Ex Parte Communications in Informal Rulemaking

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Executive Summary

This report examines legal and policy issues related to "*ex parte* communication" in informal rulemaking, defined to mean interactions, oral or in writing, between a public stakeholder and agency personnel regarding a rulemaking outside of written comments submitted to the public docket during the comment period. It describes how current *ex parte* communications usually occur as oral communications in face-to-face meetings, and identifies the value – actual and potential – and harm – real and perceived – of such communications. This report examines nine relevant D.C. Circuit cases, the Conference's previous work on this topic in 1977, and eighteen agency policies. It illuminates the legal framework governing *ex parte* communications and identifies best practices that balance the potential value and harm of such communications.

This report's major conclusions are:

- *Ex parte* communications are not prohibited in informal rulemakings.
- There are no legal requirements for handling *ex parte* communications occurring before publication of a notice of proposed rulemaking ("NPRM").
- After an NPRM has been published in quasi-judicial or quasi-adjudicatory informal rulemakings, due process requires agencies to restrict or provide additional procedures to properly receive *ex parte* communications.
- *Ex parte* communications made after publication of an NPRM must be publicly disclosed, to ensure an adequate record for judicial review.
- Disclosing *ex parte* communications can allow agencies to balance the potential value and harm of such communications.
- The digital age has made disclosure of *ex parte* communications easier and more widely accessible, but has not otherwise affected such communications, which still occur mainly through in-person meetings.

This report begins in Part I by defining "*ex parte* communications" and "informal rulemaking." Next, Part II addresses methodological issues, explaining how interviews with agency personnel and public stakeholders informed the report's analysis and conclusions. Part III explores how current *ex parte* communications are made and why, and provides a summary of the potential value and harm of *ex parte* communications in informal rulemaking, as described by the D.C. Circuit, scholars, and agency personnel and public stakeholder interviewees.

Part IV of the report confirms that the Administrative Procedure Act (APA) is silent regarding *ex parte* communications in informal rulemaking, and distills key factors from relevant D.C. Circuit cases, including six cases in which *ex parte* communications were found permissible and three in which they were found problematic. This part also discusses the Conference's previous recommendation on *ex parte* communications in informal rulemakings, which informed some agencies' policies addressing *ex parte* communications in informal rulemaking.

Part V reviews the *ex parte* communication policies of eighteen agencies, as evidenced in rules, written guidance, and unwritten policy. This examination reveals a spectrum of approaches to *ex parte* communications, with some agencies being more welcoming and others more restrictive. All agencies, however, require some disclosure of *ex parte* communications. This part identifies commonalities among the agencies' varying disclosure requirements and compares the policies of executive agencies with those of independent agencies.

Part VI summarizes the legal requirements for *ex parte* communications and concludes that agencies' policies should balance the potential value and harm of such communications. This part also discusses other legal considerations that may inform agency policy choices for best practices, and advocates disclosure of *ex parte* communications. Part VII examines whether the digital age raises new issues related to *ex parte* communications and explains that such communications made via social media is the main issue agencies must now consider.

Finally, Part VIII identifies the key questions agencies must address when crafting an *ex parte* communication policy. This section answers each question to illuminate suggested recommendations to agencies regarding how to define, approach, and handle *ex parte* communications in informal rulemaking.

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")[1]], but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them."[2] This decision was the result of several D.C. Circuit decisions[3] adding procedures governing *ex parte* communications in rulemaking conducted under the "informal" rulemaking procedures of the APA.[4] 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.[5] 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."[6]

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 recommended best practices for agencies to consider in dealing with *ex parte* practices.

A. Informal Rulemaking

Federal agency rulemakings are governed by the APA,[7] which sets forth specific procedures for two types of rulemaking: formal[8] and informal.[9] The majority of federal rulemakings[10] are informal rulemakings under the procedures in APA section 4, codified at 5 U.S.C. 553, and are commonly referred to as 553 rulemaking, notice-and-comment rulemaking, or just informal rulemaking.

The lifecycle of an informal rulemaking in its simplest form, based on the APA's procedural requirements, includes issuance of a notice of proposed rulemaking ("NPRM"),

[1] Codified at 5 U.S.C. § 551 *et seq*.

[2] Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 524 (1978).

[3] 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 (Ala.) Inc. v. Dixon, 294 F.2d 899 (D.C. Cir. 1961).

[4] 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). *See also* discussion *infra* Part I.A. Informal Rulemaking.

[5] *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).

[6] *Vermont Yankee*, 435 U.S. at 524.

[7] 5 U.S.C. § 551 *et seq.*

[8] 5 U.S.C. §§ 556–557.

[9] 5 U.S.C. § 553.

[10] This report uses the term "rulemaking" throughout to mean only federal rulemaking.

followed by a public comment period, and then issuance of a final rule. The public comment period is integral to fulfilling a basic purpose of informal rulemaking: "To provide for public participation in the rule making process."[11] The public comment period provides an opportunity for public stakeholders to interact with the agency regarding the specific substance of the agency's rulemaking. During the comment period, a public stakeholder may submit written comments to the agency's rulemaking docket for review as part of all written comments received in the docket for that specific rulemaking. Historically, all such written comments were made on paper and held in physical files at the specific agency. In the digital age, however, most agencies have an online docket to which commenters may submit electronic comments and those electronic comments are accessible via the internet.[12]

Interaction between public stakeholders and agency personnel regarding a rulemaking, however, is not necessarily limited to written communications submitted during the comment period—communications also occur via other methods and at other times. For example, public stakeholders and agency representatives may have an in-person meeting during or after the public comment period where the public stakeholder coveys comments on the proposed rule orally. Additionally, meetings between public stakeholders and agency personnel may occur before the agency issues an NPRM, when the public stakeholder knows the agency is working on a particular subject matter and wishes to provide information and opinions about the matter for the agency to consider while developing a proposed rule.

B. *Ex Parte* Communication: An Imperfect Term

Communications regarding a rulemaking between public stakeholders and agency representatives outside of written comments submitted to the public docket during the comment period are often referred to as "*ex parte*" communications. "*Ex Parte,*" a Latin term meaning "on or from one side or party only,"[13] is commonly used in the judicial or other adversarial context.[14]

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[11] ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947).

[12] COMMITTEE ON THE STATUS AND FUTURE OF FEDERAL E-RULEMAKING, ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING 3 (2008) ("More than 170 different rulemaking entities in 15 Cabinet Departments and some independent regulatory commissions are now using a common database for rulemaking documents, a universal docket management interface, and a single public website for viewing proposed rules and accepting on-line comments."); *see generally* Michael Herz, *Using Social Media in Rulemaking: Possibilities and Barriers, available at* http://www.acus.gov/sites/default/files/documents/Herz%20Social%20Media%20Final%20Report.pdf.

[13] MERRIAM WEBSTER DICTIONARY, www.merriam-webster.com.

[14] *See* Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 119 (2003) ("The prohibition of *ex parte* contacts emanates from the basic character of adjudication as an adversary proceedings with a decision 'on the record' by an impartial decisionmaker. *Ex parte* contacts deprive one party of an opportunity to become aware of and contest the assertion that the other party is advancing. To the extent that *ex parte* contacts serve as the basis for decision, they violate the principle that the decision may refer only to evidence presented as part of the formal record. In addition, because these contacts are not monitored by any outside party, they create a risk that the decisionmaker's neutrality may be compromised by threats, bribes, or flattery.") (citations omitted).

The likely origin of the use of this term in the informal rulemaking context is the APA itself: the APA defines "*ex parte* communications" as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter."[15] The APA also prohibits *ex parte* communications in hearings conducted as part of formal rulemakings or adjudicatory proceedings.[16] But neither the term "*ex parte* communications" nor any prohibition of *ex parte* communications appear in the APA's informal rulemaking procedures.

Although the APA provides a definition of *ex parte* communication, and prohibits them in formal rulemakings and adjudications, the APA is decidedly silent on any prohibition, treatment, and even the appropriateness of the use of the term "*ex parte* communications" in the informal rulemaking context.[17] Indeed, the D.C. Circuit has pondered the appropriateness of using the term in the informal context, noting its untoward connotations: "Such an approach [of labeling all communications at issue as '*ex parte*'] essentially begs the question whether these particular communications in an informal rulemaking proceeding were unlawful."[18] Agency personnel and public stakeholders interviewed for this report noted similar objections to using the term in the informal rulemaking context and in this project. Some interviewees, like the D.C. Circuit, were concerned that using the term improperly imports connotations of unethical behavior from the judicial context into the informal rulemaking context. Other interviewees, however, used the term willingly, and several agency rules use the term.[19]

Although the term "*ex parte*" may be an imperfect term as applied to informal rulemakings, this report uses it to refer to interactions, oral or in writing, between a public stakeholder and agency personnel regarding a rulemaking outside of written comments submitted to the public docket during the comment period.[20] This definition does not, however, include

[15] 5 U.S.C. § 551(14).

[16] 5 U.S.C. § 557(d)(1).

[17] "When Congress wanted to prohibit *ex parte* contacts it clearly did so." Sierra Club v. Costle, 657 F.2d 298, 401 (D.C. Cir.1981) (quoting Action for Children's Television, v. Fed. Commc'ns Comm'n, 564 F.2d 458, 474-75 n. 28 (D.C. Cir. 1977)).

[18] *Sierra Club*, 657 F.2d at 391.

[19] *See e.g.*, 14 C.F.R. Appendix 1 to part 11 (Federal Aviation Administration's definition: "'Ex parte' is a Latin term that means 'one sided,' and indicates that not all parties to an issue were present when it was discussed. An *ex parte* contact involving rulemaking is any communication between FAA and someone outside the government regarding a specific rulemaking proceeding, before that proceeding closes. A rulemaking proceeding does not close until we publish the final rule or withdraw the NPRM. Because an *ex parte* contact excludes other interested persons, including the rest of the public, from the communication, it may give an unfair advantage to one party, or appear to do so."); 11 C.F.R. § 201.2(a) (Federal Election Commission's definition: "*Ex parte communication* means any written or oral communication by any person outside the agency to any Commissioner or any member of a Commissioner's staff which imparts information or argument regarding prospective Commission action or potential action concerning any pending rulemaking"); 47 CFR § 1.1202(b) (Federal Communication Commission's definition: "*Ex parte presentation*. Any presentation which if written, is not served on the parties to the proceedings; or if oral, is made without advance notice to the parties and without opportunity for them to be present.").

[20] This definition of "*ex parte* communication" varies from the definition used in the Conference's previous work on this topic, Recommendation 77-3, see *infra* note 48. The main differences are: (1) this definition includes *ex parte* communications made before publication of an NPRM and Recommendation 77-3's definition only covers

such interactions for which there is advanced public notice. So defined, *ex parte* communications in informal rulemaking may occur: (1) before an NPRM is issued ("pre-NPRM *ex parte* communication") or (2) after an NPRM is issued ("post-NPRM *ex parte* communication"). A post-NPRM *ex parte* communication may occur either during the comment period through means other than written, submitted comments ("comment period *ex parte* communication") or after the close of the comment period but before issuance of the next rulemaking document whether it is a final rule, supplemental NPRM, or other agency action ("post-comment period *ex parte* communication").

By using this term, this report does not mean to imply or infer any unlawfulness, unethicalness, or other impropriety. Rather, the term is used purely descriptively, to refer to any public-agency interaction not in the form of a written comment submitted to the public docket during the comment period. Part IV, *infra*, explores the circumstances in which *ex parte* communications in informal rulemaking may present legal or policy problems.

II. Methodology

A key aspect of the research for this report was interviews with agency personnel and public stakeholders. I spoke with representatives from a mix of large and small, executive branch and independent agencies, as well as agencies with varying policies on *ex parte* communications from promulgated rules to no known policy. I also spoke with a cross-section of public stakeholders that represented a variety of interests and perspectives.

I interviewed agency personnel at twelve agencies:[21] seven executive agencies[22] and five independent agencies.[23] The executive agencies included: Department of Education ("ED"); U.S. Coast Guard ("USCG");[24] Transportation Security Administration ("TSA");[25] Department

such communications made post-NPRM; and (2) this report's definition covers oral and written communications "regarding a rulemaking" while Recommendation 77-3's definition only applies to oral communications "of significant information or argument respecting the merits of proposed rules" and written communications "addressed to the merits." This report's definition is purposefully broader to address legal requirements and best practices for pre-NPRM *ex parte* communications. This definition also applies one standard to both oral and written communications, and eliminates the need to determine if such communications involve a rulemaking's "merits" before applying any required or recommended procedures for handling such communications.

[21] This report uses the term "agency" as defined in the APA, codified at 5 U.S.C. 551(1), to mean: "each authority of the Government of the United States, whether or not it within or subject to review by another agency."

[22] This report uses the term "executive agency" to refer to any "Executive Department" and any agency within an Executive Department. USA.gov lists the following 15 agencies as "Executive Departments": Department of Agriculture, Department of Commerce, Department of Defense, Department of Education, Department of Energy, Department of Health and Human Service, Department of Homeland Security, Department of Housing and Urban Development, Department of Justice, Department of Labor, Department of State, Department of the Interior, Department of the Treasury, Department of Transportation, and Department of Veterans Affairs. USA.GOV, FEDERAL EXECUTIVE BRANCH, http://www.usa.gov/Agencies/Federal/Executive.shtml.

[23] USA.gov provides a list of 70 "Independent Agencies and Government Corporations," including: Environmental Protection Agency Federal Communications Commission, Federal Election Commission, and Nuclear Regulatory Commission. USA.GOV, INDEPENDENT AGENCIES AND GOVERNMENT CORPORATIONS, http://www.usa.gov/ Agencies/Federal/Independent.shtml

[24] USCG is an operational component of the Department of Homeland Security ("DHS").

[25] TSA is an operational component of DHS.

of Labor ("DOL"); Department of Transportation ("DOT"); Federal Aviation Administration ("FAA");[26] and National Highway Traffic Safety Administration ("NHTSA").[27] The independent agencies included: Environmental Protection Agency ("EPA"),[28] Consumer Financial Protection Bureau ("CFPB"),[29] Federal Communications Commission ("FCC"), Federal Election Commission ("FEC"), and Nuclear Regulatory Commission ("NRC").

The twelve agencies represented by agency interviewees ranged from some of the largest agencies with over 50,000 employees, such as DOT[30] (including FAA),[31] USCG,[32] and TSA,[33] to some of the smallest agencies with only a few hundred employees, such as NHTSA[34] and FEC.[35] The other agencies are mid-size agencies, such as DOL[36] and EPA[37] with just under 20,000 employees, to some of the larger small agencies, such as ED[38] and NRC[39] with around 4,000 employees, and FCC[40] and CFPB[41] with just under 2,000 employees.

[26] FAA is an operating administration within DOT.

[27] NHTSA is an operating administration within DOT.

[28] This report includes EPA as an independent agency, as listed in USA.gov's classification, although this report also recognizes that in recent administrations the President has offered, and the EPA Administrator has accepted, a position in the President's Cabinet. *See Hearing on S. 159 Before the S. Comm. on Governmental Affairs*, 107th Cong. (2001) (statement of Gov. Christine Todd Whitman, Administrator, U.S. Environmental Protection Agency), *available at* http://www.epa.gov/ocir/hearings/testimony/107_2001_2002/072401ctw.PDF.

[29] The CFPB is an independent agency created in 2010 under Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No 111-203 (2010). *See also* Brief for the Consumer Financial Protection Bureau as Amici Curiae Supporting Defendants-Appellees, Otoe-Missouria Tribe v. NY State Dep't of Fin. Servs., (No. 13-3769), 2013 WL 5460185, (stating CFPB is "a new independent agency focused on protecting consumers in the financial marketplace").

[30] DOT has approximately 60,000 employees. U.S. DEP'T. OF TRANSP., OUR ADMINISTRATIONS, http://www.dot.gov/administrations.

[31] FAA has approximately 47,000 employees. FED. AVIATION ADMIN., ADMINISTRATOR'S FACT BOOK, http://www.faa.gov/about/office_org/headquarters_offices/aba/admin_factbook/media/201206.pdf.

[32] USCG has approximately 43,000 active duty and 8800 civilian employees. U.S. COAST GUARD, ABOUT US, http://www.uscg.mil/top/about/.

[33] TSA has over 50,000 employees. TRANSP. SEC. ADMIN., OUR WORKFORCE, http://www.tsa.gov/about-tsa/tsa-workforce.

[34] NHTSA has approximately 700 employees. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., www.nhtsa.gov/staticfiles/administration/pdf/.

[35] FEC has just under 400 employees. ALLGOV.COM, FED. ELECTION COMM'N, http://www.allgov.com/departments/independent-agencies/federal-election-commission?agencyid=7324.

[36] DOL has approximately 17,500 employees. DEP'T OF LABOR, FY 2013 BUDGET IN BRIEF, http://www.dol.gov/dol/budget/2013/PDF/FY2013BIB.pdf.

[37] EPA has approximately 17,000 employees. ENVTL. PROT. AGENCY, FY 2014 EPA BUDGET IN BRIEF http://www2.epa.gov/planandbudget/fy2014.

[38] ED has approximately 4,400 employees. DEP'T OF EDUC., ABOUT ED: OVERVIEW AND MISSION STATEMENT, http://www2.ed.gov/about/landing.jhtml.

[39] NRC has approximately 4,000 employees. NUCLEAR REGULATORY COMM'N, FY 2014 CONGRESSIONAL BUDGET JUSTIFICATION, http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1100/v29/.

[40] FCC has approximately 1,800 employees. FED. COMMC'NS COMM'N, FY 2013 BUDGET ESTIMATES, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-312417A1.pdf.

[41] CFPB has approximately 1,500 employees. CONSUMER FIN. PROT. BUREAU, BUDGET ESTIMATES, http://www.consumerfinance.gov/strategic-plan-budget-and-performance-plan-and-report/#budget-overview.

Of the twelve agencies represented by agency interviewees, three have rules addressing *ex parte* communications in informal rulemaking (FAA, FCC, and FEC), six have written guidance (USCG, DOL, DOT, NHTSA, EPA, and CFPB), and three have unwritten policies (ED, TSA, and NRC).

The report also discusses six additional agencies: four executive agencies[42] and two independent agencies,[43] which are the only other agencies with promulgated rules addressing *ex parte* communications. Thus, this report covers eighteen agencies: eleven executive departments or agencies within executive departments, and seven independent agencies. Nine agencies with rules, six agencies with written guidance, and three agencies with unwritten policy.

I interviewed public stakeholders at eight entities that represent perspectives of industries and businesses, large and small, subject to federal regulation; consumers and government watchdogs represented by non-profit organizations; and academia.[44] Representatives of regulated industry and business interests included: a company that builds appliances, lighting, power systems, and other products for home, offices, factories, and retail facilities; a company focusing on healthcare technology such as imaging systems, patient care and clinical informatics, customer services, and home health care; an organization representing interests of businesses of all sizes, sectors, and regions; an organization representing interests of the forest products industry; and an entity charged with being an independent voice for small business and watchdog for the Regulatory Flexibility Act. Representatives from the non-profit organizations included: an organization that champions citizen interests before the three branches of federal government and focuses on practices in the pharmaceutical, nuclear, and automobile industries, among other industries; and an organization that preserves the openness of the Internet and access to knowledge, promotes creativity, and protects consumer rights in three main areas of copyright, telecommunication, and Internet law. I also spoke with a law professor who has the most recently published article discussing *ex parte* communications in federal rulemakings,[45] in addition to calling upon many representatives of academia and scholarly opinion through the body of literature referenced and quoted throughout this report.

The regulatory areas represented by the public stakeholder interviewees are: appliance, lighting, and power systems development, production, and safety; automobile production and safety; copyright; electronics; emissions control; healthcare products; Internet rights and access; life sciences; nuclear energy; pharmaceuticals; and telecommunications.

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[42] Department of Justice ("DOJ"), Federal Emergency Management Agency (with in DHS) ("FEMA"), Food and Drug Administration (within the Department of Health and Human Services) ("FDA"), and Department of the Interior ("DOI"). *See* USA.gov listing DOJ, DHS, Department of Health and Human Services, and DOI as "Executive Departments" http://www.usa.gov/Agencies/Federal/Executive.shtml.

[43] Consumer Product Safety Commission ("CPSC") and Federal Trade Commission ("FTC"). *See* USA.gov including CPSC and FTC in the list of 70 "Independent Agencies and Government Corporations" http://www.usa.gov/Agencies/Federal/Executive.shtml.

[44] Public stakeholder interviewees include representatives from: American Forest and Paper Association, General Electric, Office of Advocacy, Philips Healthcare, Professor Thomas O. McGarity, Public Citizen, Public Knowledge, and U.S. Chamber of Commerce.

[45] Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L. J. 1671 (2012).

The interviews focused on the interviewees' experience with and perspectives on interactions regarding a rulemaking between public stakeholders and agency personnel that is not part of a written comment submitted to the public docket during the rulemaking's comment period. We discussed the interviewees' perspective on the potential pros and cons of *ex parte* communications, as well as examples of *ex parte* contacts, exploring the types of information involved, motivations for, and any known results of such contacts. Interviews with agency personnel specifically covered agency policy and practice for handling *ex parte* communications. Interviews with public stakeholders also covered how, if at all, knowledge of *ex parte* contacts by other groups (industry or otherwise) in a rulemaking may affect the organization's decisions about engaging in that rulemaking.

III. Background

Regardless of the imperfection of the term "*ex parte* communication" in the informal rulemaking context, or what administrative law practitioners prefer to call *ex parte* communications, the fact that they occur is undisputed. Courts and scholars have discussed *ex parte* communications,[46] and many agencies have specific rules and policies that address *ex parte* communications in informal rulemakings.[47] The Conference's own work in the late 1970's addressed *ex parte* communications[48] and the impetus for this report was the Conference's view that *ex parte* communications "have long been controversial because they raise the possibility, or at least the appearance, of undue influence and parallel nonpublic dockets in the administrative decisionmaking."[49]

Understanding how current *ex parte* communications occur in informal rulemakings provides context for understanding why such communications are controversial but also potentially beneficial. This part discusses the contours of current *ex parte* communications as described by agency personnel and public stakeholder interviewees, and then discusses the value – actual and potential – and harm – real and perceived – of such communications, as described by the D.C. Circuit, academia, and agency personnel and public stakeholder interviewees.

A. Contours of Current *Ex Parte* Communications[50]

Ex parte contacts are mostly initiated by public stakeholders, but may also be initiated by agency personnel. Public stakeholders initiate *ex parte* communications to inform the outcome

[46] *See e.g.*, 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); and articles cited *infra* note 62, *supra* notes 4, 14, 45.

[47] *See* discussion *infra* Part V. Current Agency Policies.

[48] Recommendation 77-3, *Ex parte Communications in Informal Rulemaking*, 42 Fed. Reg. 54,253 (Oct. 5, 1977).

[49] ACUS Request for Proposals – May 23, 2013, Ex Parte Communications in Informal Rulemaking *available at* http://www.acus.gov/sites/default/files/documents/Ex%20Parte%20RFP%205-23-13.pdf.

[50] The content of this section is a summary of statements by agency personnel and public stakeholder interviewees regarding current *ex parte* communications.

of a rulemaking. In pre-NPRM *ex parte* communications, public stakeholders provide information and data to help guide the agency's policy, technical, and scientific decisions. Post-NPRM *ex parte* communications follow-up on written comments that have been or will be submitted to the rulemaking docket, highlighting one to two key points to agency personnel. Agency personnel are most likely to initiate *ex parte* communications when they need more data that is not readily available through other means, such as data showing how a proposed rule might influence regulated entities' business decisions.

Ex parte communications are almost always oral. Agency personnel and public stakeholder interviewees discussed pre-NPRM and post-NPRM *ex parte* communications as default face-to-face meetings, most likely in person. Thus, current *ex parte* communications are oral communications perhaps accompanied by some written content to help facilitate the meeting, such as powerpoint slides, a bulleted-list of key points, or a summary of the commenter's planned content of the meeting for disclosure by the agency. Public stakeholders are especially interested in oral *ex parte* communications post-NPRM because everything that a commenter would want to put in writing is already submitted in written comments to the rulemaking docket.

The exception to the default for oral *ex parte* communications would be if a public stakeholder had new information that it wanted to ensure was added to the rulemaking docket, in which case a written comment is most effective. Public stakeholder interviewees mentioned that there may be some email exchanges that would fall within this report's definition of *ex parte* communications, but that the substance of those were less likely to be rulemaking specific. Agency personnel also mentioned that there may be some email exchanges between agency leadership and public stakeholders, but that even if the exchanges were rulemaking specific, they do not provide the same level of potential value or harm as oral *ex parte* communications.

All interviewees, both public stakeholder and agency personnel, however, agreed that post-NPRM *ex parte* meetings rarely involve new information. The commenter usually reiterates information that will be or has been provided to the agency in written comments submitted to the docket during the comment period. What may be new during the *ex parte* meeting is a nuanced presentation of the information that highlights data or a policy point in a different or more direct way. A goal of an *ex parte* meeting may be to present the already or soon-to-be submitted information in person to a decisionmaker who is not likely to have read the entire record. In such an *ex parte* meeting, a face-to-face meeting makes the commenter's specific perspective and experience more salient to the decisionmaker.

Public stakeholder initiated *ex parte* communications target all types and levels of agency personnel for *ex parte* meetings, depending on the topic, the rulemaking, the agency, and the particular issue. Public stakeholders may request a meeting with technical staff about a proposed rule's details. If an issue deals with policy or other cross-cutting equities, however, the meeting request will generally be directed to the highest-level official charged with making the final policy decisions in a rulemaking.

A public stakeholder may engage in an oral *ex parte* communication on its own, representing its own interests, or as part of a coalition of public stakeholders that may or may not have similar interests beyond a particular rulemaking. Public stakeholders, especially non-profits, often form alliances of convenience for a rulemaking. An *ex parte* meeting involving many stakeholders, especially ones that usually have divergent interests, magnifies the impact and air of legitimacy of the views expressed. For example, if a non-profit organization and a corporation that usually stand on opposite sides of a regulatory issue agree on a particular proposed rule or an aspect of a proposed rule, then succinctly presenting that agreement jointly to an agency makes a bigger impact then discussing the agreement in separate, lengthy written comments.

B. Potential Value of *Ex Parte* Communications

The D.C. Circuit has said that the value of *ex parte* communications "cannot be underestimated."[51] It "recognize[d] 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."[52] The D.C. Circuit has explained that such informal contacts are important because of the policymaking function of administrative rulemaking:

> Under our system of government, the very legitimacy of general policy making performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall. As judges we are insulated from these pressures because of the nature of the judicial process in which we participate; but we must refrain from the easy temptation to look askance at all face-to-face lobbying efforts, regardless of the forum in which they occur, merely because we see them as inappropriate in the judicial contact. Furthermore, the importance of effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated. 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.[53]

1. Potential Value to Agencies: industry data and expertise, and "good government"[54]

[51] Sierra Club v. Costle, 657 F.2d 298, 401 (D.C. Cir. 1981) ("Furthermore, the importance of effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated.").

[52] Home Box Office, Inc. v. Federal Commc'ns Comm'n, 567 F.2d 9, 57 (D.C. Cir. 1977).

[53] *Sierra Club*, 657 F.2d at 401 (citations omitted).

[54] The content of this section is a summary of statements by agency interviewees regarding the value or purpose of *ex parte* communications.

