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Before the

SURFACE TRANSPORTATION BOARD



Ex Parte 739

EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING
PROCEEDINGS

COMMENTS

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Attorney for Samuel J. Nasca

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Preliminary Statement

Samuel J. Nasca, 1/ for and on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY) , submits these comments in response to Surface Transportation Board (STB or Board) Notice of Proposed Rulemaking(NPRM), dated September 26, 2017 (served September 28), 82 Fed. Reg. 45771-79 (October 2, 2017).

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The NPRM was issued without prior request, or prior review by individual members of the public, or by organizations comprising individuals usually engaged in proceedings at the agency. The NPRM would authorize, without prior waiver request, secret communications between any person, on the one hand, and agency staff and/or agency Member, on the other hand, concerning the merits or outcome of a pending agency rulemaking proceeding,^{2/} without notice to all parties or without all parties being present, prior to issuance of a notice of proposed rulemaking; which communication could, or is intended to influence anyone participating, or could reasonable be expected to participate in the agency decision. The authorization for such ex parte communications would be applicable to all “informal rulemaking proceedings,” the latter defined as proceedings to issue, amend, or repeal rules pursuant to 5 U.S.C. 553, and the Board’s rulemaking procedures at 49 CFR 1110. Ex parte communications would not be prohibited and need not be disclosed if made in informal rulemaking

^{2/} NPRM at 2n.2 might seem to minimize the effect of abolishing the ex parte communication prohibition in terming the abolition applicable only to “informal” rulemaking; but NPRM’s use of “informal” actually means most, if not virtually all rulemaking, *supra*. STB rulemaking cases are §4 APA, 5 USC 553, captioned “Rulemaking.” So-called “formal” rulemaking is said to be in §§7-8 APA, 5 USC 556-57, captioned Hearings and Initial Decisions. The terms “informal” and “formal” are not in the APA, which simply defines “rule” and “rule making.” 5 USC 551(4), (5). The two terms in the NPRM, informal and formal within “rulemaking” appear derived from academic circles, not the Congress.

proceedings prior to issuance of a notice of proposed rulemaking.^{3/} Thus, the Board would permit unrestricted communications in the Advance Notice of Proposed Rulemaking (ANPRM) stage, where the key decisional process frequently takes place, significantly dictating the ultimate agency decision. This ANPRM process can be expected to be even more decisive in the future with an automatic removal of the proposed ex parte communication rule prohibition.

SMART/TD-NY has been an active participant in a number of rulemaking proceedings at the STB, and at its predecessor Interstate Commerce Commission (ICC). Railroad employees, represented by SMART/TD, stand to be adversely affected by a “closed door” and secret STB tribunal. The proposed virtual elimination of the STB’s present and long-standing prohibition of unauthorized ex parte communications will constitute an important change for employee participation in STB rulemaking proceedings.

The NPRM has demonstrated no need for the Board to further downgrade the transparency of its proceedings. The Board should not adopt the NPRM. The Board should leave well enough alone.

^{3/} The APA has its own definition for “rule” and “rule making.” See: 5 USC 551(4), 551(6).

I. NO NEED EXISTS FOR THE BOARD TO CHANGE
ITS EX PARTE COMMUNICATION RULES; THE
CURRENT SITUATION AND PRACTICES ARE PROPER

The STB in recent years has downgraded its transparency. STB should not go further in separating its activities from public view. The current situation, unlike that of some other independent sister economic regulatory agencies,^{4/} is the STB's abolition of its Secretary in 2009; restricting public access to its docket room and library to the hours of 10AM-3PM, beginning 2016, and elimination of most current publications and trade journals, including U.S. Code; elimination of its printed decisions volumes, subsequent to year 2004, and earlier elimination of indices for its published and unpublished decisions. The agency abolished its Administrative Law Judges, such that in the last three years a growing number of cases have been handled for STB at FERC, by FERC ALJs, pursuant to an agreement between STB and FERC, moving the hearing process away from the STB's building and hearing rooms, along with access to ALJ talents familiar with rail carrier law and STB procedures , to the detriment of STB Members and staff.

