



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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Ex Parte Communications in Informal Rulemaking

How do agencies engage with the public during informal rulemaking?

Public engagement is an important part of agency rulemaking. When an agency engages in informal rulemaking, also called notice-and-comment rulemaking, it must provide a public notice of proposed rulemaking (NPRM) and provide interested persons an opportunity to submit written comments on it (5 U.S.C. § 553(c)). Comments are made part of the public rulemaking docket, and the agency must consider them in finalizing the rule.

Agencies also commonly engage with the public outside the notice-and-comment process, for example by holding public meetings, meeting one-on-one with individual stakeholders, reaching out to trade and public interest groups, and exchanging emails with technical experts.

What are “ex parte” communications?

In judicial proceedings, which are adversarial, “ex parte” communications are contacts related to the subject of a lawsuit between a single party and the judge. Ex parte communications are largely prohibited in judicial proceedings and in agency proceedings that use trial-like procedures, such as formal adjudication and formal rulemaking.

Even though informal rulemaking is not adversarial, many lawyers refer to certain communications as “ex parte.” “Ex parte” communications, which may be written or oral, are contacts regarding the substance of an anticipated or ongoing rulemaking between agency personnel and interested persons that are not placed in the public rulemaking docket at the time they occur.

What are the benefits of ex parte communications?

Ex parte communications in informal rulemaking can have immense value, because they provide continued “contact with [a] regulated industry, other affected groups, and the public.” *Sierra Club v. Costle*, 657 F.2d 298, 401 (1981). Effective policy making depends upon agency officials being accessible to the public, and that these discussions assist agencies in developing more sustainable regulations by better informing the agency. *Id.*

What concerns may ex parte communications raise?

Ex parte communications raise concerns relating to undue influence of powerful private interests and even impropriety in the rulemaking process. Further, the possibility that non-public information might affect rulemaking may undermine confidence in both rulemaking and judicial review of agency action. In certain rulemakings, ex parte communications may even give rise to due process concerns.

How do agencies handle ex parte communications?

The Administrative Procedure Act, 5 U.S.C. § 553, does not prohibit ex parte communications in informal rulemaking. Recognizing both the potential benefits and harms, ex parte communications “are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness.” *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977).

To balance the potential benefits and harms of ex parte communications, courts and ACUS distinguish between communications that take place before an NPRM is issued, while a comment period is open, and after a comment period closes:

Pre-NPRM Communications

The law does not require that agencies disclose ex parte communications that take place *before* an NPRM, and ACUS recommends against restricting them.

Communications During an Open Comment Period

Ex parte communications made during a comment period should be disclosed to ensure an adequate record is preserved for judicial review. ACUS recommends that oral ex parte communications should be summarized and added to the rulemaking docket, while written communications should be added directly.

Communications After a Comment Period Closes

ACUS recommends that agencies disclose ex parte communications that take place after the comment period closes if the communications contain significant new information and the agency considered or relied on them. The agency should also consider reopening the public comment period, if warranted.

Additional Resources

ACUS Rec. [2023-2](#), Virtual Public Engagement in Agency Rulemaking
ACUS Rec. [2018-7](#), Public Engagement in Rulemaking
ACUS Rec. [2014-4](#), Ex Parte Communications in Informal Rulemaking
ACUS Rec. [2013-4](#), The Administrative Record in Informal Rulemaking
Esa L. Sferra-Bonistalli, [Ex Parte Communications is Informal Rulemaking](#) (May 1, 2014) (report to the Admin. Conf. of the U.S.).