Agency interviewees, regardless of whether they work at an agency that welcomes or discourages *ex parte* communications, recognized at least some potential value of *ex parte* communications. The value of these communications are, generally, industry data and expertise and "good government." Pre-NPRM *ex parte* communications are necessary to provide the agency the benefit of public stakeholder expertise on areas agencies are charged with regulating. Many agencies regulate on the forefront of technical development and need public stakeholder expertise, sometimes even to begin a rulemaking. Pre-NPRM *ex parte* communications can also be helpful to agencies in moving a draft NPRM through the approval process within the Administration. Such *ex parte* communications may be necessary to update information that may have become stale while awaiting approval. Agencies indicated that agency-initiated *ex parte* contacts may be the only way to get additional information from public stakeholders to answer new questions raised during the approval process under the renewed emphasis on quantifiable data under Executive Order 13563.[55]

Post-NPRM *ex parte* communications, which are mostly oral communications, can provide information that amplifies or clarifies information or data submitted in written comments to the rulemaking docket. Most agency interviewees noted that it is rare for new information to arise after the close of the comment period, and that such *ex parte* communications mostly reiterate information previously submitted in written comments. Amplifying or clarifying information, however, provides context or detail that commenters may not be willing to put in written comments submitted to the rulemaking docket. But even when such communications do not provide new, amplifying, or clarifying information, oral comments summarizing and emphasizing key points made in submitted, written comments may also give the agency a new appreciation for a particular point or better understanding of the comment.

Ex parte communications during and after the comment period further "good government" by providing additional opportunity for public stakeholder interaction with the agency. Agency personnel indicated that in-person meetings are more interactive than written comments submitted to the public docket, even if neither party discusses any information beyond what is contained in the NPRM or written comments. And, at the very least, such *ex parte* contacts may help satisfy a public stakeholder's desire to feel heard.

2. Potential Value to Public Stakeholders: providing expertise, opportunity for unwritten discussions, stakeholder engagement, and fostering relationships[56]

All public stakeholder interviewees expressed their belief that *ex parte* communications have value, except the academia representative. Some public stakeholders, however, thought the potential value of such communications outweighed the potential harm only if disclosed. These public stakeholder interviewees differed on whether such disclosure need only cover the fact of the communication, or also its substance.[57] Public stakeholder interviewees had experience with

[55] Executive Order 13563 directs agencies to "use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." 76 Fed. Reg. 3821 (Jan. 21, 2011).

[56] The content of this section is a summary of statements by public stakeholder interviewees regarding the value or purpose of *ex parte* communications.

[57] *See* discussion *infra* Part IV.E.

agencies that welcome *ex parte* communications, such as FCC and EPA, and with agencies that discourage *ex parte* communications, such as DOT and DHS's operating components. To most public stakeholder interviewees, *ex parte* contacts are an important part of the rulemaking process because, to them, submitting comments is not enough to demonstrate the seriousness of an issue or the importance of a stakeholder's information or positions.

Public stakeholders provide a variety of information through *ex parte* communications that is useful during the pre-NPRM period, including technical data, an understanding of technology, knowledge of market dynamics, suggestions of potential unintended consequences, and policy and political information. Stakeholders acknowledged that the earlier they can engage in the rulemaking process with an agency, the best chance they have of influencing a rulemaking before an agency sets its course, gets locked into a position, or devotes limited resources to a particular rulemaking option. Engaging early also provides stakeholders an opportunity to let an agency know how it would be affected and provide its policy positions to the agency at the beginning of the agency's deliberative process.

Public stakeholders can also provide useful information through *ex parte* contacts later in the rulemaking process. Like the agency interviewees, public stakeholders, said that *ex parte* communications could be effective to update records that may become stale during a long interval between the comment period and the next agency action in the proceeding. Even when not providing new information, post-NPRM *ex parte* communications are helpful to ensure agency personnel fully understand technical data and its underlying assumptions. Public stakeholder interviewees indicated that sometimes just the request for an *ex parte* meeting can be beneficial because it ensures agency personnel with technical, legal, and policy expertise are communicating with one another. Rulemakings may have issues with complex technical and legal questions intertwined with policy implications requiring appropriate agency personnel to discuss the issues, whether or not with a public stakeholder present. Post-NPRM *ex parte* meetings with public stakeholders ensure the agency audience understands key points that may have been skimmed over or missed in a lengthy and detailed written comment, ensuring the message is clearly delivered.

Additionally, mirroring the impressions of agency personnel about what commenters are willing to commit to writing, public stakeholders acknowledged they are cautious about what they put in writing on the public record out of concern for business relationships, political sensitivities, and other considerations. Written comments are also carefully drafted for tone and presentation. In oral post-NPRM *ex parte* communications, public stakeholders can be more direct and provide a fuller description of an issue, problem, informative data, or potential solution. Even an *ex parte* meeting that is going to be disclosed carries this benefit because the disclosed summary can accurately capture the main substance of the meeting without disclosing tone, body language, verbatim quotes, or other important aspects of an in-person meeting that are not necessarily central to the written summary of the meeting.

Post-comment period *ex parte* communications are also important for public stakeholders who may not have the resources to submit specific and detailed comments during the comment period, especially if the public stakeholder is not completely familiar with the rulemaking

process. Additionally, post-comment period, rulemaking issues are more distilled by the comments in the public docket and some public stakeholders, especially small entities, can more easily engage in a large, complex rulemaking once the issues that most affect them are focused and highlighted by written comments.

Ex parte meetings, even when providing little value for the commenter in terms of providing information or influencing decisionmakers, still provides value for the commenter. *Ex parte* meetings foster relationships with agency personnel and may hold future value by revealing what the agency is thinking regarding the rulemaking or potential future agency actions. *Ex parte* meetings also help stakeholders craft better written comments in the future because they discover what the agency needs and wants to know. And for some public stakeholders, at the very least, it is still important to engage in *ex parte* meetings in order to show that it did everything possible to make its positions and interests known as part of the rulemaking. This is especially so for organizations representing collective interests.

C. Potential Harm of *Ex Parte* Communications

The D.C. Circuit's concern regarding the potential harm of *ex parte* communications is evidenced by its cases addressing such communications, discussed in detail in Part IV Legal Parameters, below. The court has been concerned that *ex parte* communications frustrate judicial review of agency rulemaking actions or raise serious questions of fairness, including undue influence on decisionmakers.[58] These concerns are rooted in the apparent "danger of 'one administrative record for the public and this court and another for the Commission.'"[59] The divergent records would result if *ex parte* communications were not accurately or adequately captured in the rulemaking record. The D.C. Circuit has expressed concern that "agency secrecy" stands between the court and its duty of judicial review of the agency's actions based on the rulemaking record. "This course is obviously foreclosed if communications are made to the agency in secret and the agency itself does not disclose the information presented."[60] On the issue of fairness, the D.C. Circuit explained:

> If actual positions were not revealed in public comments, as this statement [by a public stakeholder] would suggest, and further, if the Commission relied on these apparently more candid private discussion in framing the final pay cable rules [at issue in the *HBO* case], then the elaborate public discussion in these dockets [for the pay cable rulemaking] has been reduced to a sham.[61]

This sentiment has been reflected by scholars who wonder: "If interested parties know that they can present their cases in private to agency decisionmakers following the comment

[58] Home Box Office, Inc. v. Federal Commc'ns Comm'n, 567 F.2d 9, 57 (D.C. Cir. 1977).
[59] Sierra Club v. Costle, 657 F.2d 298, 401 (D.C. Cir. 1981).
[60] *Home Box Office*, 567 F.2d at 54.
[61] *Id.* at 53-54.

period, they are unlikely to disclose their positions fully in the public proceedings."[62] "If the agency can consult anyone it chooses at any time, what is the point of the comment process?"[63]

The D.C. Circuit has also expressed concern that there may be some sort of undue influence exerted through *ex parte* communications. In particular, the court was concerned that *ex parte* communications may "have materially influenced the action ultimately taken"[64] or affected the agency's decisionmaking such that the final shaping of the rule "may have been by compromise among contending industry forces, rather than by exercise of the independent discretion in the public interest" that authorizing statutes vest in agency decisionmakers.[65]

Commenters have criticized *ex parte* communications for providing the opportunity for undue influence. "Agencies are heavily dependent on others for information necessary for rulemakings. Thus entities with access to the needed information – usually regulated companies – may "enjoy special advantages in the rulemaking process" both before and after the formal comment period. Enabling negotiated regulatory policy in the shadows."[66] *Ex parte* contacts that are not ultimately disclosed have been criticized as a means to "protect[] access of industry or other favored groups to agency officials . . . [and] the lack of public knowledge may give a rule more legitimacy than it deserves because the secrecy hides the industry influence."[67] And one commenter speculates that: "These sorts of meetings undoubtedly influence the content of at least some of the rules that the agencies ultimately propose, or the participants would not spend their time and money setting them up."[68]

Finally, there is the concern about impropriety or the appearance of impropriety of *ex parte* communications. Indeed, "[t]here is something vaguely troubling, especially to a judge, about the image of all those legally required written comments flowing in, to be time-stamped and filed by the back-room myrmidons, while interest group representatives whisper into the ears of the agency's top official over steak and champagne dinners."[69] This "vaguely troubling" aspect seems to underlie the D.C. Circuit's recounting of the nature of the *ex parte* contacts at issue in one case as the court quoted select and specific phrases describing the contacts.[70] Agencies also seem concerned with at least the appearance of impropriety as recounted by agency interviewees, discussed below.

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[62] Note, *Due Process and Ex Parte Contacts in Informal Rulemaking*, 89 YALE L. J. 194, 209 (1979).

[63] Rubin, *supra* note 14 at 120.

[64] Action for Children's Television, v. Fed. Commc'ns Comm'n, 564 F.2d 458, 476 (D.C. Cir. 1977).

[65] *Home Box Office*, 567 F.2d at 53.

[66] McGarity, *supra* note 45 at 1706 (citations omitted).

[67] Shapiro, *supra* note 5 at 867.

[68] McGarity, *supra* note 45 at 1706-07 (citations omitted).

[69] Rubin, *supra* note 14 at 120. (As used in the quote, "myrmidons" means a subordinate who executes orders unquestioningly or unscrupulously. MERRIAM WEBSTER DICTIONARY, www.merriam-webster.com.)

[70] Sangamon Valley Television Corp. v. U.S., 269 F.2d 221, 223-24 (D.C. Cir. 1959). The court quoted, and thus highlighted, that fact that the *ex parte* contacts at issue occurred "in the privacy of their [the Commissioners'] offices", that an interested party '"was 'in all the Commissioners' offices' and went 'from Commissioner to Commissioner'" and that the interested party "probably discussed" his desired outcome at such meetings. This highlighting of the private and specific meetings is juxtaposed to the fact that the interested party entertained the Commissioners and gifted them turkeys.

1. Agency Concerns: agency resources, unvetted information, time delay, appearance of impropriety, and uneven access[71]

Agency interviewees provided insights into agencies' concerns about the potential harm of *ex parte* communications. Such concerns fall into two main categories: practical considerations and appearance considerations. The practical considerations are that *ex parte* communications rarely contain new information for agency staff, and although the verbal discussion may be a more straightforward or a nuanced presentation of information previously or ultimately submitted to the public docket, agency personnel worry about the time spent receiving such communications compared to the actual value of such communication.

Agency personnel are conscious of time and resource burdens of rulemakings and at some point the agency must finish its work on the rulemaking instead of listening to *ex parte* comments. Moreover, agency personnel generally acknowledge that to avoid the appearance of favoritism or unfair access, if an agency agrees to meet with some *ex parte* commenters than it should meet with all those who requested *ex parte* meetings. Depending on the level of interest or controversy of a rulemaking, this approach means that *ex parte* meetings may consume a significant portion of the agency's staff resources. Additionally, all agencies represented in the interviews have a policy of disclosing at least certain types of *ex parte* communications. That disclosure further adds to the time and resource burden if the disclosure must be made or overseen by agency staff.[72]

Another practical consideration is the concern that public stakeholders will read into any information gleaned from the agency during a meeting, even if the agency was just in a listening mode, and make business or other operating choices based on an assumption of the agency's decisions or forthcoming rulemaking result. Agency personnel are usually advised to not make any commitments in *ex parte* meetings, but there is still a concern that agency personnel could forget or ignore the advice or their statements or actions during the meeting could be misperceived.

Agency personnel are also concerned about the type of information that could result from *ex parte* communication. Although new information is rare, agency personnel worry that it is likely to be self-serving to the stakeholder and require vetting by other interested parties. The time necessary for this may delay a rulemaking.

New and valuable information gained during an *ex parte* contact could also delay a rulemaking and result in wasted resources if agency leadership change course after an *ex parte* meeting. Although no agency interviewees could recall a time when an *ex parte* meeting had that kind of effect, the concern is that the changed-course could require new economic analysis or data, and perhaps providing notice of the changed-course depending on the stage of the rulemaking and whether it was adequately noticed in the NPRM. Agency personnel interviewees

[71] The content of this section is a summary of statements by agency interviewees regarding the harms, concerns, or disadvantages of *ex parte* communications.

[72] Two agencies, the FCC and CFPB, place the disclosure burden on the public stakeholder. *See* discussion *infra* Part V. Current Agency Policies.

recognized that pre-NPRM *ex parte* meetings are most efficient and are encouraged by Executive Order 13563.[73] Nonetheless, such meetings can still cause delays if staff is working on a proposal based on direction from agency leadership, and leadership revises that direction after meeting with a public stakeholder.[74]

If a decisionmaker revises his or her previous guidance regarding the course of a rulemaking after an *ex parte* meeting, even if the reasons are not fully related to the *ex parte* communication, there is also the concern about the appearance of impropriety and undue influence over the decisionmaker. Agency personnel expressed concern with both the actual and perceived integrity of the rulemaking process. Specially, agency personnel are concerned about the appearance of impropriety if they meet with stakeholders after the NPRM has been issued. No agency interviewee, however, indicated concern about pre-NPRM *ex parte* communications, except for the possible resource concerns if the meeting occurs once the agency has already invested significant resources into preparing a specific proposal.

Agency personnel expressed concern that *ex parte* communications could compromise the apparent legitimacy of a rule. This could affect general acceptance of a rule: someone may be more willing to buy in to the policy rational behind a rule if the person was sure the rule was produced through a fair and reasoned process. This is especially true in a contentious rulemaking where parties are looking for any way to interrupt the rulemaking or cast aspersions on the agency.

Agency personnel are also concerned about the actual or perceived unfairness in uneven levels of access to agency representatives. Both agency and public stakeholder interviewees discussed the reality that some types of public stakeholders are more likely to make *ex parte* communications then stakeholders with less funding and knowledge of the rulemaking process. This reality itself produces uneven representation, even if an agency grants meetings to all public stakeholders requesting *ex parte* contacts.

2. Public Stakeholder Concerns: undue influence, appearance of impropriety, practical considerations, and uneven access[75]

Public stakeholder interviewees recognized a limited range of potential harm of *ex parte* communications, with the exception of academic representatives whose concerns about undue influence and appearance of impropriety are discussed and quoted above.[76] Other public

[73] Executive Order 13563 directs: "Before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking." 76 Fed. Reg. 3821 (Jan. 21, 2011).

[74] This reflects a fundamental difference in stakeholder perspective on whether an NPRM putting forth a detailed proposal is to provide context for public feedback or such a detailed proposal only shows that the agency's decisions have already been made at the NPRM stage.

[75] The content of this section is a summary of statements by public stakeholder interviewees regarding the harms, concerns, or disadvantages of *ex parte* communications.

[76] *See* academic representatives' concerns in text accompanying *supra* notes 66, 67 (undue influence concerns) and 69 (appearance of impropriety concern).

stakeholder interviewees discussed practical considerations and concern about potential and actual uneven access to agency personnel.

Practical concerns from public stakeholder interviewees included the size and completeness of a public docket. Navigating large rulemaking dockets can be difficult. Adding a myriad of *ex parte* communications may only make a docket more cluttered, which can be a particular challenge for small entities and other public stakeholders with fewer resources or less knowledge of the rulemaking process. Also, some stakeholders stated that a docket can only be truly complete if the political agenda of an *ex parte* meeting is disclosed along with the fact of the meeting. In particular, some public stakeholders were concerned that an *ex parte* meeting may happen under the auspices of providing technical expertise, while the true purpose of the meeting is to further a political agenda.

Some public stakeholder interviewees noted concern, similar to agency personnel, about the potential and actual uneven access for all public stakeholders. The public stakeholder interviewees recognized that this uneven access may occur both because agencies reach out to larger entities already familiar to the agency and because of a disparity in participation between industry groups and other groups that may have fewer resources or less knowledge about the rulemaking process. Some public stakeholders were concerned about the definition of *ex parte* communications, the use of the term, and any negative connotations imposed in the informal rulemaking context, as discussed above in Part I.B.

Despite some negative connotations of the term "*ex parte* communications," such communications are generally tolerated, and often welcomed, with an appropriate balancing of the potential value of *ex parte* communications against their potential harm. "The problem of *ex parte* communications has been described as 'one of the most complex in the entire field of Government regulations. It involved the elimination of *ex parte* contacts when those contacts are unjust to other parties, while preserving the capacity of an agency to avail itself of information necessary to decision.'"[77]

Judicial precedent establishing the legal framework for *ex parte* communications in the informal rulemaking context suggests how the potential value and harm of *ex parte* communications might be balanced within the minimal requirements of the APA and due process. Ultimately, however, it is the policies of individual agencies that establish the procedures necessary to strike the right balance in practice. This report considers both contributions. Next, Part IV discusses the legal requirements for *ex parte* communications in informal rulemaking, starting with the APA, moving through the D.C. Circuit's precedents, and finishing with the Conference's previous work on this topic. Then, Part V examines the policies and practices of 18 agencies, as evidenced in rules, written guidance, unwritten policies, and agency interviews.

IV. Legal Parameters

[77] John Robert Long, Ex Parte *Contacts and in Informal Rulemaking: The "Bread and Butter" of Administrative Procedure*, 27 EMORY L. J. 293, 296 (1978).

This section sets out the historical and existing (or persisting) legal parameters regarding *ex parte* communications in informal rulemaking starting with the APA and then discussing the D.C. Circuit's relevant cases. This section then discusses the Conference's previous work on this topic, Recommendation 77-3, *Ex parte Communications in Informal Rulemaking*, ("Recommendation 77-3")[78] 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.

A. Silent APA

As the D.C. Circuit has noted, the APA and other administrative statutes are silent regarding *ex parte* communications in informal rulemakings: "Congressional intent not to restrict *ex parte* contacts in informal rulemaking under the APA – an intent expressed [in the Government in the Sunshine Act in 1976][79] could not have been clearer. 'Informal rulemaking proceedings . . . will not be affected by the [Sunshine Act] provisions.'"[80] Indeed "If Congress wanted to forbid or limit *ex parte* contacts in every case of informal rulemaking, it certainly had a perfect opportunity of doing so when it enacted the Government in the Sunshine Act."[81]

B. D.C. Circuit Case Summary

The federal case law addressing *ex parte* communications comes mainly out of the D.C. Circuit,[82] and although the various opinions have been described as ones that "may not be wholly reconcilable,"[83] together they provide adequate legal guidance for handling *ex parte* communications. The results and reasoning differ from case to case, but mainly because of varying facts. The D.C. Circuit's cases dealing with *ex parte* contacts generally seem to agree[84]

[78] 42 Fed. Reg. 54,253 (Oct. 5, 1977).

[79] Pub. L. No. 94-409 (1976). Section 4(a)-(b) of the Government in Sunshine Act added to the APA the definition of "*ex parte*" communications and the prohibitions on such communications in formal rulemakings and adjudications.

[80] Sierra Club v. Costle, 657 F.2d 298, 402 n. 507 (D.C. Cir. 1981) (quoting Senate Comm. on Gov't Operations, Rept. To Accompany S. 5, Gov't in the Sunshine Act, S. Rep. No. 94-353, 94th Cong., 1st Sess. 35 (1975)) and also referencing 121 Cong. Rec. 35330 (1975) (remarks of Sen. Kennedy) ("informal rulemaking proceedings are also susceptible to *ex parte* influence. These areas are, however, left untouched by the provisions of (the Sunshine Act)")).

[81] Action for Children's Television, v. Fed. Commc'ns Comm'n, 564 F.2d 458, 474 n. 28 (D.C. Cir. 1977).

[82] This report focuses on the D.C. Circuit, the Circuit as Professor Pierce notes "is the only circuit that has announced and applied a broad prohibition on *ex parte* communications in informal rulemaking." Richard Pierce, Jr., *Waiting for Vermont Yankee III, IV, and IV? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 911 (2007). This report does not ignore other Circuits when relevant in considering the judicial parameters, but according to Professor Pierce: "Other circuits have refused to impose such a prohibition." *Id*. (citing as an example Katharine Gibbs Sch. Inc. v. FTC, 612 F.2d 658 (2d Cir. 1979)). *See also* Tex. Office of Public Utility Counsel v. Fed. Commc'ns. Comm'n., 265 F.3d 313 (2001) (rejecting a challenge of improper *ex parte* communications based on FCC's *ex parte* communication rules and general acceptance of such communications in policymaking areas).

[83] Mass. State Pharmaceutical Ass'n v. Rate Setting Comm'n, 438 N.E.2d 1072, 1080 n. 12 (1982) (quoting 1 K.C. Davis, Administrative Law Treatise § 6:18 at 533-537 (1978 & 1982 supp.)).

[84] *But see* Home Box Office, Inc. v. Fed. Commc'ns Comm'n, 567 F.2d 9 (D.C. Circuit 1977).

that there is no general prohibition on or specific procedures for addressing *ex parte* contacts in informal rulemaking.[85] The court's failure to prescribe procedures for addressing *ex parte* contacts is consistent with *Vermont Yankee*'s admonition against judicially-imposed procedures.

This section identifies the key factors that appears to have animated the D.C. Circuit to find *ex parte* communications permissible[86] in six of nine cases and problematic[87] in the remaining three cases. These factors provide a foundation for Part VI, which summarizes the legal parameters for *ex parte* communications and the legal considerations and administrative principles that agencies should consider when crafting an *ex parte* policy.

1. *Van Curler*: permissible communications based on agency characterization

In 1956, in *Van Curler Broadcasting Corporation v. United States*,[88] the Court addressed alleged *ex parte* communications between the Commissioners of FCC, an independent agency, and a broadcast television company during FCC's television channel allocation.[89] The television channel allocation was set in a rulemaking.[90] The court found that the *ex parte* contacts between the Commission and a television station did not compromise the procedural integrity of the rulemaking proceedings stating: "Since all procedural requirements as to rule-making proceedings were met, no defect in the order appears in that respect. . . . Having reached the foregoing conclusions the function of the court is at an end in a case such as this."[91]

The *ex parte* contacts in *Van Curler* included "calls and conversations" between the Commission and representatives of the television company during the proceeding regarding an issue separate from television channel allocation.[92] The Court stated that the substance of the *ex parte* contacts did not concern the television allocation at issue, but a separate issue on which the Commission was generally seeking advice and information.[93]

[85] *See Sierra Club*, 657 F.2d at 402; Electric Power Supply Ass'n v. FERC, 391 F.3d 1255, 1263 (noting the limitation of *Action for Children's Television* and *Sierra Club* on *Home Box Office*).

[86] For purposes of this report, the term "permissible" is used to describe *ex parte* communications that the court found did not affect the validity of the agency's action. The D.C. Circuit did not rule on whether *ex parte* communications are permissible *per se*, and as this report highlights, *ex parte* communications in informal rulemaking are not inherently invalid.

[87] For the purposes of this report, the term "problematic" is used to describe *ex parte* communications that the D.C. Circuit found tainted the validity of the agency's action.

[88] 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.

[89] *Id*. at 727.

[90] *Id*. at 729 ("this was a rule-making and not an adjudicatory proceeding . . . .").

[91] *Id*. at 729-30.

[92] *Id*. at 730.

[93] *Id*.

A key factor in *Van Curler* is that the court accepted the Commission's characterization of the alleged *ex parte* communication without further investigation: "We find nothing improper or erroneous in the Commission's consideration of these interviews as depicted in this record."[94]

2. *Sangamon*: problematic communications based on due process and agency rules

The court reached a different conclusion three years later in the 1959 case of *Sangamon Valley Television Corp. v. United States*.[95] In *Sangamon*, the Court again addressed a rulemaking by FCC regarding television channel allocation. The court invalidated the FCC's action because *ex parte* contacts (1) "vitiated its action"[96] and (2) violated the Commission's own rules, which prohibited additional comments after the close of the final comment period unless the Commission requested them or the commenter showed "good cause" for filing them.[97]

The *ex parte* contacts at issue in Sangamon were both oral and written communications from the president of a company potentially affected by FCC television channel allocation rulemaking to the Commissioners, indicating his desire for the Commission to reach a particular outcome. The Commission's eventual decision was consistent with those expressed desires. The company president spoke to the Commissioners individually "in the privacy of their offices," "had every Commissioner at one time or another as his luncheon guest," and "gave turkeys to every Commissioner in 1955 and 1956" while the proceeding was pending.[98] Additionally, seven weeks after the close of the comment period, and 10 days before the Commission made its final decision, he submitted written letters providing additional arguments and data supporting his preferred outcome. [99] The letters did not go into the public record, and the court noted that parties opposing the president's preferred outcome could not question his arguments or data because "they did not know he was making" the submission.[100]

A key factor in the *Sangamon* Court's decision was the Department of Justice's (DOJ's) intervention and intimation through briefs that due process may have been compromised. The Commission argued that *ex parte* contacts were not prohibited in rulemaking, and such attempts to influence the decisionmakers could not invalidate the agency's decision.[101] DOJ advised otherwise, and the Court agreed with DOJ's analysis. Specifically, DOJ urged that "whatever the proceeding may be called it involved not only allocation of TV channels among communities but also resolution of conflicting private claims to a valuable privilege, and that basic fairness requires such a proceeding to be carried on in the open."[102]

[94] *Id*.
[95] 269 F.2d 221 (D.C. Cir. 1959).
[96] *Id*. at 224.
[97] *Id*. at 224-25.
[98] *Id*. at 223-24
[99] The decision states that the company president submitted a letter to each Commissioner "in which he contended and tried to prove [that contention]," which is presumably additional argument and data supporting that argument. *Id*. at 224.
[100] *Id*.
[101] *Id*.
[102] *Id*.

