



Recommendation 77-3

Ex Parte Communications in Informal Rulemaking Proceedings

(Adopted September 15-16, 1977)

In Recommendation 72-5 the Conference expressed the view that, generally, agency rulemaking is preferably carried out through the simple, flexible and efficient procedures of 5 U.S.C. § 553. That statute requires publication of notice of proposed rulemaking and provision of opportunity for submission of written comments; additional procedures may be utilized by the agencies as they deem necessary or appropriate. Recommendation 72-5 counseled that Congress ordinarily should not impose mandatory procedural requirements going beyond those of § 553 in the absence of special reasons for doing so. In Recommendation 76-3 the Conference amplified its 1972 recommendation by suggesting ways in which agencies might usefully supplement the minimum procedures required by § 553 in appropriate circumstances.

The primary purposes of rulemaking procedures under § 553 are to enhance the agency's knowledge of the subject matter of the proposed rule and to afford all interested persons an adequate opportunity to provide data, views, and arguments with respect to the agency's proposals and any alternative proposals of other interested persons. Section 553 procedures, in some instances, also serve to provide the basis for judicial review. To the extent consistent with all of these purposes, the agencies should have broad discretion to fashion procedures appropriate to the nature and importance of the issues in the proceeding, in order to make rules without undue delay or expense. Informal rulemaking should not be subject to the constraints of the adversary process. Ease of access to information and opinions, whether by recourse to published material, by field research and empirical studies, by consultation with informed persons, or by other means, should not be impaired.

While the foregoing considerations militate against a general prohibition upon ex parte communications in rulemaking subject only to § 553, certain restraints upon such communications may be desirable. Ex parte communications during the rulemaking process can give rise to three principal types of concerns. First, decisionmakers may be influenced by communications made privately, thus creating a situation seemingly at odds with the widespread demand for open government; second, significant information may be unavailable to reviewing courts; and third, interested persons may be unable to reply effectively to information, proposals or arguments presented in an ex parte communication. In the context of



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§ 553 rulemaking, the first two problems can be alleviated by placing written communications addressed to a rule proposal in a public file, and by disclosure of significant oral communications by means of summaries or other appropriate techniques. The very nature of such rulemaking, however, precludes any simple solution to the third difficulty. The opportunity of interested persons to reply could be fully secured only by converting rulemaking proceedings into a species of adjudication in which such persons were identified, as parties, and entitled to be, at least constructively, present when all information and arguments are assembled in a record. In general rulemaking, where there may be thousands of interested persons and where the issues tend to be broad questions of policy with respect to which illumination may come from a vast variety of sources not specifically identifiable, the constraints appropriate for adjudication are neither practicable nor desirable.

Recommendation

In rulemaking proceedings subject only to the procedural requirements of § 553 of the Administrative Procedure Act:

1. A general prohibition applicable to all agencies against the receipt of private oral or written communications is undesirable, because it would deprive agencies of the flexibility needed to fashion rulemaking procedures appropriate to the issues involved, and would introduce a degree of formality that would, at least in most instances, result in procedures that are unduly complicated, slow and expensive, and, at the same time, perhaps not conducive to developing all relevant information.
2. All written communications addressed to the merits, received after notice of proposed rulemaking and in its course, from outside the agency by an agency or its personnel participating in the decision should be placed promptly in a file available for public inspection.
3. Agencies should experiment in appropriate situations with procedures designed to disclose oral communications from outside the agency of significant information or argument respecting the merits of proposed rules, made to agency personnel participating in the decision on the proposed rule, by means of summaries promptly placed in the public file, meetings which the public may attend, or other techniques appropriate to their circumstances. To the extent that summaries are utilized they ordinarily should identify the source of the communications, but need not do so when the information or argument is cumulative. Except to the extent the agencies expressly provide, the provisions of this paragraph and the preceding



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paragraph should not be construed to create new rights to oral proceedings or to extensions of the periods for comment on proposed rules.

4. An agency may properly withhold from the public file, and exempt from requirements for making summaries, information exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552.

5. Agencies or the Congress or the courts might conclude of course that restrictions on ex parte communications in particular proceedings or in limited rulemaking categories are necessitated by considerations of fairness or the needs of judicial review arising from special circumstances.

Citations:

42 FR 54253 (October 5, 1977)

___ FR _____ (2012)

4 ACUS 72