^{4/} We point to the Federal Maritime Commission (FMC), Federal Communication Commission (FCC), Federal Energy Regulatory Commission (FERC), and Federal Trade Commission (FTC).

1. Present Waiver and Protective Orders. The NPRM indicates that two proceedings have been handled with ex parte communications. These are Ex Parte 724 (Sub-No. 4), U.S. Rail Serv. Issues-Performance Data Reporting; Ex Parte 71 (Sub-No. 1, Reciprocal Switching. The first involved staff-prepared statements for shipper and public witnesses; the second involved summaries of stakeholder meetings with STB Members and staff prepared by stakeholder parties after the ex parte meetings. (NPRM, 5-6).^{5/}

These ex parte communications were generated by waiver from the Board of its ex parte communications prohibition in both proceedings.

One carrier, CSXT, recited it has participated in many informal discussions at the Federal Railroad Administration (FRA) which also does rulemaking. (NPRM, 6). However, the comparison with FRA is flawed, for FRA is not an independent agency, but rather is an agency of the executive branch, with its leadership subject to change without term or cause.

^{5/} These private meetings were with stakeholders subsequent to earlier stakeholder filings on the merits. Stakeholder submissions were usually prepared by and accompanied by their counsel in both instances, e.g., see: Ex Parte 711 (Sub-No. 1), Ineos Usa, comments, 10/26/2016, ID24186; Ineos Usa, Mtg. Summary, 2/7/2017, 2/8/2017, 2/8/2017, ID24587, 24594, 24206;

The fact that the STB has the ability to waive its ex parte communications prohibition in special or emergency situations, and has done so in two recent proceedings, demonstrates that STB does not require an automatic blanket removal of its ex parte communications rule, irrespective of need. The ban against ex parte communications extends throughout the independent U.S. judicial and administrative agencies, and should not be removed without cause. The recent rail congestion crisis does not support blanket exemption for virtually all STB rulemaking,, even though designated “informal.”

Moreover, the use of protective orders by parties to STB proceedings is quite common. It provides an additional method for secret transmittal of information where justified.

2. Distance from Washington, DC. The use of unrestricted ex parte communications would disadvantage witnesses and counsel located outside the immediate Washington DC area. The STB does not have the regional offices enjoyed by its predecessor ICC; and without ALJs, STB only rarely sets hearings outside the Washington DC area. The establishment of wide-ranging ex parte communications with STB Members and staff would be prejudicial to parties and counsel situated at a distance. The use of telephone is not a satisfactory alternative for face-to-face participation.

Railroad employees and their organizations would be prejudiced by the addition of significant ex parte communications in the pre-notice of proposed rulemaking stage of STB proceedings, with trips to the STB to engage in face-to-face meeting with STB staff and Members. Moreover, it is perhaps likely that joint meetings may arise conducted with other parties and agency personnel, although such could be problematic.

II. ACUS AND RELIANCE UPON POSITIONS OF OTHER AGENCIES ARE DUE LITTLE RELIANCE

The NPRM, not demonstrating any real need for STB modification of the ex parte communications regulations, has seized upon the 2014 recommendation of the Administrative Conference of the United States (ACUS) concerning ex parte communications in informal rulemaking, 79 Fed. Reg. 35988, 35994 (June 25, 2014) (NPRM, 4-5), and case law developments at other agencies, particularly judicial review of the Environmental Protection Agency determination in Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981)(Sierra Club)(NPRM 2-4). The Board's reliance upon ACUS and Sierra Club is misplaced and unpersuasive for adoption of the STB's proposed revisions.

1. ACUS. The NPRM does not cite the complete text of the ACUS recommendation,^{6/} which we do here,^{7/} and attach as Appendix, pp. 1-4, infra.

ACUS was in existence between 1968 and 1995, when it ceased operation due to termination of funding by the Congress. It was officially re-established in March 2010. The Chairman of ACUS is appointed by the President with Senate consent for a five-year term. It has a small staff, but between 75 and 101 members, a majority of whom are government officials, composed of the chairman of each regulatory board or commission, and the head of each executive department or other agency designated by the President or the head of the department or agency. The Chairman of ACUS is a full-time position, and is the only paid person.