Another key factor in the *Sangamon* Court's decision, and a second reason for invalidating the FCC's decision, was that FCC had violated its own rulemaking procedures.[103] The FCC's rules provided a cut-off date for comments and forbade the filing of "additional comments" unless the Commission requested them or the commenter showed "good cause" for submitting them.[104] The Court interpreted the *ex parte* communications as additional comments neither requested by the Commission nor supported by the required showing of good cause.[105]

3. *Courtaulds*: permissible communications based on lack of secrecy, lack of advantage given, and a purely legislative rulemaking

In 1961, in *Courtaulds (Alabama) Inc. v. Dixon*,[106] the Court reached a different conclusion and limited its holding in *Sangamon*, appearing to adopt the Supreme Court's dichotomy for due process claims[107] between "quasi-judicial"[108] proceedings and purely legislative rulemaking "in form and substance."[109] In *Courtaulds*, the Federal Trade Commission, an independent agency, issued rules regarding textile definitions that were challenged as being invalid because the rulemaking process was tainted by *ex parte* material.[110] The Court found that the *ex parte* contacts did not taint the rulemaking.[111]

In *Courtaulds*, the Commission had *ex parte* contacts with many sources and, "over a period of many months, conferences were conducted by Commission staff members with interested and informed parties, in certain of which appellant participated."[112] The Commission "invited [interested parties, including the appellant] to present suggestions."[113] The appellant's proposal, which was rejected by the Commission, "was canvassed with the appellant, Government spokesmen and others, and was the subject of correspondence addressed to the Commission by the appellant itself, as well as others."[114] It appears these communications were in addition to oral and written comments submitted for inclusion in the rulemaking docket as part of the Commission's hearings on the rulemaking.[115]

A key factor in *Courtaulds* was the lack of secrecy in the Commission's actions. The Commission openly invited interested parties to present suggestions regarding textile

[103] *Id*. at 225 n. 8.
[104] *Id*. at 225.
[105] *Id*.
[106] 294 F.2d 899 (D.C. Cir. 1961).
[107] *See* discussion of due process *infra* Part VI.C.1.
[108] *Courtaulds*, 294 F.2d at 904 n. 16.
[109] *Id*.
[110] *Id*. at 904. The FTC's rules were also challenged as not having an adequate basis and purpose, but the court found that the rules stated a satisfactorily basis and purpose. *Id*.
[111] *Id*. at 904-905
[112] *Id*. at 904 (internal quotations and editorial brackets omitted).
[113] *Id*.
[114] *Id*.
[115] *Id*. ("In the course of the hearings [with respect to the projected rules] oral and written comments were submitted by appellant and others, and the record remained open until March 27, 1959, for the submission of yet further written statements, including those offered by the appellant.").

definitions[116] and it seems that the *ex parte* contacts were included in the public record.[117] The court stated: "We find no evidence that the Commission improperly did anything in secret or gave to any interested party advantages not shared by all."[118]

Another key factor in *Courtaulds* was the lack of any advantage given to one party over another. Proposals from the persons or entities engaged in the *ex parte* contacts were shared with other parties[119] and the Commission declined to share information about the contents of the draft final rules with any interested party.[120]

A final key factor in *Courtaulds* was the lack of recognized "competitors" exerting undue influence. The Court found that there was no "basis for appellant's suggestion that somehow its 'competitors' had unlawfully so influenced the formulation of the Commission's [textile definition in its rules] as to taint the whole proceeding" and resulting rule.[121] The court grounded this finding in its specific care to distinguish *Sangamon*, thus creating the dichotomy between "quasi-judicial" proceedings and purely legislative rulemaking "in form and substance":

> [The *Sangamon*] opinion is completely distinguishable on its fact and in principle. The instant case in no way involves a license to be available to only one competing applicant nor is there a suggestion here of what 'competitors' are advantaged by the Commission's adoption of the broad generic category 'rayon'. Moreover, the instant proceeding clearly was one of rulemaking, both in form and in substance, and hence was not subject to all the restrictions applicable to a quasi-judicial hearing.[122]

4. *HBO*: problematic communications based on inadequate administrative record and due process

In 1977, the D.C. Circuit handed down two cases on *ex parte* communications four months apart, with holdings not nearly as close in outcome as in time. One case, *Home Box Office v. Federal Communications Commission ("HBO")*,[123] found *ex parte* contacts in informal rulemaking suspect and provided very specific procedures for dealing with *ex parte* contacts that included refusing all but pre-NPRM *ex parte* contacts. The other case, *Action for Children's Television v. Federal Communications Commission ("ACT")*,[124] found *ex parte* contacts could not taint the rulemaking at issue.

[116] *Id*.
[117] *Id*. ("the record remained open until March 27, 1959, for the submission of yet further written statements, including those offered by the appellant.").
[118] *Id*. at 905.
[119] *Id*. at 904.
[120] *Id*. at 905 n. 17.
[121] *Id*. at 904-905
[122] *Id*. at 904 n. 16.
[123] 567 F.2d 9 (D.C. Cir. 1977).
[124] 564 F.2d. 458 (D.C. Cir. 1977).

In *HBO*, FCC issued rules that limited the programing available for a fee via cable and subscription broadcast. One aspect of the challenge to the rules involved *ex parte* contacts.[125] The court found that the *ex parte* contacts invalided the rule and that *ex parte* information that "becomes relevant to a rulemaking will have to be disclosed at some time."[126] It set forth a scheme for handling *ex parte* communications:[127] Pre-NPRM *ex parte* communications need not be disclosed unless they form the basis of the agency's action. However, once the NPRM is issued, agency officials should refuse to discuss matters relating to the rulemaking until the agency takes final action; and if a post-NPRM *ex parte* communication nonetheless occurs, that contact must be disclosed.

In *HBO*, the agency engaged in "widespread *ex parte* communications involving virtually every party before this court" without disclosing "the nature, substance, or importance of what was said."[128] The court noted: "It is apparently uncontested that a number of participants before the Commission sought out individual commissioners or Commission employees for the purpose of discussing *ex parte* and in confidence the merits of the rules under review here."[129] The court also noted that many *ex parte* contacts occurred "in the crucial period" between the close of the comment period and adoption of the final determination, a period "when the rulemaking record should have been closed while the Commission was deciding what rules to promulgate."[130] During this crucial period the Commission met 18 times with broadcast interests, nine times with cable interests, five times with motion picture and sports interests, and zero times with public interest groups.[131]

The primary factors motivating the *HBO* court fall into two categories: (1) the adequacy of the administrative record and (2) due process concerns.[132] Most of the factors the *HBO* court discussed related to the issue of the administrative record. It was the first time the D.C. Circuit addressed this issue.[133] The due process concerns were set forth in a much more direct and succinct manner than its administrative record concerns.

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[125] *HBO*, 567 F.2d at 51-59.

[126] *Id*. at 57.

[127] *Id*. The court noted that agency compliance with its scheme would also be in accordance with the Recommendation 74-4, *Preenforcement Judicial Review of Rules of General Applicability*, 39 Fed. Reg. 23044 (Jun. 26, 1974) (regarding the substance of the administrative record). *Id.* at 57 n. 130.

[128] *Id*. at 51-52.

[129] *Id*. at 51.

[131] *Id*. at 53.

[132] As in previous cases, the court was also motivated, albeit to a lesser degree, by its conclusion that the FCC had again violated its own procedural rules governing the submission of additional comments after the final comment period had closed. *See HBO*, 567 F.2d at 55 n. 122.

[133] The court's meandering discussion of all the ways in which the *ex parte* communications at issue could affect the adequacy of the administrative record seems to indicate that the court itself was unsure about the strength of this rationale for invalidating the Commission rules. It is this rationale that the later-filed concurring opinion attempts to reign in, while reaffirmed the case's outcome based on the due process implications. *HBO*, 567 F.2d. at 195 ("To the extent our Per Curium opinion relies upon Overton Park to support its decision as to *ex parte* communications in this case, it is my view that it is exceeding the authority it cites . . . . I agree this is the proper rule [requiring agency personnel to refuse to engage in *ex parte* communications] to apply in this case because the rulemaking undeniably involved competitive interests of great monetary value and conferred preferential advantages on vase segments of the broadcast industry to the detriment of other competing business interests.")

The court's administrative record concerns involved both the adequacy and quality of the public record for judicial review. The court was concerned the record did not fully disclose the possible "undue influence" exerted on the Commission and was particularly concerned that the Commission's final decision reflected a "compromise among contending industry forces," rather than an exercise of "independent discretion in the public interest."[134] Industry representatives may have been more candid in *ex parte* communications than in their public comments. And if the Commission relied on the "secret" *ex parte* communications in making its decision, then "the elaborate public discussion in these dockets has been reduced to a sham."[135] "Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those 'in the know' is intolerable."[136] Acknowledging the court was blazing a new trail, it stated:

> Whatever the law may have been in the past, there can now be no doubt that implicit in the decision to treat promulgation of rules as a 'final' event in an ongoing process of administration is an assumption that an act of reasoned judgment has occurred, an assumption which further contemplates the existence of a body of material documents, comments, transcripts, and statement in various forms declaring agency expertise or policy which reference to which such judgment was exercised.[137]

An adequate record for judicial review must include the full body of relevant material submitted to the agency. If the agency includes in the record only the material necessary to justify its action, "a reviewing court cannot presume that the agency has acted properly."[138]

The court also expressed concern over the quality and reliability of the material in the administrative record. The court found that even if the substance of the *ex parte* contacts at issue had been included in the record for judicial review, the rulemaking would still lack the adversarial discussion needed to discover biases, inaccuracies, and incompleteness in the information communicated as part of the *ex parte* contacts.[139] The court found "the potential for bias in private presentation in rulemaking which resolve 'conflicting private claims to a valuable privilege' seems to us greater than in cases where we have reversed agencies for failure to

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[134] *HBO*, 567 F.2d. at 53.

[135] *Id*. at 53-54.

[136] *Id*. at 54. The court seemed particularly offended by the secret nature of the *ex parte* communications, which were not disclosed in the record, stating that "agency secrecy stands between [the court] and fulfillment of [its] obligation [to review the Commission's actions against the administrative record for arbitrariness or inconsistency with delegated authority.]" *Id*. Secrecy, or the lack thereof, was also a factor in *Courtaulds* and by implication and fact, if not addressed directly by the court, in *Sangamon*. The *HBO* court distinguished *Courtaulds* from *Sangamon* and the current case based on secrecy. To the *HBO* court, the finding in *Courtaulds* that there was "no evidence that the Commission improperly did anything in secret or gave to any interested party advantages not shared by all" was enough to differentiate it; in *Sangamon* and in *HBO*, the *ex parte* communications were not included in the administrative record and thus kept secret. *Id.* at 56 n. 124.

[137] *Id*. (citation omitted).

[138] *Id*.

[139] *Id*. at 55.

disclose internal studies."[140] Indeed the need for adversarial discussion seemed consistent to the Court with the FCC's own rules at the time, which provided for a comment period, reply-comment period, and oral argument.[141]

The secret nature of the *ex parte* communications also implicates the second key factor in the *HBO* court's decision: due process concerns. "Equally important is the inconsistency of secrecy with the fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law."[142] The court called on *Sangamon* to support its finding "that due process requires us to set aside the Commission's rules here."[143] The court also cited then-recent congressional and presidential actions in support of its conclusion, characterizing the Government in the Sunshine Act and an executive order as subsequent congressional and executive action bolstering and validating the *Sangamon* court's prohibition on *ex parte* contact in informal rulemaking under a due process rationale.[144] The court also rejected the idea that *Sangamon's* due process rationale only applies in "quasi-judicial" proceedings.[145]

5. *ACT*: permissible communications based on meaningful public participation, adequate statement of basis and purpose, and distinguishing case lineage

In *ACT*, FCC action was again contested, but in this case, the action was the Commission's decision not to promulgate rules in response to a petition for rulemaking urging rules on children's television programming. The Commission decided not to proceed with the rulemaking after the broadcast industry undertook measures of self-regulation.[146] The Commission's decision was challenged based on alleged *ex parte* communications with broadcast industry representatives. The Court held: "In sum, we believe that the nature of the proceedings [at issue] was not of the kind that made this rulemaking action susceptible to poisonous *ex parte* influence. Private groups were not competing for a specific valuable privilege. Furthermore, this case does not raise serious questions of fairness."[147]

The *ex parte* communications were meetings between Commission personnel and industry representatives to discuss industry proposals for self-regulation in lieu of the Commission issuing rules. The *ex parte* communications were described by petitioners as negotiations "'behind the closed doors of [the then-FCC] Chairman['s] office in a private meeting with [broadcast industry] officials."[148]

[140] *Id*. (citation omitted).
[141] *Id*.
[142] *Id*. at 56.
[143] *Id*. at 57.
[144] *Id*. at 56-57.
[145] *Id*. at 56 n. 124.
[146] *ACT*, 564 F.2d at 464.
[147] *Id*. at 477.
[148] *Id*. at 468.

A key factor in the *ACT* court's decision was that public stakeholders had been provided a meaningful opportunity to participate. The court found the Commission provided the APA-required opportunity to comment and submit data in support of and in opposition to the petition by permitting a lengthy comment period and holding six days of discussions and oral arguments.[149] The Court did not find it problematic that the public had no opportunity to respond to industry's self-regulation proposal.[150] The court stated that "while it may have been impolitic for the Commission not it invite further comment on the [industry's self-regulation] proposals, especially in view of the fact that there was no necessity for deciding these difficult issues quickly, we still cannot say that the Commission abused its discretion in deciding not to . . . nor are we persuaded that ACT's interests in these proceedings were inadequately protected, much less subverted, but the Commission's action."[151] The court found: "On balance, the procedures used by the Commission constitute substantial compliance with the APA's mandate of limited, yet meaningful, public participation."[152]

The *ACT* court also found there was an adequate statement of basis and purpose to facilitate judicial review. "We have long recognized that any judicial review of administrative action cannot be meaningfully conducted unless the court is fully informed of the basis for that action. Such review is facilitated by [APA] section 553's requirement that an agency incorporate in any rules adopted a statement of their basis and purpose."[153] Although the Commission did not adopt a rule, it did provide an explanation of its decision to rely on the self-regulation proposals, which were the content of the *ex parte* communications. The court determined that the Commission's explanation "furnishes a basis for effective judicial review."[154]

In *ACT*, the court thoroughly discussed and distinguished its earlier decisions, especially *HBO*.[155] The court also addressed the *HBO* court's divergent reasoning regarding the administrative record, noting that what should be included in the record" is obviously a matter of degree, and the appropriate line must be drawn somewhere." The court indicated *HBO* went too

[149] *Id*. at 471.
[150] *Id*.
[151] *Id*. at 473 (citations omitted).
[152] *Id*. at 471.
[153] *Id*. at 471-72 (citations omitted).
[154] *Id*. at 472.
[155] The court limited HBO's application, and it discussed *Sangamon* and *Courtaulds* in the same terms that *HBO* used to analogize *Sangamon* for support and distinguish *Courtaulds. Id.* at 474-75 ("we [the *ACT* court] agree with Judge MacKinnon [author of the HBO concurrence] that the above-quote rule [from HBO] should not apply as the opinion clearly would have it to every case of informal rulemaking"); *HBO*, 567 F.2d at 55. The *ACT* court distinguished *Sangamon*, and thus *HBO*, as dealing with "resolution of conflicting private claims to valuable privilege" and television "channel allocation via informal rulemaking is rather similar functionally to licensing via adjudication" and neither attribute was present in the Commission's decisions regarding industry self-regulation regarding children's programming. *ACT*, 564 F.2d at 475. *ACT* noted that *HBO* distinguished *Courtaulds* based on the fact that the *ex parte* communications were not secret, as found in *Sangamon* and *HBO*, and that *Courtaulds* did not involve "resolution of competing claims to valuable privilege," and it found those same facts distinguished the case before it. *Id.* at 476. Finally, the *ACT* court noted that *HBO* did not discuss *Van Curler*, but interpreted that case to mean that because the Commission said it was not influenced by the *ex parte* contacts, the court need not presume otherwise. *Id.* The *ACT* court specifically interpreted *Van Curler* as stating that "*ex parte* contacts do not *per se* vitiate agency informal rulemaking action, but only do so if it appears from the administrative record under review that they may have materially influenced the action ultimately taken." *Id.*

far in what it required to be included.[156] The *ACT* court "would draw that line at the point where the rulemaking proceedings involve 'competing claims to a valuable privilege" because "[i]t is at that point where the potential for unfair advantage outweighs the practical burden, which we imagine would not be insubstantial, that such a judicially conceived rule [requiring disclosure of all *ex parte* contacts during or after the public comment stage] would place upon administrators."[157] The *ACT* court specifically noted "what must be presumed to be Congress' intent not to prohibit or require disclosure of all *ex parte* contacts during or after the public comment stage," and refuted the *HBO* court's claims otherwise.[158]

6. *National Small Shipments*: problematic communications based on hearing requirement

The year after *HBO* and *ACT*, the D.C. Circuit considered a case involving *ex parte* contacts in a rulemaking with a statutorily-mandated hearing requirement. In *National Small Shipments Traffic Conference, Inc. v. Interstate Commerce Commission*,[159] the court noted that the proceedings at issue were informal rulemaking under APA section 553, even though there was a hearing requirement.[160] Nevertheless, the court found that because of the hearing requirement, *ex parte* communications (1) violated basic fairness of a hearing and (2) foreclosed effective judicial review of the agency's final decision.[161] The *ex parte* contacts in this case were communications that occurred prior to the Commission's order and the substance of the contacts were substantially the same as that order.[162] Of course, the statutorily required hearing, distinguishes this case from previous cases.[163]

7. *Sierra Club*: permissible communications based on authorizing statute procedural requirements, due process, and *Vermont Yankee*

In 1981, the DC Circuit handed down its seminal, and last substantial, case concerning *ex parte* contacts. In *Sierra Club v. Costle*,[164] the D.C. Circuit considered challenges to revised emission standards for coal-burning power plants issued by EPA.[165] Among the many challenges were procedural allegations of improper *ex parte* communications.[166] The court held that EPA's adoption of the revised standards were "free from procedural error. The post-comment period contacts here violated neither the statute [the Clean Air Act] nor the integrity of the proceedings. We hold that it was not improper for the agency to docket and consider

[156] *ACT*, 564 F.2d at 477.
[157] *Id*.
[158] *Id*.
[159] 590 F.2d 345 (D.C. Cir. 1978).
[160] *Id*. at 350.
[161] *Id.* at 351.
[162] *Id*. at 349-50.
[163] It should be emphasized that a hearing requirement does not automatically make a rulemaking subject to the APA hearing requirements, and thus its *ex parte* prohibition.
[164] 657 F.2d 298 (D.C. Cir. 1981).
[165] *Id.* at 311.
[166] *Id.* at 312.

documents submitted to it during the post-comment period, since no document vital to EPA's support for the rule was submitted so late as to preclude any effective public comment."[167]

In *Sierra Club*, there was "an '*ex parte* blitz' by coal industry advocates after the close of the comment period"[168] that "var[ied] widely in their content and mode; some [were] written documents or letters, others [were] oral conversations and briefings, while still others [were] meetings where alleged political arm-twisting took place."[169] The *ex parte* communications included almost 300 documents submitted during the post-comment period, all of which were docketed;[170] meetings with individuals outside of EPA;[171] and nine different post-comment period meetings comprised mostly of interagency meetings and congressional briefings.[172] All but two of these were docketed.[173]

The *Sierra Club* court evaluated the alleged *ex parte* communications "in terms of their timing, source, mode, content, and the extent of their disclosure in the docket, in order to discover whether any of them violated the procedural requirements of the Clean Air Act, or of due process."[174] The *Sierra Club* court was the only court to treat written and oral *ex parte* communications separately.

The court noted *Vermont Yankee*'s caution against imposing judicial notions of proper procedure in the administrative context,[175] and reviewed the alleged *ex parte* communications under procedural requirements of the Clean Air Act ("CAA").[176] The CAA did not prohibit *ex parte* contacts[177] or require the agency to include post-comment communications in the record.[178] The court noted that the CAA's drafters likely anticipated the agency would promulgate a rule shortly after the end of the comment period, "and did not envision a months-long hiatus where continued outside communications with the agency would continue unabated."[179] The court noted that if "documents of central importance upon which EPA intended to rely had been

[167] *Id.* at 410.
[168] *Id.* at 386.
[169] *Id.* at 396.
[170] *Id.* at 387.
[171] *Id.* at 387-89.
[172] *Id.*
[173] *Id.* EPA described the exclusion of the two meetings from the docket as an oversight
[174] *Id.* at 391 (internal footnote omitted).
[175] *Id.* at 391-92.
[176] *Id.* at 395-96. The CAA is codified at 42 U.S.C. sec. 7401 *et seq.* The CAA contained two relevant, post-comment period, procedural requirements. First, all documents "of central relevance to the rulemaking"[176] must be docketed as soon as possible. *Id.* at 395; 42 U.S.C. sec. 7607(d)(4)(B)(i). The court found EPA met this requirement because all 300 written submissions were docketed. *Sierra Club*, 657 F.2d at 395-96. Second, agency reconsideration is mandatory if an objection of "central relevance to the outcome of the rule" arose after the public comment period. *Id.* at 396; 42 U.S.C. sec. 7607(d)(7)(B). The court explained that this would only be grounds for reversal if EPA's post-comment procedures were unlawful. *Sierra Club*, 657 F.2d at 396. The court found the post-comment procedures were lawful because nothing prohibited *ex parte* contacts and nothing prohibited or required disclosure of *ex parte* contacts. *Id.*
[177] *Id.* at 395; 42 U.S.C. sec. 7401 *et seq.* (1979).
[178] *Sierra Club*, 657 F.2d at 397; 42 U.S.C. sec. 7607(d)(3)-(7) (specifying the docket contents under the CAA).
[179] *Sierra Club*, 657 F.2d at 398.

entered on the docket too late for any meaningful public comment prior to promulgation, then both the structure and spirit of [the CAA] section 307 would have been violated."[180] The court found, however, that most of the written documents were entered into the docket with ample time to respond, and those that appeared closer to promulgation did not play a significant role in supporting the agency's final rule. Thus, it was permissible for EPA to docket and consider the post-comment period documents, while declining to delay the rule further by reopening the comment period.[181]

Due process considerations also played a role in the *Sierra Club* court's evaluation of the post-comment period oral *ex parte* communications. In this analysis, the court was looking for a breach in the "basic notions of constitutional due process"[182] which the court noted "probably imposes no constraints on informal rulemaking beyond those imposed by statute."[183] The Court noted:

> Oral face-to-face discussion are not prohibited anywhere, anytime, in the [Clean Air] Act. The absence of such prohibition may have arisen for the nature of the informal rulemaking procedures Congress had in mind. Where agency action resembles judicial action, where it involves formal rulemaking, adjudication, or quasi-adjudication among 'conflicting private claims to valuable privilege,' the insulation of the decisionmaker from *ex parte* contacts is justified by basic notions of due process to parties involved. But where agency action involves informal rulemaking of a policymaking sort, the concept of *ex parte* contacts is of more questionable utility."[184]

Additionally, the Court recalled its statement in *ACT* clearly pointing out: "Where Congress wanted to prohibit *ex parte* contacts it clearly did so."[185]

A third key factor for the *Sierra Club* court was *HBO*'s limited application in light of *Vermont Yankee.* The court noted: "Later decisions of this court, however, have declined to apply Home Box Office to informal rulemaking of the general policymaking sort involved here."[186] The *Sierra Club* court went further to explain that not only does *HBO* not apply but that *HBO*'s holding is improper after *Vermont Yankee*:

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[180] *Id*.

[181] *Id.* at 398-400. The court noted that EPA could have reopened the comment period, but that doing so was unnecessary because of the length of the original comment period and statutory deadlines already missed. *Id.* at 398. EPA was also under court order to expeditiously promulgate final rules after missing the statutory deadlines. *Id.*

[182] *Id.* at 393.

[183] *Id.* at 392 n. 462 (quoting United Steelworkers of America v. Marshall, 647 F.2d 1189, n. 28 (D.C. Cir. 1980)) (citations omitted).

[184] *Id.* at 400 (quoting Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959)) (citations omitted).

[185] *Id.* at 401.

[186] *Id.* at 402 (citations omitted).

> A judicially imposed blanket requirement that all post-comment period oral communications be docketed would, on the other hand, contravene our limited powers of review, would stifle desirable experimentation in the area of Congress and the agencies, and is unnecessary for achieving the goal of an established, procedure-defined docket, viz., to enable reviewing courts to fully evaluate the states justification given by the agency for its final rule.[187]

8. *Iowa State*: permissible communications based on timing pre-NPRM

After *Sierra Club*, the D.C. Circuit decided only two additional cases addressing *ex parte* contacts.[188] In 1984, the D.C. Circuit addressed *ex parte* contacts in a ratemaking case involving natural gas transportation.[189] As in *Sierra Club*, the rulemaking procedures were set forth in the authorizing statute, rather than the APA.[190] The court found no issue with the allegedly improper *ex parte* communications and noted that *HBO* did not apply to all informal rulemaking proceedings.[191]

The *ex parte* contacts here were reports from pipeline operators used by the agency to issue a tentative decision in the ratemaking, which the court characterized as "a rough equivalent of a notice of proposed rulemaking."[192] The reports were available to the public upon request, and once the tentative decision was issued, no further *ex parte* contacts were allowed.[193]

A key factor for the D.C. Circuit was the pre-NPRM timing of the *ex parte* communications. The court noted that *HBO* does not apply to all informal rulemaking proceedings. Even if the Court viewed ratemaking as quasi-judicial and thus the "special type of rulemaking to which *Home Box Office* should apply," *HBO* still would not be controlling, because it only addressed *ex parte* contacts after the publication of an NPRM.[194]

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[187] *Id*. at 403 (citations omitted).

[188] At least that which the author and her research assistant could find. The most recent case to address the D.C. Circuit's line of decisions regarding *ex parte* communications is *Electric Power Supply Assoc. v. Fed. Energy Regulatory Comm'n*. 391 F.3d 1255 (D.C. Cir. 2004). Here, the court addressed *ex parte* contacts with an independent agency under the Government in the Sunshine Act provisions, codified at 5 U.S.C. § 557(d), but cited the seminal cases dealing with *ex parte* communications in informal rulemaking, and once again noted *HBO*'s limited application. Specifically, the 2004 court characterized HBO's holding as "*ex parte* communication of information 'relevant to a rulemaking' violated the due process clause," *id*. at 1263, and noted in its citations of *ACT* and *Sierra Club* that both cases narrowed *HBO*'s holding, *id.*

[189] *Iowa State Commerce Comm'n v. Office of the Fed. Inspector of the Alaska Natural Gas Transp. Sys.,* 730 F.2d 1566 (D.C. Cir. 1984).

[190] *Id*.

[191] *Id*. at 1576.

[192] *Id*.

[193] *Id*.

[194] *Id*.

The U.S. District Court for the District of Columbia encountered a similar pre-NPRM *ex parte* claim in 1995. In *Blackfeet Nat. Bank v. Rubin*, 890 F. Supp. 48 (1995) plaintiff's claimed they were denied administrative due process because they were not provided an opportunity to participate in a rulemaking project before the publication of a NPRM, and Treasury met with representatives of another industry during that time. The court found no administrative due process violation because participation pre-NPRM in Treasury proceedings was open to any party that sought to participate and that plaintiffs simply did not make the attempt to include themselves. *Id*. at

9. *Board of Regents*: permissible communications based on APA silence

Finally, in *Board of Regents of the University of Washington v. Environmental Protection Agency,*[195] the D.C. Circuit considered whether *ex parte* communications in an independent agency's rulemaking resulting in listing a particular landfill on its list of contaminated sites for urgent remedial action violated APA procedures.[196] The Court dispensed with the procedural-violation argument, stating that although the petitioners cited *Sierra Club* as support that EPA should have placed the *ex parte* communication in the docket, *Sierra Club* involved specific statutory language of the Clean Air Act that required placing certain documents in the rulemaking docket (43 U.S.C. 7607(d)) and that "language [] has no counterpart in the notice-and-comment provisions of 5 U.S.C. 553."[197]

The *ex parte* communications in *Board of Regents* were communications between an entity that would have been entitled to recover clean-up costs for the landfill from responsible parties if the landfill were added to the list of contaminated sites.[198] These communications were not included in the public docket.[199]

The sole key factor for the court was the lack of procedural requirements in the APA regarding *ex parte* communications.

