ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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Comments of Carol Ann Siciliano/EPA 4-7-14

Memorandum

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

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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 within informal rulemaking, 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]

Comment [A1]: Siciliano comment: what is purpose of this footnote and, in particular, the last sentence? I continue to request that we abandon the term "ex parte" when used in the informal rulemaking context. (For, if we did so, we would not need a footnote like this that defines a term in a different – and quite negative -- context.)

Comment [A2]: Siciliano comment: If we do continue to use "ex parte communications" in the context of informal rulemaking, I agree that we should note that the term "does not fit comfortably" in that context. And that invites the question why we are nevertheless using it. Therefore, I would like us to add a sentence at the end of the "does not fit comfortably" sentence that says something like this: "Nevertheless, we use the term "ex parte communication" in the context informal rulemaking because _____."

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[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 Commc'ns 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

Comment [A3]: Siciliano comment: We append a footnote to the last clause, where we appropriately cite Vermont Yankee. I have two concerns:

(1) the use of the passive voice in the first part of the quoted sentence above could imply that we encourage courts to impose those restraints. But, of course, Vermont Yankee forecloses that. So, if we mean that Agencies should voluntarily adopt restraints, we should say that directly.

*(2)*I don't think the footnote actually supports the statement in the text that "these basic principles remain valid." The law review article pre-dates Vermont Yankee, and a reader (like me) might conclude that VY washed away whatever principles were articulated in the law review article. So, rather than supporting the "remain valid" point, this footnote actually seems to undercut it. For this reason, I recommend *deleting or rewriting FN 6.*

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* Nathanial 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~~If non-public information affects decisionmaking, however, ~~it creates~~ different and more serious problems may emerge:~~.~~ 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 of non-confidential information 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~~ no 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 the 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 (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).

Comment [A4]: Siciliano comment: While I understand the transparency concern, I'm not sure this sentence makes sense. In most cases in EPA's experience (except for CBI), if we rely on non-public information and do not disclose it to the court, then our action will likely be struck down as unsupported by the record. This unappealing prospect discourages agencies from hiding information they relied on. So I'm not sure what that sentence adds. *I recommend we delete it and rely entirely on the preceding sentence to make the point.*

Comment [A5]: Siciliano comment: we state in Paragraph 8 that agencies should not restrict ex parte communications. Therefore, I think we should delete the phrase "few if any" and simply say "no."

Comment [A6]: Siciliano comment: I am troubled by the term "necessary" in the context of NPRMs (or anywhere in this recommendation). Since Vermont Yankee, courts have no authority to determine that new restrictions (on anything) are "necessary." Yet the term implies that ACUS is drawing legal conclusions from somewhere and advocating them. I suggest that we delete the term wherever it occurs in this document. I think the concept "desirable" conveys the flavor of our recommendations as recommendations, not legal conclusions.

Comment [A7]: Siciliano comment: is that really what we mean? Do we need the word "personnel" at all?

Comment [A8]: Siciliano comment: The first sentence in this pair is contains what appears to be an ACUS recommendation, even though we quickly disparage it the following sentence. I don't think recommendation (or critique) belongs in the preamble. I would end the paragraph after the phrase "close of the comment period."

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~~Communications Policies

2. Each agency that conducts informal rulemaking under 5 U.S.C. § 553 should have a written policy explaining how the agency handles oral or written information supplied to the agency after the close of the comment period.~~ex parte communications~~.

3. Agency ~~ex parte~~ communications policies discussed in Paragraph 2 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~~ Not apply to 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).

Comment [A9]: Siciliano comment: what is a "reliance" document? Can we rephrase?

Comment [A10]: Siciliano comment: Because a number of agencies do not use this term in the informal rulemaking context, I strongly recommend that we not use this term in a paragraph urging agencies to develop a policy about it. Instead, let's say exactly what we mean: "explaining how the agency handles oral or written information supplied to the agency after the close of the comment period."

Comment [A11]: Siciliano comment: I request that we delete the phrase "ex parte" here too, for the reasons noted in the previous Comment. Instead, we could refer to the "communications policy discussed in Paragraph 2."

Comment [A12]: Siciliano comment: do we mean "described"? There's not really a discussion

Comment [A13]: Siciliano comment: The term "exclude" sounds like a reference to the administrative record (e.g., excluding a document from the administrative record). I don't think that's what we mean. I think we mean that the policy "should not apply to."

Comment [A14]: Siciliano comment: : I appreciate the reference to "rulemaking docket" in (d). The docket, of course, can be larger than the administrative record. A late-arriving letter would indeed be included in the docket as a "late comment" but might not be included in the administrative record if it arrived too late for the agency to consider it. Similarly, the agency would not respond to that late comment. The courts accept this principle. See *Reytblatt v. U.S. Nuclear Regulatory Commission*, 105 F.3d 715, 723 (D.C. Cir. 1997) ("agencies are free to ignore . . . late filings")(quoting *Personal Watercraft Industrial Association v. Department of Commerce*, 48 F.3d 540, 543 (D.C. Cir. 1995). Therefore, I am troubled by the phrasing of (e), which seems to assume that a response is always appropriate. I don't think that's our intention.

Comment [A15]: Siciliano comment: What does this mean?

g. Explain how the agency will treat sensitive information submitted in ~~an ex parte~~ a communication after the comment period closes.

h. Explain how the agency's ~~ex parte~~ communications policy interacts with its comment policy.

4. In formulating policies governing ~~ex parte~~ communications outside of the comment period 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~~ choose to disclose ~~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, or in addition to, 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~~ Direct their own personnel to prepare and submit the necessary summary; or

        ii. ~~Require~~ Request 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~~ that its decisionmakers may ~~rely~~ wish to consider as part of the rulemaking, it should disclose the information and reopen the comment period~~,~~ to provide the

Comment [A16]: Siciliano comment: We are talking about agency policies. I think we should delete the term "require" and instead say "Agencies may, however, choose to disclose….."

Comment [A17]: Siciliano comment: I think our goal is achieved by recommending a public meeting in addition to individual meetings. I don't think we should recommend (or appear to recommend) the abolition of individual meetings, because small-scale stakeholder meetings have many advantages for agency decision-makers and the public.

Comment [A18]: Siciliano comment: because this is an agency policy, I think the word "direct" is better.

Comment [A19]: Siciliano comment: We should say "request" here. EPA can "require" private parties to take actions only if we have statutory authority to impose that requirement and have codified the necessary implementing regulations.

Comment [A20]: Siciliano comment: Decision makers have the option to decline to consider "significant new information" if it arrives too late in the rulemaking process (especially if a consent decree deadline is imminent). Therefore, I think the recommendation to reopen the comment period should be limited to significant new information "that the decision maker may wish to consider as part of the rulemaking." If the decision maker says "no thank you" to the new untimely information, then that should be the end of it.

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.

Comment [A21]: Siciliano comment: I don't see what these two paragraphs add. Agencies already know about video conferencing as a way of engaging with stakeholders (paragraph 14). And I'm not sure what paragraph 15 is trying to say.

[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).