The ACUS recommendations are not binding on any agency. The ACUS structure is heavily weighted by the executive branch, rather than by the Congress, and has proven highly politicized in the past, as indicated by its closure for 15 years. Moreover, the 2014 ACUS recommendation recognized varying considerations should be each evaluated by an agency in establishing ex parte rules. The ACUS discourse on ex parte informal communications indicates some important potential and anticipated harms, as well as unaddressed issues, such as

^{6/} Recommendation 2014-4, "Ex Parte" Communications in Informal Rulemaking
^{7/} 79 Fed. Reg. 35988, 35993-95 (June 25, 2014).

quasi-adjudication, or hybrid matters, among other subjects. In short, even ex parte communications prior to issuance of NPRM, are subject to the ACUS qualifications and reservations. Appendix, pp. 2-4.

The year 2014 ACUS recommendation 2014-4 is not entitled to probative weight in this proceeding.

2. Sierra Club. The court decision in Sierra Club v. Costle involved the Clean Air Act. It provides no basis for an automatic exercise of ex parte communications in current 5 USC 553 proceedings. Moreover, the EPA is an executive branch agency.

The Sierra decision was entered over 35 years ago, and does support the relief sought here by STB.

CONCLUSION

The STB should discontinue the proceeding.

Respectfully submitted,



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Notices

Federal Register

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This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendations

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Administrative Conference of the United States adopted four recommendations at its Sixtieth Plenary Session. The appended recommendations address: Resolving FOIA Disputes Through Targeted ADR Strategies; Government in the Sunshine Act; Guidance in the Rulemaking Process; and "Ex Parte" Communications in Informal Rulemaking.

FOR FURTHER INFORMATION CONTACT: For Recommendation 2014-1, David Pritzker; for Recommendation 2014-2, Reeve Bull; for Recommendation 2014-3, Funmi Olorunnipa; and for Recommendation 2014-4, Emily Bremer. For all four of these actions the address and phone number are: Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW., Washington, DC 20036; Telephone 202-480-2080.

SUPPLEMENTARY INFORMATION: The Administrative Conference Act, 5 U.S.C. 591-596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements (5 U.S.C. 594(1)). For further information about the Conference and its activities, see www.acus.gov. At its Sixtieth Plenary Session, held June 5-6, 2014, the Assembly of the Conference adopted four recommendations.

Recommendation 2014-1, *Resolving FOIA Disputes Through Targeted ADR*

Strategies, addresses more effective use of alternative dispute resolution (ADR) approaches to help resolve disputes arising under the Freedom of Information Act (FOIA). The OPEN Government Act of 2007 created the Office of Government Information Services (OGIS), a part of the National Archives and Records Administration, to assist in the resolution of FOIA disputes through use of mediation and other ADR techniques. The recommendation suggests ways that OGIS can maximize the effectiveness of its resources for this purpose. The recommendation also suggests steps agencies can take to prevent or resolve FOIA disputes, including cooperating with OGIS and making FOIA staff and requesters aware of OGIS services.

Recommendation 2014-2, *Government in the Sunshine Act*, highlights best practices designed to enhance transparency of decisionmaking at multi-member boards and commissions subject to the Government in the Sunshine Act. The recommendation urges covered agencies to provide a description of the primary mechanisms for conducting business, describe substantive business disposed of outside of open meetings subject to the Act (with appropriate protections for information made exempt from disclosure), and exploit new technologies to disseminate relevant information more broadly.

Recommendation 2014-3, *Guidance in the Rulemaking Process*, identifies best practices for agencies when providing guidance in preambles to final rules. It suggests ways that agencies can improve the drafting and presentation of these preambles, including making it easier to identify any guidance content. The recommendation also urges agencies to ensure that users of their Web sites can easily locate the required small entity compliance guides.

Recommendation 2014-4, *"Ex Parte" Communications in Informal Rulemaking*, provides guidance and best practices to agencies for managing "ex parte" communications between agency personnel and nongovernmental interested persons regarding the substance of informal rulemaking proceedings conducted under 5 U.S.C. 553.