C. Administrative Conference Recommendation 77-3

The Conference's previous work on the topic of *ex parte* communications in informal rulemaking produced Recommendation 77-3, *Ex parte Communications in Informal Rulemaking*,[200] which focused on the disclosure of *ex parte* communications. Recommendation 77-3 also recognized that "special circumstances" may necessitate restrictions on *ex parte* communications,[201] which is consistent with the Court's statement in *Vermont Yankee* the year

52. The Court also stated that most importantly, there was a second opportunity to participate during the public comment period followed by a scheduled hearing. *Id*.

[195] 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.

[196] *Id*.

[197] *Id.*

[198] *Id.*

[199] *Id.* (noting the petitioner's procedure argument involving "EPA's failure to include a summary of the *ex parte* communications in the Tulalip [landfill rulemaking] docket").

[200] 42 Fed. Reg. 54,253 (Oct. 5, 1977).

[201] The Temporary Administrative Conference of the United States 1961-62 adopted a recommendation regarding *ex parte* communications in "on-the-record-proceedings" in 1962. That recommendation, Recommendation No. 16, recommended that each agency "promulgate a code of behavior governing *ex parte* contacts between persons outside and persons inside the agency" in "proceedings required by statute or constitution or by the agency in a published rule or in an order in a particular care to be decided solely on the basis of an agency hearing" or other proceeding designated by an agency in a rule or order. SELECTED REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, S. Doc. No. 24, 88th Cong., 1st Sess. 165-205 (1963). Many federal agencies adopted *ex parte* rules in response to Recommendation No. 16. *See* Nathaniel L. Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 ADMIN. L.

after the Conference adopted the recommendation. In *Vermont Yankee*, the Court stated that there may be some circumstances, albeit rare, which may require additional procedures beyond those statutorily required for handling *ex parte* communications.[202]

Recommendation 77-3 recommends against a general prohibition on *ex parte* communications in informal rulemakings, but urges some restraints upon such communications. It advises that a general prohibition would eliminate the flexibility necessary for agencies to develop rulemaking procedures appropriate for their particular areas of regulation and would make informal rulemaking overly strict and formal.[203]

Recommendation 77-3 recognizes "three principal types of concerns" with *ex parte* communications in informal rulemakings: (1) "decisionmakers may be influenced by communications made in private, thus creating a situation seemingly at odds with the widespread demand for open government;" (2) "significant information may be unavailable to reviewing courts;" and (3) "interested persons may be unable to reply effectively to information, proposals or arguments presented in *ex parte* communications."

Recommendation 77-3 described *ex parte* communications as: "written communications addressed to the merits, received after notice of proposed rulemaking and in its course, from outside the agency by agency or its personnel participating in the decision" and "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."

Recommendation 77-3 notes that the first two concerns are remedied through disclosure of written and oral *ex parte* communications. It specifically recommends disclosure of all written *ex parte* communications. It also recommends disclosure of oral *ex parte* communications through appropriate means, such as summaries added to the public docket, public meetings, or other techniques as experimented with by agencies. The recommendation noted that information exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552, need not be so disclosed.

Recommendation 77-3 left open the possibility, however, that agencies, Congress, or the courts may decide "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."

In response to Recommendation 77-3, some agencies updated or issued rules adopting the specific recommendations regarding written and oral *ex parte* communications. Agency responses to the Conference's implementation inquires indicated "that the practices of virtually

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REV. 377, note 7 (1978). Recommendation No. 16 predated § 557 of the APA, enacted by § 4(a) of the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (Sept. 13, 1976), which prohibits *ex parte* communications only in proceedings subject to section 557 of the APA.

[202] *Vermont Yankee*, 435 U.S. at 524.

[203] Recommendation 77-3, para. 1. 42 Fed. Reg. 54,253 (Oct. 5, 1977).

all responding agencies with substantial rulemaking authority conform to the suggestion that all written communications received be made public."[204] The agency responses also indicated that agency practices regarding oral communications were "more varied."[205]

In responses to the Conference's implementation inquires, five of the current 15 executive departments[206] indicated implementation with at least part of Recommendation 77-3.[207] The Departments of Justice, State, and Transportation all indicated implementation for both written and oral *ex parte* communications. The Departments of Treasury, and Veterans Affairs indicated implementation for written *ex parte* communications. More than half of the other responding agencies indicated implementation of the written communications recommendation and most of those also noted implementation of the oral communication recommendation.[208]

Some of the responding agencies had rules[209] evidencing the agency practices in accordance with Recommendation 77-3, other agencies provided indication that then-current agency practice did conform, or the responding official would ensure future agency practice would conform, to at least part of Recommendation 77-3.[210] Over 35 years later, however, agency practices have evolved. For example, the NRC failed to approve the adoption of a policy publicizing oral communications as recommended by Recommendation 77-3,[211] but, the agency now has a policy of disclosure for *ex parte* communications.[212]

V. Current Agency Policies

This section explores current agency practices, noting which agencies have rules, written guidance, and unwritten policies regarding *ex parte* contacts. This section also explains the impetus for agency written or unwritten policies on *ex parte* communications, including whether they were in response to the activity regarding *ex parte* case law in the late 1970s and early 1980s. It also identifies divergent attitudes toward *ex parte* communications, commonalities

[204] Admin. Conference of the U. S., *Implementation Binder: Rec 77-03 Ex Parte Communications in Informal Rulemaking Proceedings (M3)* "Recommendation Implementation Summary" 4 (undated) (copy available in ACUS library).

[205] *Id.*

[206] The Department of Homeland Security, currently one of the 15 executive departments per USA.gov, was not created until 2002. *See* Homeland Security Act of 2002, Pub. L. No. 107-296 (2002).

[207] Admin. Conference of the U.S., *Implementation Binder: Rec 77-03 Ex Parte Communications in Informal Rulemaking Proceedings (M3)* "Recommendation Implementation Summary" 3 (undated) (copy available in ACUS library).

[208] *Id.*

[209] Some agency rules were promulgated in response to Recommendation 16 of the Temporary Conference of the United States addressing *ex parte* communications in adjudicatory and other non-rulemaking proceedings. *See* Barry B. Boyer, "An Analysis of the ABA Legislative Proposal on Ex Parte Contacts" (A tentative staff report to the Chairman of the Admin. Conference of the U.S.), p.1 (Aug. 2, 1972) ("Many agencies implemented this recommendation [Recommendation 16] and now have some form of *ex parte* rule.").

[210] Admin. Conference of the U.S., *Implementation Binder: Rec 77-03 Ex Parte Communications in Informal Rulemaking Proceedings (M3)* "Recommendation Implementation Summary" 4-7 (undated) (copy available in ACUS library).

[211] *Id.* p. 6

[212] *See* discussion of NRC's current policy and practice *infra* Part V.C.2.

among disclosure requirements, and differences, if any, between the practices and policies of executive departments and independent agencies.

Agency practice seems to occur on a spectrum: some agencies permit or even welcome *ex parte* communications; other agencies discourage or refuse them. This spectrum regarding *ex parte* communications also reflects a spectrum about how agencies conduct rulemaking. One agency, for example, initiates a rulemaking with a general proposal and then uses a comment period, reply comment period, and the *ex parte* communications to focus the issues and find the best solution to the problems the rulemaking was initiated to address.[213] Other agencies instead attempt to refine the issues as much as possible pre-proposal, so that the proposed rule reflects the government's best efforts to identify the problem and its best solution.

Whether agency policy regarding *ex parte* communications is found in written or unwritten form does not seem to correlate with where the agency falls on the spectrum regarding *ex parte* communications. The main difference between written and unwritten policy is its accessibility by public stakeholders; rules are generally easier to find than guidance documents, and rules and guidance documents indicate agency policy more clearly than unwritten policy.

This section first looks at the agencies that adopted rules in response to Recommendation 77-3, and then at agencies' policy along the spectrum of policy postures, starting at the welcoming end and moving toward the restricting end. The agency rules, policies, and practices discussed in this section, and the interviews conducted with agency personnel, indicate a tension for some agencies between getting rulemakings done quickly and efficiently and engaging the public and considering public input to the fullest extent.[214]

A. Agencies Implementing Recommendation 77-3

1. Department of Justice

DOJ has a non-mandatory rule that recommends disclosure of oral and written comment-period and post-comment-period *ex parte* communications. The DOJ rule, which it characterizes as a "statement of policy," [215] is an almost verbatim adoption of Recommendation 77-3, and DOJ specifically noted at promulgation that it was implementing the recommendation.[216] The

[213] Interview with FCC agency personnel. *See also* NAT'L ASS'N. OF REGULATORY UTIL. COMM'RS, WHITE PAPER OF KEY FCC PROCEDURAL REFORMS: EX PARTE COMMUNICATIONS AND THE FCC'S CONNECT AMERICA FUND PROCEEDING (2013), *available at* http://www.naruc.org/Resolutions/Resolution%20Urging%20Congress%20to%20Improve%20Fairness%20in%20the%20Federal%20Communications%20Commission1.pdf ("the culture at the FCC is one of "rulemaking by *ex parte* communication").

[214] *See e.g.*, CFBP's policy discussed below in Part V.B.2. directing agency personnel to be receptive to *ex parte* communications "consistent with the limitations on CFPB staff time." CFBP Bulletin, *infra* note 265, at para. (c).

[215] 28 C.F.R. § 50.17.

[216] 43 Fed. Reg. 43297 (September 25, 1978) ("The following statement of policy outlines the Department's position concerning receipt of *ex parte* communications after notice of proposed informal rulemaking and describes steps to be taken to insure that interested parties, the public, and the courts are not denied access to significant *ex*

DOJ rule includes the language from Recommendation 77-3 advising against adoption of a general prohibition on *ex parte* communications.[217]

The DOJ rule defines *ex parte* communications—in line with Recommendation 77-3 definitions[218]—as written communications from outside the Department "addressed to the merits of a proposed rule"[219] and oral communications as those that contain "significant information or argument respecting the merits of a proposed rule."[220] Both types of *ex parte* communications are limited to communications received after issuing an NPRM.[221]

The DOJ rule recommends disclosure of all written and oral *ex parte* communications,[222] and requires that oral *ex parte* communications be summarized in writing.[223] The DOJ rule does not specifically identify who has the burden of disclosing *ex parte* communications, but seems to indicate that agency personnel should ensure proper disclosure. The DOJ rule also does not specify timing of disclosure other than recommending it should be "promptly,"[224] which reflects the language of Recommendation 77-3. Also reflecting Recommendation 77-3, the rule notes the DOJ's authority to withhold *ex parte* information from public disclosure under proper legal authority.[225] The DOJ rule also includes from Recommendation 77-3, although not verbatim, a notice that it may impose restrictions on *ex parte* communications in particular rulemaking proceedings if "necessitated by consideration of fairness or for other reasons."[226]

2. Federal Emergency Management Agency (within DHS)

FEMA has a rule that requires disclosure of oral *ex parte* communications received after publication of a notice of proposed rulemaking.[227] FEMA, now within DHS, issued its *ex parte* communications rule in 1981 while it was an independent agency.[228] It issued the rule in response to comments from the Conference, which had recently issued Recommendation 77-3,

parte communications received. This statement of policy implements recommendation No. 77-3 of the Admin. Conference of the U.S., 42 Fed. Reg. 54, 253 (1977).").

[217] 28 C.F.R. § 50.17(a).

[218] Recommendation 77-3, paras. 2 – 3, 42 Fed. Reg. 54,253 (Oct. 5, 1977).

[219] 28 C.F.R. § 50.17(b).

[220] 28 C.F.R. § 50.17(c).

[221] 28 C.F.R. §§ 50.17(b)–(c).

[222] 28 C.F.R. §§ 50.17(b)–(c).

[223] 28 C.F.R. §§ 50.17(c).

[224] 28 C.F.R. §§ 50.17(b)–(c).

[225] 28 C.F.R. § 50.17(d) ("The Department may properly withhold from the public files information exempt from disclosure under 5 U.S.C. 552.").

[226] 28 C.F.R. § 50.17(e).

[227] 44 C.F.R. § 1.6(a).

[228] *See* Reorganization Plan No. 3 of 1978 (43 Fed. Reg. 41943) and Executive Order 12127 "Federal Emergency Management Agency" establishing FEMA as an independent agency until it joined 22 other agencies in becoming the Department of Homeland Security under the Homeland Security Act of 2002, Pub. L. No. 107-296 (2002).

requesting that *ex parte* communications be covered in FEMA's rulemaking procedure regulations.[229]

The FEMA rule also adopts the Recommendation 77-3 definition of an oral *ex parte* communication as an oral communications from outside of the agency "of significant information and argument respecting the merits of a proposed rule."[230] The rule recommends summarizing in writing all such communications and disclosing them in the public docket.[231] The rule does not specify who bears the burden of disclosure, but it does require that oral *ex parte* communications be summarized in writing and added to the rulemaking docket.[232] Like the DOJ rule and Recommendation 77-33, the FEMA rule also does not indicate timing of disclosure, other than by recommending it be "promptly."[233] The FEMA rule also includes notice, borrowing the DOJ's language rather than Recommendation 77-3's, that "FEMA may conclude that restriction on *ex parte* communications in particular rulemaking proceedings are necessitated by consideration of fairness or for other reasons."[234]

B. Agency Policy Welcoming *Ex Parte* Communications

1. Federal Communication Commission

FCC has specific and detailed rules addressing both oral and written *ex parte* communications in FCC proceedings, including informal rulemaking.[235] FCC adopted *ex parte* rules for informal rulemaking proceedings after the *HBO* decision vacated an FCC rulemaking.[236] FCC has amended and clarified its rules several times, including in 1997[237] and, most recently, in 2011.[238]

[229] 46 Fed. Reg. 32584 (June 24, 1981) ("FEMA published Notice of Proposed Rulemaking for this subject August 27, 1979 (44 Fed. Reg. 58299). Comment was received from the Administrative Conference of the U.S. who suggested a section on *ex parte* communications. This was adopted as section 1.6.").

[230] 44 C.F.R. § 1.6(a).

[231] 44 C.F.R. § 1.6(a).

[232] 44 C.F.R. § 1.6(a).

[233] 44 C.F.R. § 1.6(a).

[234] 44 C.F.R. § 1.6(b).

[235] 47 C.F.R. Part 1.

[236] FEDERAL COMMUNICATION COMMISSION, FCC 11-11, REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING: AMENDMENT OF THE COMMISSION'S EX PARTE RULES AND OTHER PROCEDURAL RULES, para. 15, (2011), *available at* http://www.fcc.gov/document/amendment-commissions-ex-parte-rules-and-other-procedural-rules-0 [hereinafter "FCC 11-11"].The Commission's informal rulemaking procedural rules, which governed the rulemakings involved in *HBO* and *ACT*, do not address *ex parte* comments except to the extent those rules do not permit additional comments after the close of the comment period unless specifically authorized by the Commission. 47 C.F.R. § 1.415. A note to that rule made in 1980, after *HBO* and *ACT*, however, 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.*" Note to 47 C.F.R. § 1.415(d).

[237] FCC 11-11, *supra* note 236, at para. 16; 62 Fed. Reg. 15,856 (Apr. 3, 1997).

[238] FCC 11-11 *supra* note 236; 76 Fed. Reg. 24,376 – 24,402 (May 2, 2011).

As described by FCC agency personnel,[239] FCC views *ex parte* communications as part of a continuing conversation that includes the comment period, the reply comment period, and the *ex parte* comments.[240] *Ex parte* comments "can provide the Commission and staff with important, timely information about the complex legal, economic, and technical issues the Commission considers."[241] Agency personnel expressed the view that *ex parte* comments help focus the Commissioners' attention on issues that remain unresolved, especially in the later stages of the rulemaking, and help produce a focused solution. Agency personnel at all levels engage in *ex parte* communications, and such communications are initiated both by public stakeholders and agency personnel. The public stakeholders initiating *ex parte* communications most often are trade associations, corporations, and public interest groups. FCC personnel initiate *ex parte* communications seeking specific information or to follow-up on a submitted comment or prior *ex parte* communication.

FCC's current rules define an *ex parte* communication using the term "*ex parte* presentation"[242] as "[a] communication directed to the merits or outcome of a proceeding" that "[i]f written, is not served on the parties to the proceedings; or [i]f oral, is made without advance notice to the parties and without opportunity for them to be present."[243] The FCC rules define a "party" in an informal rulemaking as "members of the general public after issuance of a notice of proposed rulemaking" or other similar order.[244] Thus, the FCC rules apply to *ex parte* communications made post-NPRM. The FCC rules exclude from the definition of *ex parte* communication inquiries about a rulemaking's status and timing, and about procedural requirements.[245]

The FCC rules characterize informal rulemakings as "permit-but-disclose" proceedings in which *ex parte* communications are permitted, but all *ex parte* communications must be fully disclosed.[246] Two main changes to the FCC rules in 2011 require disclosure of all *ex parte* communications (rather than just those that contained new information), and a more complete disclosure of the substance of *ex parte* communications.[247] Prior to these changes, *ex parte* communications that presented new information or arguments not already in the rulemaking record only needed to be disclosed. Disclosure notices often contained little information about what was actually presented or discussed.[248]

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[239] Except as otherwise noted, the information in this paragraph is from the interview with FCC personnel.

[240] *See also* 47 C.F.R. § 1.415 (providing for a "reasonable time" for submitting comments and for replying to original comments); NAT'L ASS'N. OF REGULATORY UTIL. COMM'RS, WHITE PAPER OF KEY FCC PROCEDURAL REFORMS: EX PARTE COMMUNICATIONS AND THE FCC'S CONNECT AMERICA FUND PROCEEDING (2013), *available at* http://www.naruc.org/Resolutions/Resolution%20Urging%20Congress%20to%20Improve%20Fairness%20in%20the%20Federal%20Communications%20Commission1.pdf ("the culture at the FCC is one of 'rulemaking by *ex parte* communication'").

[241] FCC 11-11, *supra* note 236, at para. 21.

[242] 47 C.F.R. § 1.1202(a) (definition of "presentation").

[243] 47 C.F.R. § 1.1202(b) (definition of "*ex parte* presentation").

[244] 47 C.F.R. § 1.1202(d)(5).

[245] 47 C.F.R. § 1.1202(a).

[246] 47 C.F.R. § 1.1206(a).

[247] FCC 11-11, *supra* note 236, at para. 18.

[248] *Id.*

Currently, a copy of the written communication must be disclosed and an oral *ex parte* communication must be disclosed in a memorandum that lists all persons attending or participating and summarizes the data presented and arguments made.[249] The FCC rules clarify that summaries must substantially convey the content of the oral *ex parte* communication and that generally a one or two sentence description is not sufficient.[250] If the data presented and arguments in the oral *ex parte* communication reflect information provided in previously submitted written comments to the docket, the commenter may reference that information by specific citation, including page and paragraph numbers, instead of providing a summary.[251] The FCC rules also contain procedures for excluding certain documents or information from disclosure under appropriate legal authority.[252]

The burden to disclose *ex parte* communications is on the commenter,[253] but the rules permit agency personnel to request corrections of inaccurate or missing information in *ex parte* communication summaries.[254] The commenter must disclose an oral or written *ex parte* communication within two business days after the communication with some exceptions. [255] Agency personnel reported that commenters promptly submit disclosure notices and requested revisions, and that any requested revisions usually related to the completeness of information and not its accuracy. If a commenter fails to submit a summary of an oral *ex parte* communication, which happens very rarely, the agency will ensure disclosure by submitting its own summary. The FCC rules contain a sanction provision for violation of any of the rules, which in the context of informal rulemaking would include the failure to disclose an *ex parte* communication.[256]

FCC only restricts *ex parte* communications during its "Sunshine period,"[257] which usually encompasses the week before an FCC meeting. This is considered a period of repose for the Commissioners to reflect on the issues. Although the rules prohibit *ex parte* communications during the Sunshine period,[258] the prohibition during that period is discretionary and can be waived.[259] For example, the Commission waived the first several days of the Sunshine period for the FCC meeting set for October 28, 2013.[260] According to agency personnel, this was done

[249] 47 C.F.R. §§ 1.1206(b)(1)–(2).
[250] *Id*.
[251] *Id.*
[252] 47 C.F.R. § 1.1206(b)(2)(ii).
[253] 47 C.F.R. §§ 1.1206(b)(1)–(2).
[254] 47 C.F.R. § 1.1206(b)(2)(vi).
[255] 47 C.F.R. §§ 1.1206(b)(2)(iii)–(v).
[256] 47 C.F.R. § 1.1216.
[257] *See* 47 C.F.R. § 1.1203 (defining the Sunshine period as beginning on the day after the release of notice required under the Government in the Sunshine Act that a matter has been placed on the Commission agenda until the Commission releases text of a decision or order in the matter or issues a notice that is has deleted the matter from the agenda or has sent it back to staff for further consideration).
[258] 47 C.F.R. § 1.1203(a).
[259] *Id.*
[260] Public Notice of a Commission Meeting Agenda, Federal Communications Commission, FCC to Hold Open Commission Meeting Monday, October 28, 2013, October 17, 2013, *available at* http://www.fcc.gov/document/fcc-hold-open-commission-meeting-monday-october-28-2013 ("The Commission is waiving the sunshine period prohibition contained in Section 1.1203 of the Commission's rules, 47 C.F.R. § 1.1203, until 12 noon on Thursday, October 24, 2013.").

to make up for the limited access commenters had to Commissioners during the October 2013 government shutdown.

The FCC rules address some digital technology issues regarding *ex parte* communications. The FCC rules include a default requirement for filing *ex parte* disclosures electronically[261] and for dealing with metadata in electronic disclosures.[262] In the 2011 revisions to its rules, FCC specifically considered how "new media," which it described as blogs, Facebook, MySpace, IdeaScale, Flickr, Twitter, RSS, and YouTube, should be treated under its *ex parte* rules.[263] FCC ultimately decided not to address new media in its *ex parte* rules, but said that it would "continue to associate new media contacts in the records of specific proceedings, on the terms announced for those particular proceedings."[264]

2. Consumer Financial Protection Board

CFPB has a written policy—set forth in CFPB Bulletin 11-3—requiring disclosure of oral and written *ex parte* communications that is very similar to the FCC rules.[265] CFPB aims "to provide for open development of rules and to encourage full public participation in rulemaking actions." To further this goal, the CFPB Bulletin encourages agency personnel to engage with public stakeholders, reaching out to the public when factual information is needed to resolve questions of substance and being receptive to communications from the public to the extent agency personnel has time.[266]

As described by CFPB personnel,[267] as a general matter, CFPB wants to hear from consumers and listens to all who communicate with it. The public stakeholders who usually request meetings are companies, trade associations, and consumer groups, and they will meet with different levels of agency personnel, from the rulemaking team to the Director or Associate Director for Rulemaking. CFPB may also receive *ex parte* communications from individuals, mostly in short, focused emails, in response to a conference or other agency outreach effort. CFPB personnel may also initiate *ex parte* communications seeking specific information.

The CFPB Bulletin refers to *ex parte* communications as "*ex parte* presentations" which it defines as "any written or oral communication by a person outside CFPB that imparts information or argument directed to the merits or outcome of a rulemaking proceeding."[268] The CFPB Bulletin specifically excludes from this definition status inquiries and questions about procedural requirements.[269]

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[261] 47 C.F.R. § 1.1206(b)(2)(i).
[262] 47 C.F.R. § 1.1206(b)(2)(ii).
[263] FCC 11-11, *supra* note 236, at paras. 73-75.
[264] *Id.* at para. 75.
[265] CFPB Bulletin 11-3 "Policy on Ex Parte Presentations in Rulemaking Proceedings" (August 16, 2011), *available at* http://www.consumerfinance.gov/wp-content/uploads/2011/08/Bulletin_20110819_ExPartePresentationsRulemakingProceedings.pdf ("CFPB Bulletin").
[266] *Id*. at para. (c).
[267] The information in this paragraph is from the interview with CFPB personnel.
[268] CFPB Bulletin, *supra* note 265, at para. (b)(1)(A).
[269] *Id.* at para. (b)(1)(B).

The CFPB Bulletin requires disclosure of *ex parte* communications from the date of publication of the NRPM or interim rule until final disposition of the rulemaking.[270] Thus, disclosure requirements do not apply to pre-NPRM communications. The disclosure requirements are intended "to promote fairness and reasoned decisionmaking." The CFPB Bulletin notes that written comments submitted to the rulemaking docket during the public comment are the primary means of communicating with an agency and *ex parte* communications should only supplement—and not serve as a substitute for—written comments.[271]

In the case of a written *ex parte* communication, the CFPB Bulletin requires disclosure of a copy of the communication.[272] In the case of an oral *ex parte* communication, the commenter must submit a written summary of the communication that lists all persons attending or participating in the meeting, the date of the meeting, and a summary of data presented and arguments made during the presentation.[273] If the data presented and arguments made reflect information provided in previously submitted written comments, the commenter may reference that information by specific citation, including page and paragraph numbers instead of by providing a summary.[274] The CFPB Bulletin also contains procedures for excluding certain documents or information from disclosure.[275]

The burden of disclosure is on the commenter who must submit the disclosure to the rulemaking docket within three business days after the *ex parte* communication.[276] CFPB personnel may request correction of any inaccurate or missing information provided in the disclosure of an oral *ex parte* communication,[277] or provide their own written summary in lieu of requiring the commenter to submit a summary.[278] The CFPB Bulletin contains a provision subjecting persons who violate the Bulletin's requirements to "sanctions as may be appropriate."[279]

According to CFPB personnel, there is no formal cut-off point for *ex parte* communications in its rulemakings, but as a practical matter agency personnel will stop accepting meetings at some point to provide an opportunity for staff to complete work on the next stage of the rulemaking. This concern for staff time is reflected in the CFPB Bulletin in its encouragement to agency personnel to be receptive to *ex parte* communications "consistent with limitations on staff time."[280]

[270] *Id*. at para. (d).
[271] *Id*. at para. (c).
[272] *Id.* at para. (d)(2).
[273] *Id.* at para. (d)(1).
[274] *Id*.
[275] *Id.* at para. (d)(3)(iii), (3)(2).
[276] *Id.* at para. (d).
[277] *Id.*
[278] *Id.* at para. (d)(3)(iv).
[279] *Id.* at para. (g).
[280] *Id.* at para. (c).

The CFPB Bulletin addresses other issues regarding *ex parte* communication disclosures, including a default requirement for electronic disclosure using www.regulations.gov.[281] CFPB also reserves discretion to modify its *ex parte* policy in a particular rulemaking where "the public interest so requires."[282]

3. Environmental Protection Agency

EPA has written guidance that requires disclosure of oral and written *ex parte* communications.[283] The written guidance originated in the form of a memorandum from the EPA Administrators in 1983, and is commonly referred to as the "Fishbowl Memo" because the EPA Administrator promised that, under his leadership, the agency would operate "in a fishbowl."[284] The current Fishbowl Memo was issued in 2009 and reaffirms EPA's commitment to "transparency and openness in conducting EPA operations."[285] It states a general commitment to the "fullest possible public participating in decisionmaking," urging EPA personnel to "remain open and accessible to those representing all points of views" and "take affirmative steps to solicit views of those who will be affected by these decisions."[286]

According to EPA personnel,[287] many meetings between agency personnel and public stakeholders occur throughout the lifecycle of a rulemaking and even before a rulemaking officially begins. *Ex parte* meetings that occur after the close of the comment period provide staff a chance to ask public stakeholders questions or to provide specific information in the rulemaking docket. Most *ex parte* meeting requests come from businesses, environmental groups, and states. Most meetings requests are to meet with the Assistant Administrator for the subject matter area of the rulemaking at issue. During those meetings, EPA does not provide any nonpublic information, but will respond to status inquiries. EPA personnel do not usually initiate *ex parte* contacts, but they may participate in meetings initiated by stakeholders to hear the range of perspectives.

