or written ex parte communications.

114 (e) The possibility that, even if an agency discourages ex parte communications during  
115 specified stages of the rulemaking process, such communications may nonetheless occur.

116 (f) The potential need to give agency personnel guidance about whether or to what extent  
117 to provide information to persons not employed by the agency during a face-to-face  
118 meeting.

119 **Communications before an NPRM is Issued**

120 5. Agencies should not impose restrictions on ex parte communications before an NPRM  
121 is issued.

122 6. Agencies may, however, disclose, in accordance with ¶ 8-11 of this recommendation,  
123 the occurrence or content of ex parte communications received before an NPRM is issued, as  
124 follows:-

125 (a) ~~Such disclosures may be made in~~ the preamble of the later-issued NPRM or other  
126 rulemaking document; or

127 (b) ~~Alternatively, agencies may post pre-NPRM written submissions and/or a summary of~~  
128 ~~pre-NPRM oral communications in~~ the appropriate rulemaking docket once it is opened.

129 **Communications after an NPRM Has Been Issued**

130 7. If an agency cannot accommodate all requests for in-person meetings after an NPRM  
131 has been issued, it should consider holding a public meeting (which may be informal) in lieu of,  
132 or in addition to, individual, private meetings.

133 8. After an NPRM has been issued, agencies should ~~ensure the~~ disclose to the public:



134 (a) ~~Disclosure to the public of t~~The occurrence of all oral ex parte communications,  
135 including the identity of those involved in the discussion and the date and location of the  
136 meeting.

137 (b) ~~Disclosure to the public of t~~The content of all oral ex parte communications through a  
138 written summary filed in the appropriate rulemaking docket. Agencies may either:

139 (i) Direct their own personnel to prepare and submit the necessary summary; or

140 (ii) Request or require private persons to prepare and submit the necessary summary  
141 of meetings in which they have participated, although it remains the agency's  
142 responsibility to ensure adequate disclosure.

143 (c) ~~Posting of a~~All written submissions, in the appropriate rulemaking docket.

144 **Additional Considerations after the Comment Period Has Closed**

145 9. Agencies should determine whether, and under what circumstances, ex parte  
146 communications made after the close of the comment period should be permitted and, if so, how  
147 they should be considered.

148 10. If an agency ~~elects to receives~~, through an ex parte communication, any significant  
149 new information that its decisionmakers ~~may choose to~~ consider or rely upon, it should disclose  
150 the information and ~~if appropriate~~, reopen the comment period, to provide the public with an  
151 opportunity to respond.

152 11. When an agency receives a large number of requests for ex parte meetings after the  
153 comment period has closed, it should consider using a reply comment period or offering other  
154 opportunities for receiving public input on submitted comments. *See* Admin. Conf. of the United  
155 States, Recommendation 2011-2, *Rulemaking Comments* ¶ 6, 76 Fed. Reg. 48,791 (Aug. 9, 2011)  
156 (encouraging the use of reply comment periods and other methods of receiving public input on  
157 previously submitted comments).

Commented [CA1]: Ramirez amendment

Commented [CMA2]: Siciliano amendment: This recommendation intends to suggest best practices, but its current phrasing seems instead to address the legal question of when a comment period should, as a matter of law, be reopened (i.e., anytime there is significant new information that a decision-maker relies on). Even if this paragraph does not speak to the law of "reopening the comment period," it advocates reopening as a universal best practice. But the courts recognize that an agency cannot continually reopen a comment period, even in the face of new information. The term "if appropriate" allows this best practice to account for a wide array of factors that an agency might confront.



158 **Quasi-Adjudicatory Rulemakings**

159 12. If an agency conducts “quasi-adjudicatory” rulemakings that involve conflicting  
160 private claims to a valuable privilege, its ex parte communications policy should clearly and  
161 distinctly articulate the principles and procedures applicable in those rulemakings.

162 13. Agencies should explain whether, how, and why they are prohibiting or restricting  
163 ex parte communications in quasi-adjudicatory rulemakings. Agencies may conclude that ex  
164 parte communications in this context require a different approach from the one otherwise  
165 recommended here.

166 14. Agencies should explain and provide a rationale for any additional procedures  
167 applicable to ex parte communications received in quasi-adjudicatory rulemakings.

168 **Accommodating Digital Technology**

169 15. Agencies should consider how digital technology may aid the management or  
170 disclosure of ex parte communications. For example, agencies may be able to use technological  
171 tools such as video teleconferencing as a cost effective way to engage with interested persons.

172 16. Agencies should avoid using language that will inadvertently exclude ex parte  
173 communications made via digital or other new technologies from their policies.

174 17. Agencies should state clearly whether they consider social media communications  
175 to be ex parte communications and how they plan to treat such communications. Agencies  
176 should ensure consistency between policies governing ex parte communications and the use of  
177 social media.