The Appendix below sets forth the full texts of these four

recommendations. The Conference will transmit them to affected agencies, Congress, and the Judicial Conference of the United States. The recommendations are not binding, so the entities to which they are addressed will make decisions on their implementation.

The Conference based these recommendations on research reports that are posted at: www.acus.gov/60th. A video of the Plenary Session is available at the same Web address, and a transcript of the Plenary Session will be posted when it is available.

Dated: June 20, 2014.

Shawne C. McGibbon,
General Counsel.

APPENDIX—RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2014-1

Resolving FOIA Disputes Through Targeted ADR Strategies

Adopted June 5, 2014

The Freedom of Information Act (FOIA) ¹ makes available to any person, upon request, any reasonably described agency record that is not exempt under nine specified categories. Congress has stated: "disclosure, not secrecy, is the dominant objective of the Act." ² FOIA provides a two-level agency process for decisions on requests for access to agency records: (1) an initial determination that is ordinarily made by the component of the agency with primary responsibility for the subject matter of the request; and (2) an appeal to an authority under the head of the agency in the case of an adverse initial determination. A requester's formal recourse following an adverse determination on appeal (or the agency's failure to meet the statutory time limits for making a determination) is a suit in federal district court to challenge the agency action or inaction. Attaining the highest level of compliance at the agency level, without the need for resort to litigation, has long been recognized as a critical FOIA policy objective. A series of amendments to the Act over the years has provided for more detailed monitoring of agency compliance and

¹ 5 U.S.C. § 552, as amended.

² Openness Promotes Effectiveness in our National [OPEN] Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (codified at 5 U.S.C. § 552), § 2(4). See also Presidential Memorandum of January 21, 2009, Freedom of Information Act, which stated, "The [FOIA] should be administered with a clear presumption: In the face of doubt, openness prevails." 74 Fed. Reg. 4683 (Jan. 26, 2009).

purpose. Fourth, many agencies do not mention preambles on their Web pages and in other compilations of guidance, nor do they integrate the guidance content of preambles into their indices or topical treatments of guidance. This does not assist the public and regulated entities in integrating the guidance provided in preambles with other guidance documents. Fifth, displaying electronic versions of regulations with hyperlinks to relevant portions of their preambles and other guidance—a practice with which some agencies are experimenting⁹—could make it easier to find this content, and holds promise for future innovation.

A separate but equally important concern for preamble drafting is that some agencies include statements in preambles to final rules that appear to create binding standards or obligations as opposed to making those statements in the regulatory text. In this respect, this Recommendation highlights that the prohibition against agencies making statements in guidance documents in forms that appear to be binding also applies to statements in preambles.¹⁰

Many agencies have policies on issuing guidance documents, but these policies do not generally address preambles and other forms of contemporaneous guidance. The Conference encourages agencies to include contemporaneous guidance within these policies as a step toward better integrating these forms of guidance with other guidance materials. This Recommendation also highlights that for agencies covered by *OMB's Good Guidance Bulletin*, the guidance content of their preambles should comply with the *Bulletin*.

Finally, the Small Business Regulatory Enforcement Fairness Act of 1996¹¹ requires that when agencies produce small business compliance guides, those guides be posted on the agency Web site in an “easily identified location.”¹² Despite this requirement, these guides are often difficult to find on agency Web pages. The Recommendation highlights this statutory requirement and urges greater agency attention to it with the assistance of the Small Business Administration.

Recommendation

Drafting of Preambles to Final Rules

1. In the statement of basis and purpose accompanying a final rule, agencies should address how the rule advances statutory objectives. Such discussion should go

⁹ See, e.g., <http://www.consumerfinance.gov/eregulations/1005> (visited April 15, 2014) (providing a copy of 12 CFR Part 1004 with hyperlinks to section-by-section analysis from regulatory preamble and other navigation tools and links).

¹⁰ See *OMB's Good Guidance Bulletin*, *supra* note 8, at 3440 (directing agencies not to use mandatory language in guidance documents); Recommendation 92–2, *supra* note 1, at 30103–04 (advising against making binding statements in policy statements).