The EPA Fishbowl Memo does not define or use the term "*ex parte* communication," but states:

> Robust dialogue with the public enhances the quality of our decisions. EPA offices conducing rulemaking are therefore encouraged to reach out as broadly as possible for the views of interested parties. However, while EPA may and often should meet with groups and individuals, we should attempt, to the maximum

[281] *Id.* at para. (d)(3)(ii)–(iii).
[282] *Id.* at para. (f).
[283] Memorandum from Lisa P. Jackson, Administrator, Environmental Protection Agency, "Transparency in EPA's Operations" (April 23, 2009), *available at* http://www.eenews.net/features/documents/2009/04/24/document_gw_01.pdf ("EPA Fishbowl Memo").
[284] *Id.*
[285] *Id.*
[286] *Id.*
[287] The information in this paragraph is from interviews with EPA personnel.

> extent practicable, to provide all interested persons with equal access to the EPA.[288]

The EPA Fishbowl Memo requires disclosure of the substance of all written contacts and of those oral contacts that have influenced EPA's decisions, and also requires disclosure that contacts with the EPA Administrator and other senior agency officials have occurred. The EPA Fishbowl Memo requires agency personnel to ensure that all written comments regarding a proposed rule from public stakeholders are included in the rulemaking docket.[289] It also requires "timely notice, as far as practicable, of information or views that have influenced EPA's decisions."[290] Thus, EPA personnel must summarize in writing and add to the rulemaking docket any oral communications that "contains significant new factual information."[291] If the rulemaking schedule allows, according to EPA personnel, the agency may provide specific public notice of new information from an *ex parte* communication in a notice of availability published in the *Federal Register*. The EPA Fishbowl Memo also states the Administrator's policy of making a copy of her working calendar publically available "[t]o keep the public fully informed of my contacts with interested persons" and directs other senior EPA officials to do the same.[292] This action provides disclosure of the fact of any *ex parte* contacts, but not their substance or whether they involve a rulemaking.

The EPA Fishbowl Memo places the burden of disclosure on EPA personnel, but does not provide a timeframe for the required disclosure.[293] It instead directs questions on how to handle comments and other communications regarding a rulemaking to the appropriate personnel within the Office of the General Counsel.[294]

The EPA Fishbowl Memo does address some issues of digital technology in agency personnel and public stakeholder interactions. It recognizes the various forms public participation in rulemaking make take, including Internet-based dialogues, and encourages staff to be "creative and innovative in the tools we use to engage the public in our decisionmaking.[295]

4. Consumer Product Safety Commission

CPSC has broad rules addressing oral *ex parte* communications.[296] CPSC adopted these rules in 1973, stating that, in the interest of public participation, "whenever practicable, the

[288] EPA Fishbowl Memo, *supra* note 283.
[289] *Id*.
[290] *Id*.
[291] *Id.*
[292] *Id.*
[293] *Id.* ("[e]ach EPA employee should ensure that all written comments . . . are entered into the rulemaking docket. . . . EPA employees must summarize in writing and place in the rulemaking docket any oral communication").
[294] *Id.*
[295] *Id.*
[296] 16 C.F.R. Part 1012 – Meetings Policy – Meetings Between Agency Personnel and Outside Parties.

Commission will give all interested parties the opportunity to be heard and otherwise participate."[297]

The CPSC rules define an "agency meeting" as "[a]ny face-to-face encounter, other than a Commission meeting subject to the Government in the Sunshine Act, 5 U.S.C. 552b, and part 1013, in which one or more employees, including the Commissioners, discusses with an outside party any subject relating to the Agency or any subject under its jurisdiction."[298] The CPSC rules also cover oral communications that occur via telephone, although such a communication is not considered an agency meeting under the rules.[299]

The CPSC rules have specific requirements for "meetings involving matters of substantial interest held or attended by its personnel."[300] "Substantial interest matter" includes open rulemakings.[301] Status inquiries about a rulemaking and discussions about general interpretations of existing rules and regulations, however, do not constitute substantial interest matters.[302]

Interesting, the CPSC rules require advanced notice of agency meetings involving a substantial interest matter,[303] which puts the contact outside the definition of "*ex parte* communication" as used in this report.[304] The CPSC rules also require that such public meetings be open for public attendance,[305] with the contents of the meetings disclosed.[306] The CPSC rules require meeting summaries "setting forth the issues discussed at all Agency meetings with outside parties involving substantial interest matters" and puts the burden of preparing the meeting summary on the agency personnel who held or attended the meeting, though only one such summary need be prepared for each meeting.[307] The meeting summary "should state the essence of all substantive matters relevant to the Agency, especially any matter discussed which was not listed in the Public Calendar, and should describe any decisions made or conclusions

[297] 38 Fed. Reg. 27214 (Oct. 1, 1973).

[298] 16 C.F.R. § 1012.2(b).

[299] 16 C.F.R. § 1012.2(b) ("The term Agency meeting does not include telephone conversations, but see § 1012.8 which related to telephone conversations.").

[300] 16 C.F.R. § 1012.1(a).

[301] Section 1012.2(d) defines "substantial interest matter" as "any matter, other than that of a trivial nature, that pertains in whole or in part to any issue that is likely to be the subject of a regulatory or policy decision by the Commission. Pending matters, i.e., matters before the Agency in which the Agency is legally obligated to make a decision, automatically constitute substantial interest matters. Examples of pending matters are: . . . matters published for public comments; petitions under consideration; and mandatory standard development activities."

[302] 16 C.F.R. § 1012.2(c) ("The following are some examples of matters that do not constitute substantial interest matters: Inquiries concerning the statues of a pending matter; discussions relative to general interpretations of existing laws, rules, and regulations. . . .").

[303] *Id*.

[304] This report defines "*ex parte* communication" to mean interactions, oral or in writing, between a public stakeholder and agency personnel regarding a rulemaking outside of written comments submitted to the public docket during the comment period. This definition does not, however, include such interactions for which there is advanced public notice.

[305] 16 C.F.R. § 1012.4(a).

[306] 16 C.F.R. § 1012.5.

[307] 16 C.F.R. § 1012.5(b).

reached regarding substantial interest matters."[308] Meeting summaries must be provided to the Office of the Secretary for public disclosure within 20 calendar days after the meeting.[309]

The CPSC rules recognize that telephone conversations "present special problems,"[310] which includes the lack of opportunity for advanced notice and public attendance. Thus, these oral communications fall within this report's definition of *ex parte* communication.[311] The rules recognize that telephone conversations may be the only means through which public stakeholders can communicate orally with agency personnel because "such persons may not have the financial means to travel to a meeting with Agency employees." Yet at the same time, "telephone conversations, by their very nature, are not susceptible to public attendance, or participation."[312] The CSPC rules require meeting summaries for all telephone conversations discussing substantial interest matters,[313] and further direct agency personnel to "exercise sound judgment" and to "not hesitate to terminate a telephone conversation and insist that the matters being discussed be postponed until an Agency meeting with appropriate advanced public notice may be scheduled, or, if the outside party is financially or otherwise unable to meet with the Agency employee, until the matter is presented to the Agency in writing."[314]

The CPSC rules put the burden of providing advance notice of oral *ex parte* communications on agency personnel. Specifically, the rules require that "Commissioners and Agency personnel . . . report[] meeting agreements for Agency meetings to the Office of the Secretary so that they may be published in the Public Calendar or entered on the Master Calendar at least seven days before a meeting . . . ." with some exceptions.[315] The notice report must identify the probable participants and their affiliations; date, time, and place of the meeting; the subject of the meeting "as fully and precisely described as possible"; who requested the meeting; whether the meeting involves a matter of substantial interest; notice that the meeting is open or the reason why it or any portion of it is closed; and a CPSC point of contact.[316] The CPSC rules also require agency personnel, other than Commissioners and their staff, to obtain General Counsel permission to attend any agency meeting where there has been no opportunity to provide seven-days advance notice of the meeting, and if the meeting is approved, they must ensure it is included in the agency's calendars.[317]

C. Agencies with Neutral Postures

[308] 16 C.F.R. § 1012.5(b)(1).
[309] 16 C.F.R. § 1012.5(b)(2).
[310] 16 C.F.R. § 1012.7(a).
[311] The term "*ex parte* communications" as used in this report excludes interactions between a public stakeholder and agency personnel for which there is advanced public notice. See the full definition in *supra* note 304.
[312] 16 C.F.R. § 1012.7(a).
[313] 16 C.F.R. § 1012.7(b)(1).
[314] 16 C.F.R. § 1012.7(b)(2).
[315] 16 C.F.R. § 1012.3(a). The rules do not require advanced notice of meetings with "state, local, or foreign governments concerning intergovernmental cooperative efforts and not the advocacy of a particular course of action on behalf of a constituency of the governmental entity." *Id.*
[316] 16 C.F.R. § 1012.3(a).
[317] 16 C.F.R. § 1012.3(c).

1. Federal Election Commission

FEC has rules that require disclosure of oral and written *ex parte* contacts in different types of FEC proceedings, including informal rulemaking.[318] FEC issued its *ex parte* rules 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."[319]

As described by agency personnel,[320] *ex parte* contacts between public stakeholders and FEC officials happen very infrequently. *Ex parte* contacts with FEC staff occur, if at all, during impromptu, brief meetings between public stakeholders and FEC staff during breaks during Commission meetings or chance encounters in hallways. Public stakeholders who may engage in *ex parte* contacts will likely be most interested in communicating with the Commissioners and their staff, which is also to whom the FEC rules apply.

The FEC rules define an *ex parte* communication as "any written or oral communication by any person outside the agency to any Commissioner or any member of a Commissioner's staff which imparts information or argument regarding prospective Commission action or potential action concerning" several types of Commission proceedings, including any pending rulemaking.[321] The FEC rules, therefore, apply to Commissioners and their staff only.[322]

The FEC rules require disclosure of all *ex parte* contacts and place the burden of disclosure on agency personnel. The FEC rules require disclosure of all *ex parte* contacts that occur from the time a petition for rulemaking or NPRM is circulated to the Commission until final Commission action on the issue.[323] A Commissioner or a member of the Commissioner's staff who receives any *ex parte* communication about a pending rulemaking must disclose the substance of the communication no later than three business days after the communication, absent special circumstances.[324] The disclosure consists of a copy of any written communication or a written summary of an oral communication to the Commission Secretary for inclusion in the rulemaking docket.[325]

2. Nuclear Regulatory Commission

Since the 1980s, NRC has had an informal (unwritten) policy on *ex parte* contacts in rulemaking that generally requires disclosure of any new information received *ex parte*.[326] NRC

[318] 11 C.F.R. part 201, § 201.4.
[319] 58 Fed. Reg. 59,642 (Nov. 10, 1993).
[320] The information in this paragraph is from the interview with FEC personnel.
[321] 11 C.F.R. § 201.2(a)(4).
[322] *Id*. ("A Commissioner or member of a Commissioner's staff who receives an *ex parte* communication concerning a rulemaking . . . shall . . . provide a copy of the written communications or a written summary of an oral communication . . . for placement in the public file of the rulemaking . . . .").
[323] 11 C.F.R. § 201.4.
[324] 11 C.F.R. § 201.4(a)
[325] *Id*.
[326] Unless otherwise noted, the information in this paragraph and the following 2 paragraphs is from the interview with NRC personnel.

has a rule prohibiting *ex parte* contacts in NRC adjudications that make the Commission sensitive to *ex parte* communications in other contexts, including informal rulemaking.[327] *Ex parte* contacts, however, can be highly valuable for NRC in its rulemakings because of its need for technical expertise outside of the agency.

Ex parte contacts at NRC occur during courtesy visits with Commissioners, during which the commenters reiterate and emphasize the written comments that have been or will be submitted to the docket. Rarely does new information arise during such meetings. The public stakeholders attending these meetings are usually representatives from utilities, hospitals, and foreign governments. Most stakeholders seek meetings with Commissioners, and as early in the rulemaking process as possible. If stakeholders request meetings with Commission staff, NRC requires issuance of a notice of meeting with technical staff.[328] NRC also has a policy that allows the creation of an internal, rulemaking working group that may include a representative of a state. That representative's input is considered part of NRC's internal, deliberative process and thus outside the scope of *ex parte* communication rules.[329]

NRC's general, unwritten policy permits agency staff to listen to public stakeholders in *ex parte* communications, and any new information presented in *ex parte* communications on which NRC plans to base its decision must be added to the rulemaking record. If an *ex parte* meeting does not present new information, there may be no record of the meeting. Some Commissioners, however, make their calendars publicly available, which would disclose the fact, but not the substance, of an *ex parte* meeting.

D. Agencies with Policies Restricting *Ex Parte* Communications

1. Department of Labor

[327] 10 C.F.R. § 2.347 (prohibiting *ex parte* communications in NRC adjudications and requiring disclosure of any *ex parte* communications).

[328] *See* 65 Fed. Reg. 56964 (Sept. 20, 2000) (presenting NRC policy regarding meetings between NRC staff and outside persons to discuss substantive issues directly associated with the NRC's regulatory and safety responsibilities).

[329] DIRECTIVE 5.3 "AGREEMENT STATE PARTICIPATION IN WORKING GROUPS" (August 22, 2007), *available at* http://nrc-stp.ornl.gov/procedures/md0503.pdf (describing NRC policy for internal NRC working groups, which include rulemaking working groups, and that "are established by an NRC office to address a particular technical, policy, or procedural matter (such as development or modification of a rule, policy, or guidance document) or to perform a special study.")

DOL has written guidance that advises limiting *ex parte* contacts and requires disclosure of oral *ex parte* contacts.[330] DOL's long-standing policy on *ex parte* communications, which agency personnel recalled being issued initially in 1984, exists in current form in a 2003 memorandum. The DOL Memorandum contains procedures for handling *ex parte* communications with the aim of "avoid[ing] the appearance of unfairness and reduc[ing] judicial concerns over the nature of the notice and comment process."[331]

The DOL Memorandum defines *ex parte* communications as "[m]eetings or discussions with one or more parties [in an informal rulemaking] to the exclusion of other interested parties."[332] Communications concerning the status of a rulemaking or requesting "further information or clarification," however, are not considered *ex parte* communications under the DOL Memorandum.[333]

DOL's longstanding policy is to "minimize *ex parte* contacts once a proposed rule is published"[334] and to summarize any *ex parte* contacts and disclose them in the public docket.[335] The DOL Memorandum requires disclosing all oral *ex parte* communications that "express an opinion about the rule or otherwise go to its substance."[336] The disclosure should identify: the rulemaking, the stage of rulemaking, the parties present or represented, the date of the discussion, whether the discussion was via telephone or in-person meeting, a description of the factual materials or information presented, and the identity of the agency personnel participating.[337] If the communication is unclear, agency personnel should "err on the side of over-inclusiveness."[338] The burden for disclosing oral *ex parte* communications falls on agency personnel,[339] but DOL does not specify a timeframe for disclosing the communication.

Although the DOL Memorandum defines, and mainly addresses, *ex parte* communications as oral *ex parte* communications, it does seem to account for post-comment period written comments in setting out guidance for handling "submissions made after the close of the official comment period." DOL agencies have discretion to accept or reject such submissions, but if accepted, they must be treated as late comments and placed in the public record.[340] If the agency decides to rely on information provided in a late comment, the agency may have to reopen the record to provide an opportunity for public comment on that information.[341]

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[330] Memorandum for the Executive Staff from Howard M. Redzely, Acting Solicitor of Labor, "Procedures for Handling Ex Parte Communications in Informal Rulemaking" (Jan. 2, 2003) (on file with the author) ("DOL Memorandum").

[331] *Id*. at 2.

[332] *Id*. at 1.

[333] *Id*. at 1-2.

[334] *Id*. at 1.

[335] *Id*.

[336] *Id*.

[337] *Id*. at 1-2, and "Record of Contact with Outside Party to discuss issues related to Informal Rulemaking."

[338] *Id*. at 2.

[339] *Id*. at 2 ("After the meeting, the agency should create a brief written summary . . . .").

[340] *Id*.

[341] *Id*.

The DOL policy acknowledges that it sets "only general guidelines, and different agencies have different rulemaking authority that may affect the adoption of particular procedures."[342] Within DOL, implementation of the guidance differs. For example, within the Wage and Hour Division, the close of the comment period is the end of public comments, and although late comments are accepted, they are not necessarily considered. There is a file for late oral or written comments that is kept separate from the official record for the rulemaking. Another division, the Planned Benefits Security Division, however, allows and considers late comments, and permits *ex parte* meetings post-comment period. Both divisions will re-open the comment period if there is new information.

Most public stakeholders initiating *ex parte* communications are interested in speaking face-to-face with DOL personnel at the policy and leadership level, as well as with the rulemaking staff.[343] The DOL Secretary, however, rarely participates in *ex parte* meetings. The public stakeholders most likely requesting an *ex parte* meeting with DOL are trade associations and labor unions or other similar entities well-versed in federal rulemaking procedures and practice. DOL is in listening-mode during these *ex parte* meetings, and if agency officials engage in a dialogue, it is usually only by noting content of written comments and listening to the *ex parte* communicator's response to the information and arguments in those comments. DOL may initiate *ex parte* communication for a specific purpose, but usually only during the comment period, while the rulemaking docket is still open. DOL attempts to engage with stakeholders as much as possible before publication of an NPRM. DOL's public stakeholder outreach includes public hearings, online announcements, frequently-asked-questions, and implementation meetings.

2. Department of Transportation

DOT has longstanding written guidance—embodied in DOT Order 2100.2—discouraging *ex parte* communications after publication of an NPRM and requiring disclosure of all *ex parte* communications.[344] The purpose of the DOT Order, which was issued in 1970, is "[t]o assure adequate public participation."[345] Disclosure is required on the theory that "communications that could influence a decisionmaker must be reflected in the rulemaking record so that (1) it can be as complete as possible to permit full judicial review; and (2) all members of the public have an equal access to information available to the decisionmaker and, therefore, an equal opportunity to present their views in the proceedings."[346]

Although the DOT Order encourages *ex parte* contacts that "will be helpful in the resolution of questions of substance and justification"[347] and directs agency personnel to "be

[342] *Id*. at 2.
[343] The information in this paragraph is from the interview with DOL personnel.
[344] Department of Transportation, Order 2100.2 "Policies for Public Contacts in Rule Making" (Oct. 5, 1970) *available at* http://www.reg-group.com/library/DOT2100-2.PDF ("DOT Order").
[345] *Id*.
[346] *Id.* at "Summary of Procedures to Deal with Ex Parte Contacts In Connection with Rulemaking."
[347] *Id.* at para. 2.

receptive to proper contacts from those affected by or interested in the proposed action,"[348] it does not define "proper contacts" and seems to indicate that pre-NPRM contacts are the only proper ones. The DOT Order directs that *ex parte* contacts "should be held to a minimum once the closing date for comment on a particular rulemaking has passed."[349] The DOT Order also directs that all such "contacts [while the docket is open], and especially post-closing contacts, should be discouraged."[350] The DOT Order explains that post-comment period contacts, even if disclosed, "tend to be hidden since many persons feel that they have no need to check further the public docket after the closing date for comments." DOT personnel, and the FAA rules discussed below, confirm that, in practice, *ex parte* contacts after publication of an NPRM are all but forbidden.

The DOT Order requires disclosure of the substance of all *ex parte* contacts involving agency personnel involved in developing or influencing a rulemaking and public stakeholders that provide information or views bearing on the substance of the rulemaking.[351] In practice, as recounted by agency personnel, any *ex parte* contact involving an open rulemaking will be disclosed. The burden of disclosure falls on agency personnel. Under the DOT Order, disclosure should include a list of participants, a summary of the discussion, and a statement of any commitments made by agency personnel.[352]

The DOT Order establishes disclosure procedures for *ex parte* contacts depending on when during a rulemaking they occur, but does not distinguish between oral and written contacts.[353] Pre-NPRM *ex parte* contacts should be discussed in the NPRM, but may also be included as a memorandum in the rulemaking docket.[354] Comment-period *ex parte* contacts and post-comment period *ex parte* contacts should be disclosed in the docket,[355] and post-comment period contacts that are "significant" may require reopening of the docket for reply public comment.[356] For post-comment period contacts, the DOT Order also encourages advanced public notice of, and an invitation to interested parties to participate in, such contacts.[357]

Ex parte contacts with DOT personnel occur more frequently at the operating administrations within DOT (e.g., FAA, NHTSA), which is where the majority of DOT rulemaking occurs, than within the Office of the Secretary.[358] If a public stakeholder requests an *ex parte* meeting with the Office of the Secretary, DOT will most likely permit the meeting, but will disclose the contact in the rulemaking docket in a written summary regardless of when the contact occurs in the rulemaking's lifecycle. In an *ex parte* meeting with the Secretary or

[348] *Id.* at para. 2.a.
[349] *Id.* at para. 2.c.
[350] *Id.* at "Summary of Procedures to Deal with Ex Parte Contacts In Connection with Rulemaking."
[351] *Id.* at para. 3.a.
[352] *Id.* at para. 4.
[353] *Id.* at para. 3.b. and "Summary of Procedures to Deal with Ex Parte Contacts In Connection with Rulemaking."
[354] *Id.*
[355] *Id.*
[356] *Id.* at "Summary of Procedures to Deal with Ex Parte Contacts In Connection with Rulemaking."
[357] *Id.* at para. 2.c.
[358] The information in this paragraph and the following paragraph is from interviews with DOT personnel.

representatives of the Office of the Secretary, the commenter will usually summarize written comments already submitted to the docket but does not usually discuss the substantive or technical details of the rule. Representatives from the Office of the Secretary will usually be in listening mode only. *Ex parte* meetings are most often requested by larger industry groups, lobbying groups, and trade associations. DOT rarely receives a request for an *ex parte* meeting from individuals, but does receive some *ex parte* meetings requests from public interest groups and states.

The DOT Order applies throughout the Department, including at the operating administrations. At the operating administrations, commenters will be more likely to get into the substantive issues of the rulemaking with the technical experts and other personnel involved in drafting the rule. Additionally, personnel at the operating modes that are involved in developing rules have ongoing relationships with public stakeholders through general outreach activities.

3. National Highway and Transportation Safety Administration (within DOT)

As one of DOT's operating administrations, NHTSA follows the DOT Order.[359] NHTSA's practice under the DOT Order permits *ex parte* contacts during the comment period and post-comment period depending on the identity of requestor, and so long as the requestor only seeks to highlight aspects of written comments already submitted to the rulemaking docket. Generally, the reputation of the requestor is a key factor in permitting an *ex parte* meeting. The meeting, regardless of whether it contains new information or not, is disclosed in the docket.

Requests for *ex parte* meetings with NHTSA personnel come most frequently from industry, and some requests come from public interest groups, such as groups focused on safety issues, fuel economy, and environmental issues. Public interest groups usually want to talk to NSHTA pre-NPRM, and often present themselves to the agency as a broad coalition of groups with common interests to remind the agency what they stand for and their positions on important issues. Commenters targeted different NHTSA personnel for *ex parte* meetings depending on the rulemaking and the issues the commenter wishes to discuss. Most often, the request is directed to the Senior Associate Administrator for Vehicle Safety. Meetings may also be requested with, or may include, the Administrator or Associate Administrator of NHTSA, Chief Counsel, Associate Administrator for Rulemaking, or rulemaking staff.

4. Federal Aviation Administration (within DOT)

FAA, which is another operating administration within DOT, has rules governing *ex parte* communications that essentially codify the DOT Order.[360] FAA rules appear in an Appendix to its general rulemaking procedures. FAA issued its Appendix in 2000 to align its rules with the DOT Order, removing an older rule addressing *ex parte* communications.[361]

[359] The information in this paragraph and the following paragraph is from interviews with DOT personnel.
[360] 14 C.F.R. Appendix 1–part 11.
[361] 65 Fed. Reg. 50863 (August 21, 2000).

The FAA Appendix explains that an *ex parte* contact is any communication between FAA and someone outside of government regarding a specific rulemaking before FAA publishes a final rule or withdraws the proposed rule, except written comments submitted to the docket.[362] The FAA Appendix notes a danger of *ex parte* contacts as "giv[ing] an unfair advantage to one party, or appear[ing] to do so."[363] Because "[e]ven the appearance of impropriety can affect public confidence in the [rulemaking] process," the DOT Order sets careful guidelines for the kind of contacts permitted and proper disclosure procedures.[364]

The FAA Appendix requires disclosure of *ex parte* contacts per the DOT Order depending on the timing of the contact, but distinguishes between written and oral contacts. It permits oral and written pre-NPRM contacts necessary to obtain technical and economic information and states that FAA will note such contacts in the preamble to the NPRM or similar rulemaking document.[365] FAA interprets the DOT Order as prohibiting written *ex parte* contacts during the comment period.[366] It holds that if oral *ex parte* contacts occur during the comment period, agency personnel should tell the commenter "that the proper avenue of communication during the comment period is a written communication to the docket."[367] If an *ex parte* contact during the comment period nonetheless occurs, the FAA Appendix requires agency personnel to place a summary of the contact along with any materials provided as part of the contact in the docket and encourages the commenters to file written comments to the docket.[368]

The FAA Appendix notes that DOT "strongly discourages" post-comment period *ex parte* contacts and characterizes such contacts as "improper, since other interested persons w[ill] not have an opportunity to respond."[369] FAA, however, permits all written post-comment period *ex parte* communications, but cautions they will only be considered if time permits, and may prompt reopening of the comment period.[370] If an oral post-comment *ex parte* contact does occur, it will be summarized for the docket,[371] and FAA may consider reopening the comment period after considering whether the contact will give the commenter an "unfair advantage."[372] FAA interprets the DOT Order as requiring reopening the comment period if the substance of a proposed rule changes significantly as a result of a post-comment period *ex parte* contact.[373]

The FAA Appendix places the burden of disclosure on agency personnel, but does not specify a timeframe for disclosure. Generally, however, FAA personnel are discouraged from engaging in post-NPRM *ex parte* dialogue to prevent purposeful or inadvertent statements that

[362] 14 C.F.R. Appendix 1–part 11 para. 1,2.
[363] *Id.* at para. 1.
[364] *Id.*
[365] *Id.* at para. 4.
[366] *Id.* at para. 5 ("5. *Does DOT policy permit ex parte contacts during the comment period?* No, during the comment period, the public docket is available for written comment from any member of the public.").
[367] *Id.* at para. 7.
[368] *Id.* at para. 8.
[369] *Id.* at para. 9.
[370] *Id.* at para. 12.
[371] *Id.* at para. 9.
[372] *Id.* at para. 11.
[373] *Id.*

inaccurately characterize the agency's proposed rule or make or suggest any commitments regarding the future course of the proceeding.[374]

FAA staff is also discouraged from engaging in post-NPRM *ex parte* contacts because of the possibility of delaying the rulemaking schedule or overburdening the staff. An *ex parte* contact could extend the rulemaking's schedule if it presents information for which FAA would have to re-open the comment period, even if the information is not particularly relevant to FAA's decisions in the rulemakings. Some FAA rulemakings, such as their chart updates and air space actions, are under strict deadlines and cannot be delayed. Other rulemakings implicate sensitive safety issues and require quick agency action. In addition, *ex parte* communications impose burdens on agency personnel, who must take the time necessary to participate in the communication and disclose it.

FAA, however, does not get many requests for *ex parte* meetings for specific rulemakings. FAA does meeting with public stakeholders for a variety of reasons, but rarely to discuss a rulemaking. If an open rulemaking becomes a topic of conversation in such a meeting, that discussion will be disclosed if it impacts rulemaking decisions. Additionally, FAA frequently engages in public outreach early in a rulemaking process. For example, in airspace related rulemakings, FAA will host ad hoc committee meetings and face-to-face meetings with public stakeholders in the early stages of proposal development, and then address all issues raised during these meetings in the NPRM. FAA has also frequently hosted public meetings for rulemakings, during which commenters had an opportunity to make oral presentations to FAA.

FAA may initiate an *ex parte* contact if it needs further information about a comment in the docket or other information such as economic data, and will disclose this information in the docket.[375] If FAA initiates any *ex parte* contact, it will be disclosed in the rulemaking docket as well as the preamble to the next rulemaking document. FAA rulemakings, however, require exact and precise presentation of equipment and technology performance issues that are unlikely to change during the course of the rulemaking.

5. U.S. Coast Guard (within DHS)

USCG has a Commandant Instruction Manual entitled "Preparation of Regulations" ("USCG Manual") that "severely restricts *ex parte* communications" both oral and written.[376] The purpose of the USCG Manual is to address concerns that rulemakings suspected of being influenced by *ex parte* communications may be challenged in court and invalidated, and concerns "about the appearance of impropriety that such communications can generate."[377] The

[374] The information in this sentence and in the following three paragraphs, unless otherwise noted, are from interviews with DOT personnel.

[375] 14 C.F.R. Appendix 1–part 11 para. 9.

[376] COMMANDANT INSTRUCTION M16703.1 "PREPARATION OF REGULATIONS" (October 29, 2009) at 6-4-6-5, *available at* http://www.uscg.mil/directives/cim/16000-16999/CIM_16703_1.pdf ("USCG Manual").

[377] *Id.* at 6-4.

USCG Manual reflects that USCG was formerly an agency within DOT covered by the DOT Order, and that USCG retained its policies created under DOT when it became part of DHS.[378]

The USCG Manual uses the APA definition of *ex parte* communications[379] and sets out procedures for handling such communications based on when they occur in the rulemaking process. Specifically, the USCG Manual addresses communications with public stakeholders about "a possible rulemaking" but requires such pre-NPRM *ex parte* communications to be described in the NPRM preamble and possibly also disclosed via a memorandum or other summary filed in the rulemaking docket, once its opened.[380]

Under the USCG Manual, post-comment period *ex parte* communications "are a particular concern, and could require reopening the comment period."[381] The USCG Manual does not address how to handle *ex parte* communications that occur during or after the comment period. According to USCG personnel, however, the general policy is to restrict *ex parte* communications after publication of the NPRM and disclose all *ex parte* contacts in the docket and in the preamble to the final rule. The USCG Manual also directs agency personnel never to disclose the details of the rulemaking or portions of draft rulemaking documents to someone outside of the Executive Branch, unless the same material is also publicly disclosed in the *Federal Register*.[382]

Most *ex parte* communications with USCG initiated by public stakeholders arise as part of meetings devoted to non-rulemaking items.[383] Public stakeholders meet with USCG personnel for a variety of reasons, and *ex parte* communications regarding rulemakings are most likely to arise during those meetings if the stakeholder brings up an open rulemaking. USCG leadership is mostly in listening mode when such *ex parte* communications occur, and if the information presented is relevant to a rulemaking, USCG staff will disclose the *ex parte* communication in the rulemaking docket.

USCG may initiate *ex parte* contacts to get clarification of submitted comments or if it needs additional information, such as economic information. Some of these *ex parte* contacts may be initiated by staff that contact their industry and other contacts requesting specific information without realizing that such communications are *ex parte* contacts and may be prohibited under the USCG Manual. USCG-initiated *ex parte* contacts will be disclosed in the rulemaking documents and possibly in the docket, depending on when the contact occurred and the information presented in the contact.

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[378] The Homeland Security Act of 2002, Pub. L. No. 107-296 (2002) (transferred Coast Guard to DHS from DOT).

[379] USCG Manual, *supra* note 376, at 6-4 para. E.1. ("an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports").

[380] *Id*. at 6-4–6-5.

[381] *Id*. at 6-5.

[382] *Id*.

[383] The information in this paragraph and the following paragraph is from interviews with USCG personnel.

6. Transportation Security Administration (within DHS)

Another DHS operating component, TSA, has only an unwritten policy on *ex parte* communications.[384] TSA may issue guidance to staff for a particular rulemaking, but generally, TSA's unwritten policy encourages pre-NPRM communications between agency personnel and public stakeholders to help identify concerns and problems on a particular issue. Through this policy, TSA attempts to get a broad level of input with representation of various viewpoints and counterpoints. TSA staff is advised to avoid communicating anything that could be construed as a commitment by the agency beyond the promise that the agency will carefully consider all input. Post-NPRM, during the public comment period, TSA adheres to a strict policy of ensuring all communications are in the record. If an oral communication occurs, it will be reduced to writing and placed in the docket. TSA tries to avoid *ex parte* communications after the close of the comment period.

TSA does not receive many requests for *ex parte* contacts after publication of the NPRM, because most of the public stakeholders that would request an in-person meeting know its policy and try to schedule such meetings early in the rulemaking process. Requests for meetings come mostly from trade associations to meet with the TSA Administrator or an Assistant Administrator. Those that do come in usually provide a summary of the substance that will be presented during the meeting, and TSA adds that summary to the rulemaking docket.

7. Department of Education

ED has an unwritten policy that encourages *ex parte* communications before publication of the NPRM and generally discourages them after the NPRM.[385] Communications with public stakeholders prior to issuance of an NPRM provide useful information and input to inform development of a rulemaking. Even at the pre-NPRM stage, however, ED personnel are advised not to disclose agency policy preferences or the likely substance of a forthcoming proposal. Once an NPRM is with the Office of Information and Regulatory Affairs for review under Executive Order 12866,[386] ED does not accept any meetings with public stakeholders and instead defers to the process established in this executive order. During the comment period, all potential commenters are encouraged to submit written comments, but ED may host a teleconference or webinar to take questions and provide answers based on the substance of the NPRM only. Post-comment period, *ex parte* communications are discouraged to avoid the appearance of unfair access and prioritize the use of agency resources for developing the next stage of rulemaking.

[384] Unless otherwise noted, the information in this paragraph and the following paragraph is from the interview with TSA personnel.

[385] Unless otherwise noted, the information in this paragraph and the following paragraph is from the interview with ED personnel.

[386] Section 6, Centralized Review of Regulations, of Executive Order 12866 provides procedures for Office of Information and Regulatory Affairs review of Executive Departments' regulatory actions. 58 Fed. Reg. 51735 (Sept. 30, 1993).

Commenters most often requesting *ex parte* meetings are states, school districts, institutions of higher education, and organizations representing those interests. The commenters usually request *ex parte* meetings with agency leadership. ED also receives *ex parte* meeting requests as part of its negotiated rulemakings.[387] The goal of the negotiated rulemaking process is to reach a consensus on the rule text, and if there is no consensus at the end of the process, ED may receive several *ex parte* meeting requests. This occurred recently in ED's negotiated rulemaking "Program Integrity: Gainful Employment" that was controversial and generated over 90,000 comments.[388] In response to *ex parte* meeting requests, ED announced a series of public meetings and limited participation to commenters that had already submitted written comments during the comment period.[389] ED also limited the content of the meetings to the information in previously submitted written comments.[390] ED also held some private meetings, which were announced in advance, to accommodate commenters who wanted to discuss material that could not be discussed publicly because it contained proprietary or sensitive business information. [391]

8. Food and Drug Administration (within the Department of Health and Human Services)

The Food and Drug Administration ("FDA") has rules covering oral and written *ex parte* communications and restricts such communications after publication of the NPRM.[392] The FDA rules address permissible dissemination and discussion of FDA rulemaking documents, and were first issued in 1975 to codify its policy ensuring equal access to rulemaking information.[393] FDA "welcomes assistance in developing ideas for, and in gathering the information to support, notices and regulations."[394]

The FDA rules do not define or use the term "*ex parte* communication," but the rules still cover *ex parte* communications in practice. Prior to publication of an NPRM, the FDA rules permit communications with public stakeholders that discuss "general concepts."[395] The FDA rules also permit discussions with public stakeholders about the details of draft NPRMs or draft proposed rules with advance, written permission from the Commissioner.[396] After publication of an NPRM or other rulemaking documents, the FDA rules restrict discussions of those documents and agency personnel may only "clarify and resolve questions raised and concerns expressed about the draft."[397]

[387] Section 492 of the Higher Education Act of 1965, as amended, sets forth ED's negotiated rulemaking requirements for promulgating Federal Student Aid program regulations.

[388] 75 Fed. Reg. 63763 (Oct. 18, 2010).

[389] *Id.*

[390] *Id.*

[391] Interview with ED personnel. [following up to find a public source since the meetings were publicly announced]

[392] Dissemination of Draft Federal Register Notices and Regulations. 21 C.F.R. § 10.80.

[393] 40 Fed. Reg. 22950, 22961 (May 27, 1975) (noting the rules codify the policy followed by FDA for the previous two years, and that prior FDA activities providing some persons and not others draft rulemaking documents raised public concern).

[394] 21 C.F.R. § 10.80(a).

[395] 21 C.F.R. § 10.80(b)(1).

[396] *Id.*

[397] 21 C.F.R. § 10.80(b)(2), (c), (d)(2).

The only exceptions to the FDA's general restrictions on comment-period and post-comment-period *ex parte* communications are for specific, Commissioner-approved discussions about the details of draft final rules [398] and for FDA initiated *ex parte* communications. FDA may initiate *ex parte* communications if "additional technical information from a person outside the executive branch is necessary to draft the final notice or regulations or its preamble"[399] or "direct discussion by FDA of a draft of a final notice or regulations or its preamble is required with a person outside the executive branch."[400] The FDA rules require procedures for both circumstances to ensure such communications are included in the administrative record of the rulemaking.[401]

The FDA rules also provide additional permission and procedures for *ex parte* communications relating to rulemakings involving specific subject matters,[402] and rulemakings requiring a "formal evidentiary public hearing" by statute.[403]

9. Department of Interior

DOI has rules that prohibit all *ex parte* contacts in all its proceedings, including informal rulemakings, unless all parties are present for oral communications and written communications are provided to all parties.[404] DOI issued its rules in 1971 as part of a larger body of procedures and practices aimed at "establishing and maintaining uniformity to the extent feasible in Department hearings and appeals procedures, and for improved public service."[405] Although the rule covers informal rulemakings, it appears that DOI was more concerned with other types of proceedings.[406]

DOI rules define an *ex parte* communication as a "communication concerning the merits of a proceedings between any party to the proceeding or any person interested in the proceeding or any representative of a party or interested person and any Office personnel involved who may reasonably be expected to become involved in the decisionmaking process."[407] The rule specifically excludes status inquires or requests for advice with procedural requirements.[408]

[398] 21 C.F.R. § 10.80(d)(1).
[399] 21 C.F.R. § 10.80(d)(2)(ii).
[400] 21 C.F.R. § 10.80(d)(2)(iii).
[401] 21 C.F.R. § 10.80(d)(2)(i) ("The final notice or regulations and its preamble will be prepared solely on the basis of the administrative record."); (ii)(additional technical information "will be requested by FDA in general terms and furnished directly to the Division of Dockets Management to be included as part of the administrative record."); and (iii)("appropriate protective procedures will be undertaken [when FDA requires a direct discussion of a draft final rule document] to make certain that a full and impartial administrative record is established.").
[402] See 21 C.F.R. §§ 10.80(g)(addressing food additive color additive and animal drug rulemakings) and 10.80(h) (addressing rulemakings setting for performance standards for electronic products).
[403] 21 C.F.R. § 10.55 Separation of functions; *ex parte* communications.
[404] 43 C.F.R. § 4.27(b)(1).
[405] 36 Fed. Reg. 7186 (Apr. 15, 1971).
[406] *See* 43 C.F.R. § 4.27(b)(1) (requiring additional disclosure procedures for a written *ex parte* communication made in violation of the rule "[i]n proceedings other than informal rulemakings.").
[407] 43 C.F.R. § 4.27(b)(1).
[408] *Id.*

DOIs rules also requires disclosure of any oral or written *ex parte* communications made in violation of the prohibition.[409] Specifically, an oral *ex parte* communication must be "reduced to writing in a memorandum to the file by the person receiving the communication"[410] and a written *ex parte* communication must "be included in the record."[411] The rules provide for "appropriate sanctions" on a person who knowingly makes a prohibited *ex parte* communication.[412]

10. Federal Trade Commission

FTC has rules prohibiting certain *ex parte* communications and requiring disclosure of others in trade regulation rulemaking.[413] The FTC rules were promulgated to implement a statutory requirement to issues such rules.[414] They prohibit the "presiding officer"[415] from consulting the public on "any fact at issue" unless notice and an opportunity to participate is given to all.[416]

The FTC rules also require disclosure of both written and oral *ex parte* comments received by Commissioners and their staff in trade regulation rulemakings,[417] and distinguishes between comment period *ex parte* communications and post-comment period communications for disclosure purposes. The FTC rules do not specifically address pre-NPRM *ex parte* communications. The FTC *ex parte* disclosure rules apply to Commissioners and their personal staffs only,[418] and the burden of disclosure falls on agency personnel.

Written *ex parte* communications to Commissioners and Commissioner's personal staff received during the comment period must be disclosed in the rulemaking record.[419] Written *ex parte* communications received after the comment period must be publicly disclosed, but not necessarily as part of the rulemaking record.[420] In all cases, written communications "that comply with the applicable requirements for written submissions at that stage of the proceeding" will be added to the rulemaking record, and all others will be added to the "public record."[421]

[409] *Id.*
[410] *Id.*
[411] *Id.*
[412] 43 C.F.R. § 4.27(b)(2).
[413] 16 C.F.R. § 1.7 (defining trade regulation rules as rule promulgated as provided in Section 18(a)(1)(B) of the Federal Trade Commission Act).
[414] *See* 25 Fed. Reg. 78,626, (Nov. 26, 1980) and 45 Fed. Reg. 36,338, (May 29, 1980) (noting the regulations implement the Federal Trade Commission Improvement Act of 1980 (Pub. L. No. 96-252)).
[415] The "presiding officer" is appointed at the commencement of trade regulations rulemaking and is responsible for the "orderly conduct of the rulemaking proceeding and the maintenance of the rulemaking and public records until the close of the post-record comment period." 16 C.F.R. § 1.13(c).
[416] 16 C.F.R. § 1.13(c)(6).
[417] 16 C.F.R. § 1.18(c).
[418] *Id.* (entitled "Communications to Commissioner and Commissioners' personal staffs").
[419] 16 C.F.R. § 1.18(c)(1)(i).
[420] *Id.*
[421] *Id.* FTC defines "rulemaking record" as "the rule, its Statement of Basis and Purpose, the verbatim transcripts of the informal hearing, written submissions, the recommended decision of the presiding offices, and the

Oral *ex parte* communications to Commissioners and their staff, both during and after the comment period, are permitted only with advance notice in the Commission's "Weekly Calendar and Notice of 'Sunshine' Meetings." These communications are disclosed via transcript or a written summary.[422] The burden of creating the written summary falls on the Commissioner or the Commissioner's advisor to whom such oral communications are made.[423] Oral post-comment period *ex parte* communications are prohibited at the close of the "post-record comment period;"[424] however, if one such communication does occur, the Commissioner or the Commissioner's advisor must promptly and publicly disclose the contents of the communication via transcript or memorandum, and it will specifically be excluded from the rulemaking record.[425]

The FTC rules also prohibit other FTC personnel from communicating or causing to be communicated to any Commissioner or Commissioner's personal staff "any fact which is relevant to the merits of such proceedings and which is not on the rulemaking record of such proceeding, unless such communication is made available to the public and in included in the rulemaking records."[426]

E. Disclosure Requirement Commonalities

Regardless of how welcoming agency policies regarding *ex parte* communications are, all of the policies studied require *ex parte* communications to be disclosed. These disclosure policies cover, and also differ on, which types of communications must be disclosed, when they must be disclosed and by whom, any exceptions from disclosure, and any sanctions for violation of the disclosure policy.

What must be disclosed under agency policies depends on the definition or description of *ex parte* communication used in the agency policy. Many agency policies do not apply to status inquires or procedural questions.[427] But the definition of "*ex parte* communication" and the

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staff recommendations as well as any public comment thereon, verbatim transcripts or summaries of oral presentations to the Commission or any communication's paced on the rulemaking record pursuant to § 1.18c and any other information which the Commission orders relevant to the rule." 16 C.F.R. § 1.18(a). FTC does not define "public record."

[422] 16 C.F.R. § 1.18(c)(1)(ii).

[423] *Id.*

[424] The FTC rules provide for a "post-record comment" period in which "[t]he staff report and the presiding officer's recommended decision shall be the subject of public comment for a period to be prescribed by the presiding officer at the time the recommended decision is placed in the rulemaking record. The comment period shall be no less than sixty (60) days. The comments shall be confined to information already in the record and may include requests for review by the Commission of determinations made by the presiding officer." 16 C.F.R. § 1.13(h).

[425] 16 C.F.R. § 1.18(c)(1)(ii).

[426] 16 C.F.R. § 1.18(c)(2).

[427] 47 C.F.R. § 1.1202(a) ("Excluded from this term are . . . inquiries relating solely to the status of a proceeding."); CFPB Bulletin paragraph (b)(1)(B) (exceptions to the definition of *ex parte* presentation); CSPC: 16 C.F.R. § 1012.2(d) (excluding "inquiries concerning status of a pending matter"); USCG Manual, *supra* note 375 at 6-4, paragraph E.1 ("but it [the term *ex parte* communication] shall not include request for status reports"); and 43

types of communications covered differs from agency to agency. Agencies definitions or descriptions of *ex parte* communications, however, can be described in three main categories: (1) breadth of coverage; (2) extent of adoption of Recommendation 77-3; and (3) coverage of new or influential information in communication.

The broadest *ex parte* policies employ an expansive definition of "*ex parte* communication". The CPSC rules cover meetings involving any matter "that is likely to be the subject to a regulatory or policy decision by the Commission."[428] The FEC rules define *ex parte* communications as information or argument regarding prospective Commission action or potential action."[429] The FAA Appendix defines *ex parte* communication as "regarding a specific rulemaking proceeding before it closes."[430] The DOT Order describes which *ex parte* communications must be disclosed based on timing of the communication,[431] but in practice, DOT personnel disclose everything. Thus, the DOT Order is grouped with the other broad coverage policies. The USCG Manual uses the APA definition of a communication "not on the public record with respect to which reasonable prior notice to all parties is not given."[432] And the FDA rules cover all discussion about draft and published rulemaking documents.[433]

Several agency policies use the Recommendation 77-3 language describing *ex parte* communications as "addressed [or respecting] the merits" of a rulemaking. The policies of DOJ and FEMA, which implement Recommendation 77-3, FCC and CFPB, which are the most similar and specific policies, and DOI, which was implemented before Recommendation 77-3, all describe or define *ex parte* communications that must be disclosed as communications directed or addressed to the "merits" of a rulemaking.[434] Similarly, the DOL Memorandum requires disclosure of oral *ex parte* communications that "express an opinion about the rule or go to its substance."[435] FCC amended its rules in 2011 to switch from a policy of only requiring disclosure of *ex parte* communications containing new information, to requiring disclosure of all *ex parte* communications. The reason for the FCC's policy shift was to ensure that all *ex parte* communications are documented to achieve "a compressive filing requirement," the lack of which FCC considered a policy "shortcoming."[436]

Two agencies require disclosure of information that is new, may influence the agency's decision, or on which an agency plans to rely. The EPA Fishbowl Memo requires disclosure of "information or views that have influenced EPA's decisions" and "significant new factual

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C.F.R. § 4.27(b) ("This regulation does not prohibit communications concerning case status or advice concerning compliance with procedural requirements unless the area of inquiry is in fact an area of controversy in the proceeding.").

[428] 16 C.F.R. § 1012.2(d).

[429] 11 C.F.R. § 201.2(a).

[430] 14 C.F.R. Appendix 1 to Part 11.

[431] DOT Order, *supra* note 344.

[432] USCG Manual, *supra* note 376, at 6-4, para. E.1.

[433] 21 C.F.R. § 10.80.

[434] 28 C.F.R. § 50.17(b); 44 C.F.R. §1.6(a); 47 C.F.R. § 1.1206(b); CFPB Bulletin paragraph (b)(1)(A); 43 C.F.R. § 4.27(b).

[435] DOL Memorandum, *supra* note 330, at 1

[436] FCC 11-11, *supra* note 236, at para. 18.

information."[437] EPA, however, also requires disclosure of the fact of meetings with agency leadership.[438] The NRC unwritten policy requires disclosure of new information on which NRC plans to rely, and NRC personnel indicated that there may be no record of an *ex parte* communication that does not present new information.[439]

All agencies' policies, except three, cover both oral and written *ex parte* communications. The three agencies, FEMA, CPSC, and DOL, only cover oral communications.[440] CPSC defines a telephone conversation separate from a face-to-face meeting, mainly because its rules require advance notice of all face-to-face meetings, but disclosure of the substance after the fact of both types of oral *ex parte* communications.[441] The DOL Memorandum describes and addresses "meetings and discussions," but also addresses written *ex parte* comments post-comment period as late comments.[442]

All agencies except two place the burden of disclosure on the agency. FCC and CFPB require the commenter to disclose an *ex parte* communication.[443] The other agencies either specify that agency personnel are charged with disclosing an *ex parte* communication or presume the burden falls on agency personnel.

Many agencies do not set a deadline for disclosure, while others require disclosure from 2 business days to 20 calendar days to "timely" or "promptly." FCC requires commenters to disclose all oral and written *ex parte* communications within two business days of the communication.[444] CFPB and FEC require disclosure of *ex parte* communications within three business days.[445] CPSC requires disclosure within 20 calendar days.[446] EPA requires "timely notice"[447] of *ex parte* communications, and DOJ, FEMA, and DOT require *ex parte* communications be placed in the public docket "promptly."[448]

Only three agencies make an exception to disclosure requirements for information exempt from disclosure or eligible for withholding under appropriate legal authority. Mirroring language from Recommendation 77-3, the DOJ rule indicates it may "properly withhold from the public files information exempt from disclosure under 5 U.S.C. 552."[449] The FCC rules and CFPB Bulletin both provide procedures for handling "confidential" information contained in *ex parte* communications.[450]

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[437] EPA Fishbowl Memo, *supra* note 283.
[438] *Id*.
[439] *See* discussion *supra* at Part V.C.2.
[440] 44 C.F.R. § 1.6(a); 16 C.F.R. § 1012.2(b); DOL Memorandum, *supra* note 330.
[441] *See* discussion *supra* at Part V.B.4.
[442] *See* discussion *supra* at Part V.D.1; DOL Memorandum, *supra* note 330.
[443] 47 C.F.R. § 1.1206(b)(1) and (2); CFPB Bulletin, *supra* note 265, at para. (d).
[444] 47 C.F.R. § 1.1206(b)(2)(iii).
[445] CFPB Bulletin, *supra* note 265, at paras. (d)(1)–(2); 11 C.F.R. § 201.4(a).
[446] 16 C.F.R. § 1012.5(b)(2).
[447] EPA Fishbowl Memo, *supra* note 283.
[448] 28 C.F.R. § 50.17(b) and (c); 44 C.F.R. § 1.6(a); DOT Order, *supra* note 344.
[449] 28 C.F.R. § 50.17(d).
[450] 47 C.F.R. §1.1206(b)(2)(ii); CFPB Bulletin, *supra* note 265, at para. (b)(3)(iii).

A few agencies allow sanctions for violations of *ex parte* disclosure rules. FCC, CFPB, FEC, and DOI all have sanction provisions providing for imposition of "appropriate" sanctions as determined by the agency General Counsel, Designated Agency Ethics Official, or other agency personnel.[451] FCC personnel indicated that although FCC has sanction provisions in its rules, it is not likely to use them in the informal rulemaking context. I Instead, they try to resolve any violation of the FCC rules before imposing a sanction. FCC and CFPB place the burden of disclosure on the commenter, and thus a sanction provision may be necessary to help an agency enforce its disclosure requirements against commenters.

F. Executive Departments Compared to Independent Agencies

This section compares and contrasts the *ex parte* communication policies in the eleven executive departments and seven independent agencies discussed in this report. Although the independent agencies were involved in the seminal cases addressing *ex parte* communications, of the nine agencies with promulgated rules, only four are independent agencies.[452] Two independent agencies have written guidance documents addressing *ex parte* communications,[453] compared to three executive agencies that have such written guidance documents.[454] The final independent agency[455] has an unwritten policy, as do the remaining two executive agencies.[456] Three agency policies, FEMA, CPSC, and DOL, cover oral communications only,[457] and the rest of the agencies cover both oral and written. Of these three, only CPSC is an independent agency.

The biggest difference of the *ex parte* communication policies between the independent agencies and executive departments discussed in this report is agency posture toward *ex parte* communications. All independent agencies, except one, have policies that either welcome *ex parte* communications or appear neutral. The only independent agency that seems wary and more cautious with *ex parte* communications is FTC, and its *ex parte* rules implement statutory requirements.[458] In fact, the agencies most welcoming of *ex parte* communications are all independent agencies; no executive department falls near the welcoming end of the spectrum, despite statements in executive department written policies that seem to welcome or encourage certain *ex parte* communications.[459]

Independent agencies may be more sensitive to the impact of *ex parte* communications in informal rulemaking, perhaps because of the open-meeting requirements under the Government

[451] 47 C.F.R. § 1.1216; CFPB Bulletin, *supra* note 265, at para. (g); 11 C.F.R. § 201.4; 43 C.F.R. § 4.27b)(2).

[452] FCC, CPSC, FEC, and FTC. The remaining five agencies are executive agencies: DOJ, FEMA (within DHS), FAA (within DOT), FDA (within the Department of Health and Human Services), and DOI. *See* discussion *supra* at Parts V.A.1.-2., V.B.1.-2., V.C.1, and V.D.4, 8-10.

[453] CFPB and EPA. *See* discussion *supra* at Parts V.B.2.-3.

[454] DOL, DOT, and USCG (within DHS). *See* discussion *supra* at Parts V.D.1.-2, 5.

[455] NRC. *See* discussion *supra* at Parts V.C.2.

[456] TSA (within DHS) and ED. *See* discussion *supra* at Parts V.D.6.-7.

[457] 44 C.F.R. § 1.6(a); 16 C.F.R. § 1012.2(b); DOL Memorandum *supra* note 330.

[458] *See* discussion *supra* at Parts V.B-D.