¹¹ See Pub. L. No. 104–121, 110 Stat. 873, codified at 5 U.S.C. § 601 nt., § 212 (2012) (requiring the production of compliance guides whenever the agency must produce a regulatory flexibility analysis under 5 U.S.C. § 605(b), and quoting § 605(b)).

¹² *Id.* § 212(a)(2)(A).

beyond merely repeating the text or title of the statute.

2. Agencies should consider including, particularly for lengthy regulations, a section-by-section analysis in the preamble in which the organization of the preambular discussion corresponds to the organization of the final rules themselves. Such section-by-section analyses should go beyond merely repeating the regulatory text discussed.

3. When agencies incorporate or rely upon discussions of a rule's basis and purpose from prior notices, such as from the notice of proposed rulemaking, they should be mindful that such incorporation and reliance may make it more burdensome for readers to find all relevant information.

4. Agencies should not use the preamble as a substitute for regulatory language. Agencies should avoid use of mandatory language in the preambles to final rules, unless an agency is using these words to describe a statutory, regulatory, or constitutional requirement, or the language is addressed to agency staff and will not foreclose agency consideration of positions advanced by affected parties. Such language should be understood to include not only mandatory terms such as “shall,” “must,” “required,” and “requirement,” mentioned in the *OMB Final Bulletin for Agency Good Guidance Practices (OMB's Good Guidance Bulletin)*, but also any other language that appears to impose substantive standards or obligations.

Policies on Guidance and Collections of Guidance

5. Agencies should mention preambles to their final rules as sources of guidance in their general compilations of guidance and on their webpages devoted to guidance. Agencies should also consider ways to integrate the guidance content of their preambles into their general compilations of guidance and on their webpages devoted to guidance.

6. To the extent agencies have policies on issuing guidance, those policies should assess and clearly state how they address the guidance content of preambles to their final rules. For agencies covered by *OMB's Good Guidance Bulletin*, their policies should address compliance with the *Bulletin* with respect to any significant and economically significant guidance included in preambles to final rules.

Electronic Presentation of Regulations

7. The Office of the Federal Register and the Government Printing Office are encouraged to work with agencies to develop ways to display the Code of Federal Regulations in electronic form in order to enhance its understanding and use by the public, such as developing reliable means of directing readers to relevant guidance in preambles to rules and to other relevant guidance documents.

Small Entity Compliance Guides

8. Agencies should reassess how they are displaying the small entity compliance guides on their websites to ensure that these guides are in an “easily identified location,” as required by Small Business Regulatory Enforcement Fairness Act of 1996.

9. The Small Business Administration should work with agencies to develop guidelines for posting small entity compliance guides on agency websites in ways that make them easily identifiable.

Administrative Conference Recommendation 2014–4

“Ex Parte” Communications in Informal Rulemaking

Adopted June 6, 2014

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

In Recommendation 77–3,⁴ the Conference expressed the view that a general prohibition on ex parte communications in the context of informal rulemaking proceedings would be undesirable, as it would tend to undermine the flexible and non-adversarial procedural

¹ In the judicial context, “ex parte” contacts are those that are related to the subject of a lawsuit and occur between just one of the parties involved and the presiding judge, usually “without notice to or argument from the adverse party.” *Black's Law Dictionary* (9th ed. 2009). Unless otherwise authorized by law, such contacts are generally viewed as highly unethical.

² See 5 U.S.C. § 557(d).

³ *Home Box Office, Inc. v. Federal Comm'n's Comm'n*, 567 F.2d 9, 57 (D.C. Cir. 1977); see also *Sierra Club v. Costle*, 657 F.2d 298, 400–01 (D.C. Cir. 1981).

⁴ Recommendation 77–3 emerged from a select committee the Conference convened in response to the D.C. Circuit's groundbreaking decision in *Home Box Office*. See Nathaniel L. Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 Admin. L. Rev. 377, 377 (1978). Following the recommendation's adoption, the Supreme Court decided *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978), admonishing federal courts not to impose on administrative agencies procedural requirements beyond those contained in the APA. See Nathanson, 30 Admin. L. Rev. at 406–08.

framework established by 5 U.S.C. § 553.⁵ At the same time, the Conference concluded, it may be appropriate for agencies to impose certain restraints on ex parte communications to prevent potential or perceived harm to the integrity of informal rulemaking proceedings. Although the law has evolved since Recommendation 77-3 was adopted, these basic principles remain valid. Over the past several decades, agencies have implemented Recommendation 77-3 by experimenting with procedures designed to capture the benefits of ex parte communications while reducing or eliminating their potential harm. This recommendation draws on this substantial experience to identify best practices for managing ex parte communications received in connection with informal rulemakings.

Ex parte communications, which may be oral or written, convey a variety of benefits to both agencies and the public. Although the rulemaking process has largely transitioned to electronic platforms in recent years, most ex parte contacts continue to take the form of oral communications during face-to-face meetings. These meetings can facilitate a more candid and potentially interactive dialogue of key issues and may satisfy the natural desire of interested persons to feel heard. In addition, if an agency engages in rulemaking in an area that implicates sensitive information, ex parte communications may be an indispensable avenue for agencies to obtain the information necessary to develop sound, workable policies.⁶

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

⁵ See Admin. Conf. of the United States, Recommendation 77-3, *Ex Parte Communications in Informal Rulemaking Proceedings*, 42 Fed. Reg. 54,253 (Oct. 5, 1977).

⁶ In such areas, interested persons may be willing to share essential information with the agency only through face-to-face, private conversations, and agency personnel may be subject to severe penalties for not keeping the information shared with them confidential. See, e.g., 26 U.S.C. § 6103 (addressing confidentiality and disclosure of tax returns and tax return information). Of course, agencies may protect information from disclosure only to the extent permitted or required by law.

Best practices for preventing the potential harms of ex parte communications may vary depending on the stage of the rulemaking process during which the communications occur. Before an agency issues a Notice of Proposed Rulemaking (NPRM), few if any restrictions on ex parte communications are desirable.⁷ Communications during this early stage of the process are less likely to pose the harms described above and can help an agency gather essential information, craft better regulatory proposals, and promote consensus building among interested persons.⁸ After an NPRM has been issued and during the comment period, there may be a heightened expectation that information submitted to the agency will be made available to the public. Indeed, during this time period, an agency's comment policy and its policy addressing ex parte communications may both apply.⁹ Finally, once the comment period closes, the dangers associated with agency reliance on privately-submitted information become more acute. Interested persons may be particularly keen to discuss with the agency information provided in comments by other persons filed at or near the close of the comment period. Agencies have in some circumstances disclosed significant new information received through such communications and reopened the comment period. This solution is not costless, however, and has the potential to significantly delay a proceeding.

This recommendation focuses on how agencies can best manage ex parte communications in the context of informal rulemaking proceedings, including those that involve "quasi-adjudication among conflicting private claims to valuable privilege."¹⁰ It does not address several related or peripheral issues. First, it does not evaluate formal or hybrid rulemakings or proceedings in which agencies voluntarily use notice-and-comment procedures to develop guidance documents. Second, it does not address ex parte communications in the executive review process, including before the Office of Information and Regulatory Affairs (OIRA).¹¹ Third, it does not examine

⁷ Recognizing these principles, the Clinton Administration directed agencies "to review all . . . administrative ex parte rules and eliminate any that restrict communication prior to the publication of a proposed rule," with the limited exception of "rules requiring the simple disclosure of the time, place, purpose, and participants of meetings." See Memorandum for Heads of Departments and Agencies, Regulatory Reinvention Initiative (Mar. 4, 1995), available at <http://www.acus.gov/memorandum/regulatory-reinvention-initiative-memo-1995>. This memorandum, which has never been revoked, continues to inform agency practice.

⁸ See *id.*

⁹ The Conference recently addressed agency comment policies. See Admin. Conf. of the United States, Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,791 (Aug. 9, 2011).

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

¹¹ See Admin. Conf. of the United States, Recommendation 88-9, *Presidential Review of Agency Rulemaking*, 54 Fed. Reg. 5207 (Feb. 2, 1989); Admin. Conf. of the United States,

interagency communications outside the process of executive review. Fourth, it does not address intraagency interactions between an agency's staff and its decisionmakers.¹² Finally, it does not address unique issues that may arise in connection with communications between agencies and members of Congress, foreign governments, or state and local governments.