[459] *See* discussion *supra* at Parts V.B-C. showing FCC, CFPB, EPA, and CPSC as agencies with welcoming policies, and FEC and NRC as agencies with neutral policies.

in the Sunshine Act of 1976,[460] which only apply to independent agencies.[461] Another possibility is that the nature of independent agency rulemaking proceedings may make these agencies more subject to *ex parte* communications.[462] Independent agency rulemaking proceedings in which agency action is taken only through a specific vote by several decisionmakers, make those decisionmakers more likely the focus of *ex parte* communications. However, it seems that if independent agencies are more sensitive to *ex parte* communications because of the Government in the Sunshine Act, their sensitivity leads them to find that the potential value of such communications generally outweighs the potential harm.[463]

Independent agencies with a welcoming attitude toward *ex parte* communications, however, do not seem to have policies requiring any more disclosure than executive departments. In fact, the FCC rules and CFPB Bulletin, which are among the most welcoming policies, require slightly less disclosure that the DOT Order or USCG Manual, which are among the most cautious and restrictive policies. The FCC rules and CFPB Bulletin require disclosure of all post-NPRM *ex parte* communications and the DOT Order and USCG Manual require disclosure of all *ex parte* communications pre- and post-NPRM.

VI. *Ex Parte* Communication Procedures: Legal Requirements and Best Practices

Agency policies on *ex parte* communications must comply with applicable legal requirements and then should include considered policy choices to attain best practices balancing the potential value and harm of *ex parte* communications. This section outlines applicable legal requirements, identifies the areas in which agencies have discretion, and articulates the considerations that should inform agency policies.

A. No *Ex Parte* Communication Prohibition

Ex parte communications are permissible during all stages of the informal rulemaking process. The APA governs all informal rulemaking by federal agencies, unless provided for otherwise or supplemented by an agency's authorizing statute, and the APA is decidedly silent on *ex parte* communications in informal rulemakings. Thus, the APA does not impose any legal requirements on agencies for dealing with such communications.[464]

[460] 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).

[461] *See* JEFFERY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 34 2(4th ed. 2006) (suggesting that independent agencies' *ex parte* communications policies may reflect their experience with the open-meeting requirements of the Government in the Sunshine Act of 1976).

[462] *See* McGarity, *supra* note 45 at 1727 ("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.") (citations omitted).

[463] *See e.g.* discussion *supra* at Parts V.B.1. and 2. noting FCC and EPA find *ex parte* communications a useful part of the rulemaking process.

[464] *See* discussion *supra* at Part IV.A.

Neither Congress nor the courts have prohibited or established procedural requirements for *ex parte* communications in informal rulemaking conducted under section 553 of the APA.[465] In *Sierra Club*, the court observed that Congress "did not extend the *ex parte* contact provisions of the amended section 557 to section 553 even though such extension was urged upon it during the hearing."[466] The court viewed this as "a sound indication that Congress still [30 years after enacting the APA] does not favor a per se prohibition or even a 'logging' requirement in all such proceedings."[467] The court also explained that *HBO* does not apply to "informal rulemaking of the general policy sort"[468] and *Vermont Yankee* further prevents any "judicially imposed blanket requirement" for handling *ex parte* communications.[469] In *Board of Regents*, the D.C. Circuit affirmed that the APA also does not contain any procedural requirements for dealing with *ex parte* communications in informal rulemaking.[470]

B. No Legal Requirements for Pre-NPRM *Ex Parte* Communications

Pre-NPRM *ex parte* communications are generally beneficial and do not implicate administrative and due process principles the way post-NPRM *ex parte* communications do. In *Iowa State*, which involved pre-NPRM *ex parte* communications, the D.C. Circuit clarified that any possible application of *HBO* and its disclosure regime is limited to *ex parte* communications that occur after publication of the NPRM only.[471] In both *Van Curler* and *Board of Regents*, the timing of the *ex parte* communications is ambiguous, but neither case finds any issue with the fact of the communications.[472] Indeed, both cases dispense with the allegations of agency wrongdoing regarding *ex parte* communications rather quickly.[473]

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[465] *See generally* Jack M. Beerman & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 233 (2007) (arguing a judicially-imposed general prohibition on *ex parte* contacts in informal rulemaking is impermissible in light of *Vermont Yankee*); Pierce, *supra* note 82, at 911 (responding to Beerman and Lawson that the D.C. Circuit has so narrowly construed opinions on *ex parte* communications in informal rulemaking since *HBO* that its general prohibition on *ex parte* communications "has virtually no effect on any agency.").

[466] *Sierra Club*, 657 F.2d at 402 (quoting *ACT*, 564 F.2d at 474-75 n.28).

[467] *Id*.

[468] *Id*. at 402.

[469] *Id*. at 403.

[470] *Board of Regents*, 83 F.3d at 1222; *see* discussion *supra* at Part IV.B.9.

[471] *Iowa State*, 730 F.2d at 1576 (noting *HBO* "barred *ex parte* contacts only after the publication of the notice of proposed rulemaking").

[472] *See* discussion *supra* at Part IV.B.1, B.9. In all the other relevant D.C. Circuit cases, the *ex parte* contacts occurred post-NPRM. *See* discussion *supra* Part IV.B.2–8.

[473] In *Van Curler*, the whole of the courts discussion of the *ex parte* communications is the following three sentences: "Petitioners urge that the action before the Commission is invalid because during the course of the proceedings the Commission received and listened to, *ex parte*, representatives of the Columbia Broadcasting System. But it appear that these calls and conversations were in regard to the nation-wide intermixture problem, concerning which the Commission was seeking all sorts of advice and information preparatory to setting up a general nation-wide rule-making proceedings to deal with intermixture. We find nothing improper or erroneous in the Commission's consideration of these interviews as depicted in this record." *Van Curler*, 236 F.2d at 730.

In *Board of Regents*, the court recounted the petitioners' *ex parte* communication argument and then took one sentence to dismiss it: "But Sierra Club [on which the petitioners' argument relies] involving statutory language (§ 307(d) of the Clean Air Act, 42 U.S.C. § 7607(d)) providing that all documents 'of central relevance to the rulemaking' were to be placed in the docket as soon as possible after they become available, see 657 F.2d at 402, -- language that has no counterpart in the notice and comment provisions of 5 U.S.C. § 553." *Board of Regents*, 83 F.3d at 1222.

The lack of legal constraints on pre-NPRM *ex parte* communications is consistent with the presidential guidance to agencies. Executive Order 13563 directs: "Before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking."[474] Additionally, the Unified Agenda of Federal Regulatory and Deregulatory Actions[475] provides stakeholders a specific means of knowing what an agency is working on, which facilitates public stakeholder initiated pre-NPRM communications with agencies.

The lack of legal constraints on pre-NPRM *ex parte* communications is also already reflected in many of the agency policies presented in this report. Many such agency policies, as well as Recommendation 77-3, exclude pre-NPRM *ex parte* communications from coverage either by definition or by exclusively applying procedural requirements or restrictions to *ex parte* communications occurring after publication of an NPRM. Recommendation 77-3, and DOJ and FEMA rules implementing the recommendation, define "*ex parte* communications" as those received after publication of an NPRM or similar rulemaking document.[476] The FCC rules, the EPA Fishbowl Memo, and the DOL Memorandum address *ex parte* communications that occur after issuance of an NPRM or that address a proposed rule only.[477] TSA's unwritten policy and the CFBP Bulletin do not define *ex parte* communications, but apply disclosure requirements, and a post-comment period prohibition under TSA's policy, to post-NPRM *ex parte* communications only.[478]

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[474] Exec. Order No. 13563, sec. 2(c), 76 Fed. Reg. 3831 (Jan. 21, 2011).

[475] Under EO 12866, each agency must publish information informing the public about all regulatory actions and specific significant regulatory actions the agency will undertake following publication. *See* EO 12866 sec. 4, 58 Fed. Reg. 51735 (Sept. 30, 1993). Each agency must publish "an agenda of all regulations under development or review" in the spring and the fall of each year as part of the Unified Regulatory Agenda. *Id*. at sec. 4(b). Each agency must include in the fall publication a "Regulatory Plan [] of the most important significant regulatory actions that the agency reasonably expects to issue in the proposed or final form in that fiscal year or thereafter." *Id*. at sec. 4(c)(1). The Unified Agenda is available at www.reginfo.gov and provides "uniform reporting of data on regulatory and deregulatory activities under development throughout the Federal Government, covering approximately 60 departments, agencies, and commissions."

[476] Recommendation 77-3, paras. 1–2. 42 Fed. Reg. 54,253 (Oct. 5, 1977) ("All written communications addressed to the merits, received after notice of proposed rulemaking" and ""oral communications from outside the agency of significant information or argument on the proposed rule"); 28 C.F.R. § 50.17(b)–(c) ("received after notice of proposed informal rulemaking"); 44 C.F.R. § 1.6(a) ("respecting the merits of a proposed rule").

[477] The FCC rules define *ex parte* communication as an oral or written communication made without advance notice to parties, which, in an informal FCC rulemaking, are members of general public "after issuance of a notice of proposed rulemaking or other order [provided under FCC rules]." 47 C.F.R. § 1.1202. The EPA Fishbowl Memo, *supra* note 283, states: "Therefore, each EPA employee should ensure that all written comments regarding a proposed rule, including regulated entities and interested parties, are entered into the rulemaking docket. . . . This means that EPA employees must summarize in writing and place in the rulemaking docket any oral communication during a meeting or telephone discussion with a member of the public or an interested group that contains significant new factual information regarding a proposed rule." The DOL Memorandum, *supra* note 330, at 1, addresses only *ex parte* communications "in informal rulemakings once a proposed regulation has been published in the Federal Register for notice and comment."

[478] *See* discussion of TSA's policy *supra* at Part V.D.6.; CFPB Bulletin, *supra* note 265, at paras. b (definitions), (d) (disclosure).

Two independent agencies have *ex parte* communications polices that apply slightly before publication of an NPRM, but have specific reasons for doing so. The FEC rules apply beginning at the point where a draft NPRM is complete and ready for Commission consideration, which precedes the Commission's vote of approval for publication.[479] Thus, the rules apply when the Commission is specifically deliberating on a draft NPRM. The FEC rules, however, do not apply while an NPRM is under development by FEC staff. The FTC rules apply to communications once the Commission votes to publish the NPRM, and thus covers the limited period of time when the NPRM is public but not yet published.[480]

A minority of agencies, it bears noting, do have *ex parte* policies that address—directly or indirectly—pre-NPRM communications, but such policies reflect agency discretion rather than legal requirement. The DOT Order and USCG Manual both specifically address disclosure of *ex parte* communications in advance of the NPRM.[481] The FAA Appendix and FDA rules address the kinds of *ex parte* contacts permitted pre-NPRM[482] The unwritten policy of ED generally addresses pre-NPRM *ex parte* communications by encouraging such communications and cautioning agency personnel to not provide any non-public information about the rulemaking, including proposal substance or policy preferences.[483] The NRC unwritten policy and the CPSC, DOI, and FDA rules apply to pre-NRPM *ex parte* communications because they either do not address timing of such communications,[484] or do not limit the definition of an *ex parte* communication or application of its notice and disclosure requirements.[485] Again, these agency policies do not reflect any legal restrictions resulting from the APA or the D.C. Circuit cases for pre-NPRM *ex parte* communications.

C. Legal Requirements for Post-NPRM *Ex Parte* Communications: Due Process Considerations and Disclosure Standards

[479] 11 C.F.R. § 201.4 (requiring disclosure only "from the date on which a proposed rulemaking document [or petition for rulemaking] is first circulated to the Commission or placed on the agenda of a Commission public meeting, through final Commission action on that rulemaking").

[480] 16 C.F.R. § 1.18(c).

[481] DOT Order, *supra* note 344, at Summary of Procedures to Deal with Ex Parte Contacts in Connection with Rulemaking, para. a ("Significant contacts before a rulemaking document is issues that influence a rulemaking should be noted in the preamble to the proposed regulation or in a memorandum place in the rulemaking docket once it is opened."); USCG Manual, *supra* note 376, at 6-4, para. E.2 ("document significant communications that influenced, or may have influenced, either the initiation or direction of a rulemaking.).

[482] 11 C.F.R. Appendix 1 to Part 11 at para. 4 (addressing permitted contacts prior to issuing an NPRM and Advance or Supplemental NPRM, as well as a final rule); 21 C.F.R. § 10.80(b)(2) (generally prohibiting providing a draft NPRM document to any public stakeholder except through publication in the Federal Register, and permitting limited discussion of a draft NPRM so provided unless the agency personnel has prior written permission of the FDA Commissioner).

[483] *See* discussion *supra* at Part V.D.7.

[484] *See* discussion *supra* at Part V.C.2.

[485] A communication covered by the CPSC rules includes a face-to-face encounter that covers any matter "that pertains in whole or in part to any issue that is likely to be the subject of a regulatory or policy decision of the Commission." 16 C.F.R. § 1012.2 (b) and (d). The CPSC rules require advance public notice and disclosure of all covered communications. 16 C.F.R. § 1012.1.

The DOI rules generally prohibit to any "communication concerning the merits of a proceeding between any party to the proceeding or any person interested in the proceedings or any representative of a party or interested person and any Office personnel." 43 C.F.R. § 427(b).

The legal requirements agencies must observe for post-NPRM *ex parte* communications fall in two categories: (1) possible *ex parte* communication restrictions to avoid due process violations in "quasi-judicial" or "quasi-adjudicatory" informal rulemakings; and (2) disclosure requirements in all rulemakings to ensure sufficiency of the administrative record, or an adequately stated basis and purpose, to facilitate judicial review.

1. Due Process: Restrictions or Procedures in Quasi-Judicial, Quasi-Adjudicatory Rulemakings

In applying due process to the administrative context, purely legislative rulemaking must be distinguished from "quasi-judicial" rulemaking.[486] Indeed application of due process

[486] *See generally* Henry J. Birnkrant**,** Ex Parte *Communication During Informal Rulemaking***,** 14 COLUM. J. L. & SOC. PROBS. 269, 280-81 (1979) (noting "When rulemaking was still in its early stages of development" the Supreme Court addressed due process application to "general legislative and regulatory enactments" starting from a position that due process does not apply in those context to later and continuing to "avoid[] imposing any constitutional requirements on rulemaking beyond those included in the APA.").

In 1915, the Court heard a due process claim under the 14th Amendment that a real estate owner in Denver was given no opportunity to be heard prior to a property tax increase by a state administrative body, and thus the owner's property was being taken without due process of law when the State of Colorado increased the property tax. Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915). The Court analogized the property tax increase by the state administrative body to the state legislative body, pointing out that the legislative body enacts statutes that affect persons and property of individuals without giving them a chance to be heard and their rights are protected by the people's power over those that make the rule. *Id*. at 446. The Court also distinguished the general policy making at issue in that case with the issue in another case where "[a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing." *Id*.

In 1938, the Supreme Court coined the term "quasi-judicial" in the administrative context when characterizing a ratemaking proceeding and noted that in such quasi-judicial proceedings "the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play." Morgan v. U.S., 304 U.S. 1, 14-15 (1938). *See also* Gregory Brevard Richards**,** Ex Parte *Contacts in Informal Rulemaking Under the Administrative Procedure Act*, 52 TENN. L. REV. 67, 85 (1984) ("the Court first recognized that, even though the agency was engaged in rulemaking, which was generally considered a legislative function, the interests involved could rise to the level that merited the protection of adjudicatory devices . . . . The Court did not disregard the legislative/judicial distinction in administrative rulemaking, but carved out an area that it termed 'quasi-judicial' that was subject to some of the procedural constrains of adjudications."). The Court invalidated the agency action resulting from the ratemaking because of the decisionmaker's reliance on a government report that was not made available to the parties until served with the final order. Although that case involved an administrative action prior to the enactment of the APA that required the authorizing statute to include a "full hearing," the Supreme Court utilized this dichotomy of policy-making rulemakings and quasi-judicial rulemakings after APA enactment. Morgan v. U.S., 304 U.S. 1, 15 (1938) (noting that the authorizing statute required a "full hearing.").

In *Vermont Yankee*, the Court stated: "In prior opinions we have intimated that even in a rulemaking proceeding when an agency is making a 'quasi-judicial' determination by which a very small number of persons are 'exceptionally affected, in each case upon individual grounds,' in some circumstances additional procedures may be required in order to afford the aggrieved individuals due process." Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 542 (1978) (citing U.S. v. Florida East Coast R. Co., 410 U.S. 224, 242-245 (1973), and quoting Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 446 (1915)). *Florida East Coast Railway* concerned whether an authorizing statute requirement for a hearing as part of a rulemaking invokes the formal rulemaking procedures under the APA. This Supreme Court discussed the distinctions between rulemaking and adjudication and continued from *Bi-Metallic Investment*, and later decisions, its distinction "in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one

considerations seem to depend on whether the nature of the rulemaking is "quasi-judicial"[487] or "quasi-adjudicatory"[488] or if it instead involves "rulemaking procedures in their most pristine sense."[489]

The term "quasi-judicial and "quasi-adjudicatory" describes rulemakings involving "resolution of conflicting private claims to a valuable privilege, and that basic fairness requires such a proceeding to be carried on in the open,"[490] or a win-lose situation with "competitors where one could be advantaged over the other during the course of the rulemaking. [491]

The D.C. Circuit adopted the dichotomy between quasi-judicial or quasi-adjudicatory informal rulemakings and pristine informal rulemakings in form and substance to decide its cases. Of its nine relevant cases, the court found *ex parte* communications problematic and requiring restrictions or additional procedures in only three cases, all of which involved quasi-judicial or quasi-adjudicatory rulemakings and the court's application of due process considerations.[492]

Thus, due process may require additional procedural requirements for handling *ex parte* communications in quasi-judicial or quasi-adjudicatory informal rulemakings, including appropriate restrictions or prohibitions.[493] And such procedural requirements would not run

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hand, and proceedings designed to adjudicate disputed facts in particular cases on the other hand." U.S. v. Florida East Coast R. Co., 410 U.S. at 245.

[487] *See infra* note 490.

[488] *See infra* note 490.

[489] *Vermont Yankee*, 435 U.S. at 524 n. 1.

[490] *Sangamon*, 269 F.2d at 224. The D.C. Circuit used the term "quasi-judicial" in *Courtaulds* to describe *Sangamon*, *Courtaulds*, 294 F.2d at n.16, and in ACT quoting *Courtaulds*, *ACT*, 564 F.2d at 475. The court used the term "quasi-adjudicatory" in *Sierra Club* to describe *Sangamon*. *Sierra Club*, 657 F.2d at 400.

[491] *Id.*

[492] *See* discussion *supra* at Part IV.B.2, 4, and 6. The D.C. Circuit defined the rulemakings in other cases as purely legislative rulemakings by contrasting those rulemakings with the description of the quasi-judicial rulemaking in *Sangamon*. *See* discussion *supra* at Part IV.B.3, 5, 7. The *Sierra Club* court affirmed the dichotomy of informal rulemakings and quasi-judicial rulemakings, and the application of due process to the latter only. Specifically, the *Sierra Club* court stated: "Where agency action resembles judicial action, where it involves formal rulemaking, adjudication, or quasi-adjudication among 'conflicting private claims to a valuable privilege,' insulation of the decisionmaker from *ex parte* contacts is justified by basic notions of due process to the parties involved. But where agency action involves informal rulemaking of a policymaking sort, the concept of *ex parte* contacts is of more questionable utility." *Sierra Club*, 657 F.2d at p. 400 (citations omitted).

[493] *National Small Shipments*, 590 F.2d 345 (involving an informal rulemaking, as well as a statutorily-mandated hearing requirement, in which the court found that *ex parte* contacts violated the basic fairness of a hearing, although it did not so far as to invoke due process); *see also*, John Roberts Long, Ex Parte *Contacts and Informal Rulemaking: The 'Bread and Butter' of Administrative Procedure*, 27 EMORY L.J. 293, 322 (1978) ("An examination of the cases that have restricted *ex parte* communications or otherwise imposed due process requirements on rulemaking procedures indicates that in most cases the rule making involved more than purely legislative considerations. Most have also dealt with factual question that would lend themselves to adjudicatory resolution."). But see Beerman and Lawson, *supra* note 465 *at* 888 stating:

But despite the decisions narrowing the doctrine to rulemakings involving relatively specific claims, nothing suggests that the D.C. Circuit means to limit its doctrine only to those rulemakings that actually account as adjudications for constitutional purposes. There is no way, for example, that the rulemaking proceeding in Home Box Office, which involved broad regulation of cable and subscription television programming, could conceivably fall on the 'adjudication' rather than 'rulemaking' side for constitutional purposes.

afoul of *Vermont Yankee* because the Supreme Court specifically found due process considerations applicable to quasi-judicial rulemakings, and because any procedural requirements based on due process would in fact be those "rare" circumstances carved out by the Court.[494]

Agencies undertaking a quasi-judicial or quasi-adjudicatory rulemaking must carefully consider whether to permit *ex parte* communications as part of that rulemaking, and if so, what procedural safeguards they will implement in order to comport with due process considerations. Generally, however, the vast majority of federal informal rulemakings are neither quasi-judicial nor quasi-adjudicatory, so such considerations apply only in a distinct minority of rulemaking settings.

2. Disclosure: For Adequate Judicial Review

For the vast majority of federal rulemakings that are rulemaking in the "most pristine sense," [495] there is only one legal requirement: disclosure. Disclosure of post-NPRM *ex parte* communications is necessary to ensure an adequate record for judicial review. Disclosure of such communications is necessary, at the very least, to avoid the secrecy which was so offensive to the D.C. Circuit in *Sangamon* and *HBO*, and the lack of which was a key factor in the court's decisions in *Courtaulds* and *ACT*.[496]

The APA instructs courts to "review the whole record or those parts of it cited by a party" when reviewing the validity of an agency action.[497] However, Congress did not define what constitutes the "whole record" in the APA. The APA also does not provide any other guidance on which documents should be included in the "whole record."[498] The Supreme Court has held

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The authors, however, overlook the *HBO* court's own statements analogizing *HBO* to *Sangamon* under a due process theory. *See supra* text accompanying note 145.

[494] *See* discussion *supra* at I. Introduction; *see generally* Carberry, *supra* note 5, at 96-97 ("A better argument for the District of Columbia Circuit's *ex parte* procedural requirements is based on the *Vermont Yankee* exception for 'constitutional constraints.'. . . It is arguable, therefore, that when an off-the-record proceeding involves adversary interests, as in *Sangamon Valley*, that *Vermont Yankee* prohibition is inapplicable.") (internal footnotes omitted); Michael E. Ornoff, Ex Parte *Communication in Informal Rulemaking: Judicial Intervention in Administrative Procedures,* 15 U. RICH. L. REV. 73, 96-97 (1981) ("The [*Vermont Yankee*] Court noted that, even though an agency is engaged in rulemaking proceedings, additional procedures beyond those compelled by the APA may be required if the agency is making a 'quasi-judicial' determination exceptionally affecting a small number of persons in which each case is decided upon individual grounds.") (internal footnotes omitted); Beerman and Lawson, *supra* note 465 *at* 888 (discussing that a prohibition on *ex parte* contacts in informal rulemaking grounded in procedural due process would not violate *Vermont Yankee*, but arguing that the D.C. Circuit has not limited its holdings to quasi-judicial or quasi-adjudicatory rulemakings while recognizing in note 183 that the court, indeed, may have done so).

[495] *Vermont Yankee*, 435 U.S. at 524 n. 1.

[496] The *Sierra Club* court did not discuss general disclosure requirements because the court was reviewing the rulemaking action for compliance with specific procedural requirements in an authorizing statute only. *See* discussion *supra* at Part IV.B.7.

[497] 5 U.S.C. § 706.

[498] *See* Leland E. Beck, *Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking*, 2 (Admin. Conference of the U.S., 2013), *available at*

that judicial review of informal rulemaking must be "based on the full administrative record that was before [the decisionmaker] at the time he made his decision."[499] Despite some evolution in the details, the courts have consistently reaffirmed and reiterated this standard.[500] A legal requirement to disclose *ex parte* communications does not run afoul of *Vermont Yankee's* prohibition on judicially-imposed procedures, so long as the disclosure requirements is grounded in APA requirements.[501]

The APA also requires that agencies must "incorporate in the rules adopted a concise statement of their basis and purpose."[502] The courts utilize this statement of basis and purpose during judicial review to consider whether the agency's rulemaking action was arbitrary or capricious under the APA.[503] The Supreme Court has explained that an adequate statement of basis and purpose is neither "concise" nor "general."[504] To be adequate, it "must examine the relevant data and articulate a satisfactory explanation of its action," and show a "rational connection between the facts found and the choice made."[505]

The disclosure of post-NPRM *ex parte* communications must provide enough information to satisfy the APA's requirement of an adequate "concise general statement of their [the adopted rules'] basis and purpose"[506] and facilitate judicial review.[507] Agencies should take

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http://www.acus.gov/sites/default/files/documents/Agency%20Practices%20and%20Judicial%20Review%20of%20Administrative%20Records%20in%20Informal%20Rulemaking.pdf.

[499] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971).

[500] In *Overton Park*, the Court went even further to say that if the record did not disclose the factors considered by the Secretary during his decision-making, the District Court could require "some explanation in order to determine if the Secretary acted within the scope of his authority." *Overton Park*, 401 U.S. at 420. However, the Court narrowed this standard in its unanimous decision regarding an adjudicatory proceeding in *Camp v. Pitts*, 411 U.S. 138 (1973). The *Camp* Court held that the "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court" and that "the validity of the Comptroller's action must … stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review." *Id*. at 142-43.

[501] The Supreme Court in *Vermont Yankee* also affirmed that the adequacy of the administrative record in informal rulemakings "is not correlated directly to the type of procedural devises employed, but rather turns on whether the agency has followed the statutory mandate of the Administrative Procedure Act or other relevant statutes." *Vermont Yankee*, 435 U.S. at 547. *See also* Sherry Iris Brandt-Rauf, Ex Parte *Contacts under the Constitution and Administrative Procedure Act*, 80 COLUM. L. REV. 379, 392 (1980) ("While *Vermont Yankee* forecloses courts from imposing nonstatutory procedures on agencies, it does not prevent the courts from 'fleshing out' skeletal sections of the APA."). But see Shapiro, *supra* note 5 at 859, arguing that *Vermont Yankee*'s conclusion that the adequacy of the record depends on APA requirements alone precludes the "whole record" for judicial review purpose from requiring disclosure of *ex parte* contacts "because the APA does not require the publication of such contacts." The APA does not require disclosure of *ex parte* contacts under its informal rulemaking requirements, but the author overlooks whether an *ex parte* contact may form the basis of agency decision or otherwise provide necessary support for agency decision, in which case, the *ex parte* contact must be disclosed under APA judicial review provisions.

[502] 5 U.S.C. § 553 (c).

[503] *See* 5 U.S.C. § 706(2)(A) (requiring courts to invalidate any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

[504] Automobile Parts & Accessories Ass'n v. Boyd, 407 F.2d 330 (D.C. Cir. 1968). *See* JEFFERY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 377 (4th ed. 2006).

[505] Motor Vehicle Manufacturers Ass'n. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983).