Recommendation

"Ex Parte" Policies

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

2. Agency ex parte policies should:

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

(b) Explain the scope of their coverage, which should be limited to communications on substantive matters and should exclude non-substantive inquiries, such as those regarding the status of a rulemaking or the agency's procedures.

(c) Establish procedures for ensuring that, after an NPRM has been issued, the occurrence and content of all substantive oral communications, whether planned or unplanned, are included in the appropriate rulemaking docket.

(d) Establish procedures for ensuring that, after an NPRM has been issued, all substantive written communications are included in the appropriate rulemaking docket.

(e) Explain how the agency will treat significant new information submitted to the agency after the comment period has closed.

(f) Identify deadlines for all required or requested disclosures of ex parte communications.

(g) Explain how the agency will treat sensitive information submitted in an ex parte communication.

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

3. In formulating policies governing ex parte communications in informal rulemaking proceedings, agencies should consider the following factors:

(a) The stage of the rulemaking proceeding during which oral or written communications may be received.

(b) The need to ensure that access to agency personnel is provided in a balanced, viewpoint-neutral manner.

(c) Limitations on agency resources, including staff time, that may affect the ability of agency personnel to accept requests for face-to-face meetings or prepare summaries of such meetings.

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

Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86,407 (Dec. 31, 1980).

¹² See 5 U.S.C. § 557(d).

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

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

Communications Before an NPRM Is Issued

4. Agencies should not impose restrictions on ex parte communications before an NPRM is issued.

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

(a) In the preamble of the later-issued NPRM or other rulemaking document; or

(b) In the appropriate rulemaking docket once it is opened.

Communications After an NPRM Has Been Issued

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

7. After an NPRM has been issued, agencies should disclose to the public:

(a) The occurrence of all oral ex parte communications, including the identity of those involved in the discussion and the date and location of the meeting.

(b) The content of all oral ex parte communications through a written summary filed in the appropriate rulemaking docket. Agencies may either:

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

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

(c) All written submissions, in the appropriate rulemaking docket.

Additional Considerations after the Comment Period Has Closed

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

9. If an agency receives, through an ex parte communication, any significant new information that its decisionmakers choose to consider or rely upon, it should disclose the information and consider reopening the comment period, to provide the public with an opportunity to respond.

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

periods and other methods of receiving public input on previously submitted comments).

Quasi-Adjudicatory Rulemakings

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

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

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

Accommodating Digital Technology

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

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

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

[FR Doc. 2014-14878 Filed 6-24-14; 8:45 am]

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UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT

Notice of July 9 Advisory Committee on Voluntary Foreign Aid Meeting

AGENCY: United States Agency for International Development.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, notice is hereby given of a meeting of the Advisory Committee on Voluntary Foreign Aid (ACVFA).

Date: Wednesday, July 9, 2014.

Time: 2:00 p.m.-4:00 p.m.

Location: Horizon Room, Ronald Reagan Building.

Purpose

The Advisory Committee on Voluntary Foreign Aid (ACVFA) brings together USAID and private voluntary organizations (PVO) officials, representatives from universities,

international nongovernment organizations (NGOs), U.S. businesses, and government, multilateral, and private organizations to foster understanding, communication, and cooperation in the area of foreign aid.

Agenda

USAID Administrator Rajiv Shah will make opening remarks, followed by panel discussions among ACVFA members and USAID leadership on the Global Development Lab. The full meeting agenda will be forthcoming on the ACVFA Web site at <http://www.usaid.gov/who-we-are/organization/advisory-committee>.

Stakeholders

The meeting is free and open to the public. Persons wishing to attend should register online at <http://ow.ly/wlC6G>.

FOR FURTHER INFORMATION CONTACT: Jayne Thomisee, 202-712-5506.

Dated: June 18, 2014.

Jayne Thomisee,

Executive Director & Policy Advisor, U.S. Agency for International Development.

[FR Doc. 2014-14836 Filed 6-24-14; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

June 19, 2014.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques and other forms of information technology.

Comments regarding this information collection received by July 25, 2014 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and