[506] 5 U.S.C. § 553(c).

care to disclose all *ex parte* communications that could prevent judicial review of a full and useful administrative record.[508] Admittedly, it is difficult to know what a judge may find useful, and one of the criticisms of disclosure decisions is that a judge has no way of knowing what information is in undisclosed *ex parte* communications.[509] An agency should also take care to disclose in its statement of basis and purpose the substance of *ex parte* communications that underpin the agency's decisions.[510]

At a minimum, disclosure of post-NPRM *ex parte* communications must be sufficient to avoid the taint of secrecy that ultimately led the D.C. Circuit to invalidate the challenged agency actions in *Sangamon*, *HBO*, and *National Small Shipments*.[511] Since the D.C. Circuit itself has specifically limited *HBO*'s holding that would require disclosure of all *ex parte* contacts, the baseline legal requirement is that agencies must disclose the *ex parte* communications on which the agency wants to rely or otherwise supports the agency's decisionmaking.[512]

But exactly what must be disclosed, when and how it must be disclosed, and who must disclose *ex parte* communications, remain open questions under D.C. Circuit case law. Yet, the court cannot answer these questions without running afoul of *Vermont Yankee* since that would undoubtedly go beyond "fleshing out"[513] APA requirements and would add *bone fide* and inappropriate procedural requirements.

The Administrative Conference recently issued guidance to agencies regarding the administrative record, in Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*.[514] Among other things, this recommendation addressed the contents, compilation, indexing, preservation, and certification of administrative records. Recommendation 2013-4 also provided guidance to review courts regarding affording agencies the presumption of regularity and permitting supplementation and completion of an administrative record on review.[515] It states that the administrative record for judicial review should include: "comments and other materials submitted to the agency related to the rulemaking; transcripts or recordings, if any, of oral presentations made in the course of the rulemaking; . . . ; other materials required by . . . agency rule to considered or to be made public in connection with the rulemaking; and any other material considered by the agency during the course of the rulemaking," excluding any material

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[507] 5 U.S.C. § 706.

[508] *See* discussion *supra* at Part IV.B.4.

[509] *Id.*

[510] *See* discussion *supra* at Part IV.B.5.

[511] *Sangamon*, 269 F.2d 221 (D.C. Cir. 1959); *HBO*, 567 F.2d 9 (D.C. Cir. 1977); *National Small Shipments*, 590 F.2d 345 (D.C. Cir. 1978); *see* discussion *supra* at Part IV.B.2, 4, and 6. In *ACT*, secrecy was a distinguishing factor between it and the court's lineage concluding that *ex parte* communications in rulemakings were problematic. *ACT*, 564 F.2d at 476; *see* discussion *supra* at Part IV.B.5. The lack of secrecy in agency action and *ex parte* communications, which stems from the fact that such communications were disclosed, was a key factor in *Courtaulds. See* discussion *supra* at Part IV.B.3.

[512] *See* discussion *supra* at Part IV.B.4-5.

[513] *See* Brandt-Rauf, *supra* note 501 at 392.

[514] Admin. Conference of the U.S., Recommendation 2013-4, "The Administrative Record in Informal Rulemaking," 78 Fed. Reg. 41352 (July 10, 2013).

[515] *Id.*

protected from disclosure by law or an appropriate legal standard.[516] *Ex parte* communications could fall within any of the specifically enumerated categories that should be included in the administrative record. The ACUS recommendation also advised that all information covered by the enumerated categories should be disclosed (insofar as feasible) in the public rulemaking docket.[517] This recommendation provides little guidance regarding which *ex parte* communications should be disclosed, when, how, and by whom but states a preference for maximum disclosure.

And so, if disclosure of *ex parte* communications is required to ensure adequate judicial review, the contours of that disclosure is left to agencies to figure out. Current agency disclosure policies may help illuminate some best practices to fulfill the legal baseline requirement of disclosure.

D. Other Considerations for Legal "Insurance"

Agencies may wish to consider including in their *ex parte* communication policies other principles that, while not legally required, may bring additional transparency to the rulemaking process and provide some measure of "insurance" should an agency's rulemaking later be subject to legal challenge.

First, an agency may want to characterize in the preamble to its rulemaking documents the effect *ex parte* communications had on its decisionmaking in an informal rulemaking. In *Van Curler*, the key factor for the court was the agency's characterization of *ex parte* communications, which the court accepted without any further inquiry.[518] There the agency stated that the *ex parte* communications had no bearing on the rulemaking at issue.[519] Although the *ex parte* communications in *Van Curler* may not have been germane to the rulemaking, it may be helpful for an agency to consider whether an explanation about the effect of the *ex parte* communications would help allay potential concerns about the harm of *ex parte* communications, such as undue influence.

Second, an agency that has its own procedural requirements in promulgated rules or written policy addressing rulemaking or *ex parte* communications, as well as or alternatively, procedural requirements in its authorizing or programmatic statutes, should take care to follow such requirements. In *Sangamon* and *HBO*, the FCC's acceptance of *ex parte* communications in violation of its own procedural rules led the D.C. Circuit to invalidate the Commission's orders.[520] Additionally, in *Sierra Club*, a key factor, other than due process, was that the agency fulfilled the procedural requirements set out in the Clean Air Act, which governed the rulemaking at issue.

[516] *Id.* at paras. 1, 3.
[517] *Id.* at para. 2.
[518] *See* discussion *supra* at Part IV.B.1.
[519] *Van Curler*, 236 F.2d at 730.
[520] *See* discussion *supra* at Parts IV.B.4.-5.; *Sangamon*, 269 F.2d at 225 n. 8; *HBO*, 567 F.2d at 55 n. 122.

Finally, an agency should consider whether any information received *ex parte* needs vetting via adversarial discussion. The lack of opportunity for an adversarial discussion (e.g., an opportunity for public comment on, or reply to, disclosed *ex parte* contacts or materials) was a primary concern identified by the Conference in Recommendation 77-3. The D.C. Circuit, however, has not resolved whether such discussion is necessary for *ex parte* information, and in fact has directly contradicted itself. Adversarial discussion, according to the *HBO* court, is necessary to fully vet information and uncover any biases, inaccuracies or incompleteness, particularly in rulemakings that are quasi-judicial in nature.[521] In *ACT*, however, the D.C. Circuit found that the lack of adversarial discussion on the *ex parte* material did not negate the meaningful opportunity to participate provided during the comment period and opportunity for oral presentation, nor "inadequately protected, much less subverted" opposing interests at issue in that case.[522] It may be prudent for agencies to consider, when crafting rules or guidance governing *ex parte* communications in rulemakings, to provide an opportunity for public comment on (or reply to) matters raised in disclosed *ex parte* contacts. Disclosure in the digital age, itself, can provide that opportunity for adversarial discussion, as discussed in Part VI.E., below. This is especially true if agencies help draw stakeholders' attention to new information added to the docket due to the filing of written disclosures of *ex parte* communications. Although digital dockets are more easily accessible throughout the course of a rulemaking, public stakeholders may not know to look for new or updated material, especially later in the rulemaking process. But if directed to new or updated material through agency disclosure processes, public stakeholders can see that material as it is added, and add their own reply or counter material, as necessary.

E. Balancing Potential Value v. Harm in Policies: Disclosure

This report suggests that agencies are legally required to disclose post-NPRM *ex parte* communications when necessary to justify the agency's decision in its statement of basis and purpose and provide a complete rulemaking record. However, to more equitably balance the potential value and harm from *ex parte* contacts, agencies should generally go beyond this legal baseline.

Even if a reader disagrees with the analysis above concluding that some disclosure of post-NPRM *ex parte* communications is legally required, all eighteen agencies covered in this report have disclosure requirements in their respective *ex parte* policies. Thus a presumption of disclosure of post-NPRM *ex parte* communications aligns with what agencies already require by policy. These agency policies range from requiring disclosure of all *ex parte* communications regardless of timing and content, to requiring disclosure of new information only, to requiring disclosure of only information on which the agency relied in explaining the basis for its rulemaking decisions.

The likely reason that disclosure is the only commonality among all eighteen agencies' policies on *ex parte* communications is that disclosure helps balance the potential value of *ex*

[521] *See* discussion *supra* at Part IV.B.4; *HBO*, 567 F.2d at 55.
[522] *ACT*, 564 F.2d at 473.

parte communications with their potential harm. Despite the untoward connotation some may draw from the term "*ex parte* communications," and concerns over the decades about such communications, they often have real value to agencies, public stakeholders, and the rulemaking process.[523] Some of the value *ex parte* communications, as discussed previously, is providing industry data and expertise to agencies and providing an opportunity for stakeholder engagement and fostering agency/stakeholder relationships.[524] Agencies should take advantage of the potential value of *ex parte* contacts, while also seeking to minimize their potential harm. One way for agencies to do so is to publish—and consistently enforce—comprehensive *ex parte* disclosure policies. By doing so, agencies can ensure they have the information necessary to develop rules, increase public participation and transparency in the rulemaking process, while also ensuring that rulemaking proceedings are not subject to improper influence from off-the-record communications.

Disclosure of *ex parte* communications, moreover, does not seem to discourage public stakeholders from making *ex parte* communications. Public stakeholder interviewees stated that they want the information from their *ex parte* communications to be disclosed in the rulemaking docket to ensure that the agency can rely on them and that they are part of the administrative record, if necessary during judicial review. Additionally, FCC—which has both a robust set of rules for *ex parte* communications and an expansive disclosure regime—nonetheless still receives a substantial number of *ex parte* communications during rulemakings; indeed, so much so that FCC has been criticized by some for its "culture of 'rulemaking by *ex parte* communication'."[525]

One of the primary concerns associated with *ex parte* contacts—as expressed to varying degrees by the D.C. Circuit, scholars, and Recommendation 77-3—is that undue influence exerted in private meetings or other off-the-record contacts may influence agency decisionmakers and subvert the democratic principles underlying notice-and-comment rulemaking. Yet as Recommendation 77-3 notes, this concern is remedied by disclosure.[526] If the basic facts of a meeting between a public stakeholder and agency personnel are publicly disclosed, then any presumed influence that the meeting has on the agency at least is known. Additionally, assuming agency policies state that all timely *ex parte* communications and meeting requests will be accepted, and that policy is consistently applied, then the opportunity to leverage *ex parte* contacts to provide additional input or potentially influence the agency's rulemaking process is at least equally open to all stakeholders. Consistent disclosure of *ex parte* communications ensures that such communications do not occur in whispers, or over steak and champagne dinners, or with gifts of turkeys. The transparency of agency actions will counter the

[523] *See* discussion *supra* at Part III.B.

[524] *Id.*

[525] NAT'L ASS'N. OF REGULATORY UTIL. COMM'RS, WHITE PAPER OF KEY FCC PROCEDURAL REFORMS: EX PARTE COMMUNICATIONS AND THE FCC'S CONNECT AMERICA FUND PROCEEDING (2013), *available at* http://www.naruc.org/Resolutions/Resolution%20Urging%20Congress%20to%20Improve%20Fairness%20in%20the%20Federal%20Communications%20Commission1.pdf; *see also* EchoStart Satellite L.L.C v. Fed. Commc's. Comm'n., 457 F.3d 21 (2006) (observing that the parties repeatedly availed themselves of the FCC *ex parte* communication rules and noting that appellant could have submitted its concerns about data relied on by FCC via an *ex parte* communication).

[526] See discussion *supra* at Part IV.C.

concern that an agency is doing something outside the bounds of valid public stakeholder interaction.

Of course, there is the reality discussed by agency personnel and public stakeholder interviewees that some types of public stakeholders—namely, those who are well-funded or sophisticated regulatory players—are more likely to make *ex parte* communications than others. But it seems that agencies nonetheless benefit from engaging the former types of stakeholders, perhaps via *ex parte* communications, rather than preventing all public stakeholders from interacting with the agency once the rulemaking process has begun. In fact, public stakeholder interviewees suggested *ex parte* communications could also provide agencies a means of engaging public stakeholders with less resources and knowledge of the rulemaking process in a part-educational, part-solicitous interaction.

Disclosure can also provide a means of remedying another concern about *ex parte* communications noted in Recommendation 77-3: lack of adversarial discussion. This concern was also discussed by agency personnel in terms of unvetted information. Disclosure in this digital age, which includes online disclosure, also addresses Recommendation 77-3's third concern because online disclosure by its accessible and public nature allows for the opportunity of adversarial discussion for public stakeholders. A public stakeholder can access *ex parte* communications disclosed in the online docket and submit its own *ex parte* communication if necessary to refute, correct, or refine any information. Of course, not all stakeholders continually check a rulemaking docket for new additions, and as the DOT Order warns, new additions "tend to be hidden since many persons feel that they have no need to check further the public docket after the closing date for comments."[527] If agencies provide notice to check the docket or announce via other means, perhaps via social media, that the docket has been updated, that would provide other public stakeholders a chance to also communicate with the agency *ex parte* if necessary. Agencies should, however, limit such notices or announcements about docket updates to substantive, new material only in order to not inundate or exhaust public stakeholders.

Disclosure, however, can do little for practical concerns presented by agency personnel and public stakeholder interviewees.[528] In fact, a policy of disclosure coupled with an encouraging posture toward *ex parte* communications, could exacerbate the practical concerns of the amount of agency resources necessary for engaging in *ex parte* communications. If agencies are concerned about agency resources in contentious rulemakings, those rulemakings already take greater resources because of the likelihood of receiving overwhelming numbers of written comments submitted to the rulemaking docket. Agencies could potentially use *ex parte* meetings, with an individual stakeholder or groups of stakeholders, to help general relations in such a rulemaking, as ED did in its recent rulemaking. Of course, pre-NPRM *ex parte* communications, on which there are no legal restrictions and for which agency personnel indicated were free from the concern about the appearance of impropriety, may help an agency avoid resource issues later in a rulemaking if the agency already knows public stakeholder opinions and information.

[527] DOT Order, *supra* note 344.
[528] See discussion *supra* Part III. C.

Disclosure also creates the practical concern that *ex parte* communications disclosed in the docket can make an already large rulemaking docket even larger and potentially harder to navigate. This concern, however, is a concern about modern rulemaking generally and not *ex parte* communications.

VII. *Ex Parte* Communications in the Digital Age

The section looks 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 considers whether technology provides any special benefits or obstacles for addressing *ex parte* contacts.

Interviews with agency personnel and public stakeholders did not uncover use of digital technology as a means of engaging in *ex parte* communications. Indeed, most *ex parte* communications occur as old-fashioned, face-to-face meetings. However, agency personnel and public stakeholder interviewees noted generally that digital technologies have made communications and submission of *ex parte* disclosures easier. These interviewees also noted that electronic, online rulemaking dockets generally make the public more aware of rulemaking, and provide better and timelier access to the rulemaking content. These interviewees also noted that online, electronic dockets facilitate more discussion in the docket because commenters can submit comments that not only provide the commenters opinions and information, but that can also react to other comments available in the online docket. This provides an example of how disclosure of *ex parte* communications can facilitate adversarial discussion of such communications.

Reflecting these views, several agencies included in this report have embraced digital technologies to implement electronic docketing of written *ex parte* disclosures (for example, on regulations.gov), posting of such disclosures on agency websites, or both. The FCC rules include a default requirement for filing *ex parte* disclosures electronically[529] and for dealing with metadata in electronic disclosures.[530] The CFPB Bulletin also includes a default requirement for electronic disclosure using Regulations.gov.[531] The EPA Fishbowl Memo addresses digital technology in agency personnel and public stakeholder interactions by recognizing the various forms public participation in rulemaking make take, including internet-based dialogues, and encourages staff to be "creative and innovative in the tools we use to engage the public in our decisionmaking.[532]

The digital age question, however, implicates communications from or to an agency via "social media."[533] The Conference recently concluded a study and recommendation on *Use of*

[529] 47 C.F.R. § 1.1206(b)(2)(i).
[530] 47 C.F.R. § 1.1206(b)(2)(ii).
[531] *Id.* at para. (d)(3)(ii)-(iii).
[532] *Id.*
[533] For a definition of social media and a full discussion on its use in Federal informal rulemaking see Michael Herz, *Using Social Media in Rulemaking: Possibilities and Barriers* 87, *available at* http://www.acus.gov/sites/default/files/documents/Herz%20Social%20Media%20Final%20Report.pdf.

Social Media in Rulemaking.[534] This study previewed the question of how to treat social media under agency *ex parte* communications policies: "Suppose an agency official is reading a blog – it could be her own agency's blog or something wholly unrelated – on which there is discussion relevant to an ongoing rulemaking. Is that an impermissible *ex parte* contact? Should it be?"[535]

Under the definition of *ex parte* communication used in this report, the mere reading of social media by a decisionmaker, would not constitute an *ex parte* communication. If, however, the blog in the above example was a blog that contained specific information about a rulemaking from the agency to public stakeholders, or content from a public stakeholder specifically intended for agency personnel, then the blog itself would constitute an *ex parte* communication between the agency and public stakeholders. As this report makes clear, such an *ex parte* communication is not legally impermissible. Such a communication made post-NPRM, however, may have to be disclosed.

This report defines *ex parte* communications as a communication between a public stakeholder and agency personnel regarding a specific rulemaking outside of written comments submitted to the rulemaking docket during the comment period.[536] An agency interaction with a public stakeholder via social media regarding a specific rulemaking would fall under this definition unless also submitted to the docket during the comment period.

In its 2011 rulemaking revising its *ex parte* communication rules, FCC discussed "new media," its role in FCC communications with public stakeholder, and the potential complications of treating such new media communications as *ex parte* communications subject to disclosure.[537] FCC defined "new media" as including "the Commission's blogs, its Facebook page, its MySpace page, its IdeaScale pages, its Flickr page, its Twitter page, its RSS feeds, and its YouTube page."[538] FCC decided not to disclose new media communications in the record of all rulemaking, and other proceedings, because doing so would be "impractical."[539] For the time being, FCC plans to associate new media contacts in specific rulemaking records on a rulemaking-by-rulemaking basis.[540] As described by FCC personnel, a motivation for including new media communications in the rulemaking record would be to draw stakeholders' attention to its existence since stakeholders are not likely aware of every blog post or updated content on other social media platforms.

Compare, however, the CFPB Bulletin, similar to the FCC rules in every other way, which excludes from the definition of *ex parte* communications covered by the Bulletin: "Statements by any person made in a public meeting, hearing, conference, or similar event, or

[534] *Id.*; *see also* Admin. Conference of the U.S., Recommendation 2013-5, Use of Social Media in Rulemaking, 78 Fed. Reg. 76,269 (Dec. 17, 2013).
[535] *Id.* at 87.
[536] *See* discussion *supra* at Part I.B.
[537] FCC 11-11, *supra* note 236, paras. 73-75.
[538] *Id.* at para. 73.
[539] *Id.* at para. 75.
[540] *Id*. As described by FCC personnel, this association will likely take the form of specifically including or pinpoint citing new media material in a rulemaking document or in the rulemaking docket.

public medium such as a newspaper, magazine, or blog."[541] The CFPB Bulletin seems to mirror the *ACT* court's warning that an overly broad interpretation of what constitutes the "whole record" for judicial review purposes would have an absurd result in requiring disclosure and inclusion in the record of "a newspaper editorial that he or she [the decisionmaker] reads or their evening-hour ruminations."[542]

The question is not whether they must be disclosed, since they are already public, but whether such publicly available communications should be included in the rulemaking docket. The legal baseline requirements for post-NPRM comments discussed above would likely not apply since there would be no secrecy in these contacts, unless something in a new media communication was necessary to provide an adequate basis and purpose statement and complete the administrative record for judicial review. But the FCC discussion on new media indicates that that there may be concern, similar to the DOT Order's concern about post-comment period *ex parte* communications,[543] that stakeholders will not know of the existence of relevant social media communications if not specifically included in or noted in the rulemaking docket. Of course, including in the rulemaking docket every relevant social media communication directly implicates the public stakeholder concern about adding to an already voluminous rulemaking docket.[544]

VIII. Suggested Recommendations

If disclosure of post-NPRM *ex parte* communications is required and disclosure generally is recommended as a means to balancing the potential value of such communications with the potential harm, the question is what should agencies disclose. This section sets forth recommendations for agency disclosure policies, in addition to recommendations for general policies regarding *ex parte* communications.

A. How should agencies define *ex parte* communication?

Agency policies should use broad terms to define or describe *ex parte* communications, and use appropriate exclusions from the definition or procedural requirements to limit policy application. This report defines *ex parte* communication to mean interactions, oral or in writing, between a public stakeholder and agency personnel regarding a rulemaking outside of written comments submitted to the public docket during the comment period.[545] Using a broad

[541] CFPB Bulletin, *supra* note 265, at para. (a)(1)(B)(i).

[542] *ACT*, 564 F.2d at 477.

[543] DOT Order, *supra* note 344 (noting concern that material may be hidden especially since stakeholders may not check the public docket after the close of the comment period).

[544] *See* discussion *supra* Part III.C.2.

[545] This definition of "*ex parte* communication" varies from the definition used in the Conference's previous work on this topic, Recommendation 77-3, see *infra* note 48. The main differences are: (1) this definition includes *ex parte* communications made before publication of an NPRM and Recommendation 77-3's definition only covers such communications made post-NPRM; and (2) this report's definition covers oral and written communications "regarding a rulemaking" while Recommendation 77-3's definition only applies to oral communications "of significant information or argument respecting the merits of proposed rules" and written

definition that includes pre-NPRM communications, for which there are no legal requirements and less concern of harm, may help to eliminate the negative connotation of the term "*ex parte* communications" in the informal rulemaking context.

Agencies should exclude from *ex parte* communication policies any communication involving only status inquiries or procedural information. Many agency policies discussed in this report exclude such communications, which do not relate substantively to a rulemaking, from either the policy's definition of *ex parte* communications or the policy's coverage.

Agency personnel and public stakeholder interviewees discussed current *ex parte* communications as mainly occurring orally, so agencies should address oral *ex parte* communications in their policies. Agencies' policies should also cover written *ex parte* communications because such communications still occur. Also, in the digital age of electronic dockets, written material may be provided directly to the rulemaking docket even after the comment period if the electronic docket still allows public submissions.

Agencies should be clear as to whether they consider a late comment an *ex parte* comment or not, and how they will treat late comments if treated differently from *ex parte* comments.[546] Under the definition of *ex parte* communication used in this report, a late comment – a written comment submitted after the close of the comment period – would be considered an *ex parte* comment. If such a comment is submitted directly to the rulemaking docket, the issue of whether to disclose it is moot. If an agency wants to distinguish between *ex parte* communications submitted directly to the rulemaking docket after the close of the comment period, and thus already disclosed, and those not similarly disclosed, the agency should use the term "late comment" to define the former and describe whether and how an agency will consider such a comment. Agencies should consider advising in their policies that it may be necessary to reopen the comment period if an agency wants a robust reply on any late comments, but as noted earlier, providing notice that the docket has been updated may be enough to ensure such comments are vetted.

B. Should agencies set a general policy encouraging, restricting, or remaining neutral toward *ex parte* communications?

Agency policies should note that *ex parte* communications are not prohibited and should clearly state whether the agency welcomes *ex parte* communications generally, or remain neutral. Agencies should refrain from restricting *ex parte* communications because agency policy cannot, and does not, eliminate all actual occurrences of *ex parte* communications

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communications "addressed to the merits." This report's definition is purposefully broader to address legal requirements and best practices for pre-NPRM *ex parte* communications. This definition also applies one standard to both oral and written communications, and eliminates the need to determine if such communications involve a rulemaking's "merits" before applying any required or recommendation procedures for handling such communications.

[546] Even if an agency chooses to "close" a docket to prevent additional public submissions (for example on regulations.gov), public submissions may still post to the docket after the closure date, and agencies should be clear about how they will treat these comments.

whether engaged in accidentally, unknowingly, or purposefully by agency personnel. Rather than restricting such communications, agencies should experiment with how they can capitalize on the communications' value. If, however, an agency policy generally prohibits *ex parte* communications, it should fully explain why it does and further explain when it will accept *ex parte* communications contrary to its general policy.

C. Should agencies prohibit, restrict, or set specific procedures for *ex parte* communications in quasi-adjudicatory informal rulemakings?

Agencies that engage in quasi-adjudicatory informal rulemakings should cover those rulemakings specifically and separately from other informal rulemakings in *ex parte* communications policies. Agencies should explain whether they are prohibiting or restricting *ex parte* communications in the quasi-adjudicatory rulemakings and why. Agencies should also explain any additional procedures for *ex parte* communications in quasi-adjudicatory rulemakings and the underlying rationale for those procedures.

D. Should agencies disclose pre-NPRM *ex parte* communications, and if so which ones?

There is no legal requirement for disclosure of pre-NPRM *ex parte* communications, but agencies should disclose in the NPRM preamble the fact of such communications to indicate who or what perspectives may have influenced the agency's proposal, and to show that the agency has engaged public stakeholders evenly. Additionally, such disclosure shows compliance with Executive Order 13563 to seek, pre-NPRM, the views of those who are likely to be affected by the rulemaking.

E. Which post-NPRM *ex parte* communications should agencies disclose?

Agencies should disclose in the preamble to the next rulemaking document the fact and substance of all post-NPRM *ex parte* communications that an agency deems relevant to its rulemaking decisions. Such disclosure would comply with the legal requirement to do so. Agencies should also disclose in the public docket at least the fact of all post-NPRM *ex parte* communications to avoid the appearance of impropriety or unfair access.

F. Should agencies or public stakeholders have the burden of disclosing *ex parte* communications?

Agencies should place the burden on commenters for disclosure of both oral and written *ex parte* communications. This would alleviate some of the concern over agency resources that oral *ex parte* communications take time not only to participate in, but also to disclose. Agencies should reserve the right to request corrections or revisions if the commenter's summary of the

oral *ex parte* communication was inaccurate or incomplete, as well as to submit the agency's version in lieu of or in addition to the commenter's summary. In doing so, sanction provisions may be necessary to help an agency enforce its disclosure requirements against commenters as necessary.

G. How quickly should agencies require disclosure of *ex parte* communications?

Although agencies likely need flexibility in determining when an *ex parte* communication must be disclosed, every agency should indicate timing of such disclosure at least in terms of "timely" or "promptly." If an agency places the burden of disclosure on the commenter, however, then it should also provide a specific timeframe in which the commenter must disclose.

H. Should agencies exempt confidential or otherwise protected information from *ex parte* disclosures?

Agencies should make sure to provide for nondisclosure of information that has an appropriate legal basis for doing so.

I. How should agencies address digital technology in *ex parte* communications?

Agencies should consider how to take advantage of digital technology to aid in disclosure of *ex parte* communications, and consider adopting a default of digital disclosure. At the very least, agencies should avoid inadvertently excluding *ex parte* communications made via new digital communications from their policies by crafting policies that are too narrow in scope or nomenclature to cover changing technologies and use of those technologies for communicating. Although current *ex parte* communications occur mainly via old-fashioned face-to-face meetings, new technologies and general adaptation to new technologies for communicating occur quickly in the digital age. Agency policy written only to cover current *ex parte* communications could become incomplete or obsolete.

Agencies should be clear whether they consider a social media communication an *ex parte* communication, and how they plan to treat such communications. Under the definition of *ex parte* communication in this report, communication via social media regarding a specific rulemaking – a written comment not submitted to the rulemaking docket – would still be considered an *ex parte* communication. Agencies should consider including such communications in the rulemaking docket, providing notice in the rulemaking docket pointing to a social media communication, or providing notice in the rulemaking docket about its use of social media in connection with a specific rulemaking or rulemakings generally. Agency policies on *ex parte* communications via social media should be consistent with its general policy regarding use of social media in its informal rulemakings.[547]

[547] *See* Admin. Conference of the U.S., Recommendation 2013-5, "Social Media in Rulemaking," 78 Fed. Reg. 76269 (Dec. 17, 2013).