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Surface Transportation Board
 Attn: Docket No. EP 739
 395 E Street, SW
 Washington, DC 20423-0001

Re: Comments Regarding the Surface Transportation Board's Proposed Revisions to its Ex Parte Communications in Informal Rulemaking Proceedings, 82 FR 45771

I. The proposed changes to the Surface Transportation Board's procedures for ex parte communications will promote responsible governance by facilitating promulgation of informed substantive rules while preserving transparency.

When an agency engages in making substantive policy changes, it should be incentivized to comply with appropriate rulemaking processes that encourage both transparency and public participation. The Antonin Scalia Law School Administrative Law Clinic appreciates the Surface Transportation Board's (STB's) use of notice-and-comment procedures to implement these regulatory changes regarding the STB's ex parte communications policies. Further, on any occasion where an agency engages in substantive actions—particularly actions impacting the rights and privileges of the regulated public—it is appropriate, beneficial, and often necessary for the agency to utilize notice-and-comment procedures.¹ To the extent that the STB's proposed ex parte communications changes encourage the Board to produce better-informed substantive regulations via public notice-and-comment proceedings rather than less transparent opinion letters or policy statements, the STB's proposed procedural changes will be beneficial.

In particular, the STB's proposed changes here clarify that the STB may engage in ex parte communications before the issuance of a notice of proposed rulemaking (NPRM), enabling the Board to gather more expertise before engaging in the rulemaking process.² Furthermore, the proposal wisely would permit the STB to continue receiving ex parte communications after an NPRM is published (up until twenty days before the NPRM's imposed deadline for submitting reply comments).³ Providing more transparency than is statutorily mandated, the STB's proposed

¹ See 5 U.S.C. § 553(b)(A)-(B) (2015) (excepting from notice-and-comment requirements only “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice” or those rules where “the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest”); *see also* 49 U.S.C. § 1321(a) (2015) (authorizing the STB to “prescribe regulations” without imposing any particular procedural requirements).

² Ex Parte Communications in Informal Rulemaking Proceedings, 82 Fed. Reg. 45,771, 45,775 (Oct. 2, 2017).

³ *Id.* at 45,776.

changes require the public docketing of the content of ex parte communications that occur after the issuance of an NPRM, giving the public the opportunity to comment on the information that was gathered through the ex parte process.⁴

Taken together, these proposed changes ensure the public receives valuable notice of the STB's regulatory activities through the Board's publication of its proposed rules based on the expertise and evidence it has gathered behind the scenes. Informal, face-to-face meetings with stakeholders and regulated parties give the agency the benefit of the public's expertise through a back-and-forth discussion that can provide the Board important insights to which it otherwise would have been deprived.⁵ In short, by removing procedural hurdles to an efficient notice-and-comment process, the proposal will promote the Board's use of best practices and ultimately will result in better rules.

The history of rulemaking suggests that agencies facing excessive procedural requirements may be inclined to circumvent notice-and-comment proceedings in favor of more informal and less transparent processes.⁶ Scholars have suggested that, over time, courts "turned the modest requirements of the APA as drafted into an onerous code"⁷—prompting agencies and reformers to use more informal processes like the issuance of guidance documents.⁸ Consequently, there is evidence suggesting that agencies have turned to guidance documents as their "primary method of setting forth agency policy"⁹—a trend that stunts public participation in agency policymaking and undermines transparency. Agencies may be incentivized to return to more frequent usage of notice-and-comment procedures if they can more efficiently and effectively engage in that process without the obstacles created by extra-statutory procedural hurdles. Relaxing the STB's rules governing ex parte communications will remove one such procedural hurdle, making it easier for the Board to engage in informed notice-and-comment proceedings, which in turn will encourage transparency.

Moreover, the STB's proposal is consistent with the statutory provisions governing the STB and the Administrative Procedure Act's (APA's) notice-and-comment requirements, both of

⁴ See *id.* at 45,776-77.

⁵ See *id.* at 45,774 ("Ex parte communications would provide the Board with the opportunity to informally engage stakeholders, gather information, and receive the benefit of industry data and stakeholder expertise. Such informal discussions would help ensure the Board thoroughly understands stakeholder perspectives and would ultimately aid the Board in developing the most appropriate regulations. Ex parte communications would also allow stakeholders to further explain or clarify data and arguments submitted in written comments and would enable the Board to explore the nuances of those arguments by asking follow-up questions, as needed.").

⁶ See, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) ("There may be times when an agency's decision to issue an interpretive rule, rather than a legislative rule, is driven primarily by a desire to skirt notice-and-comment provisions.").

⁷ Richard A. Epstein, *The Role of Guidances in Modern Administrative Procedure: The Case for De Novo Review*, 8 J. LEGAL ANALYSIS 47, 51 (2016); see also Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN L. REV. 159, 163-64 (2000) (discussing the "increasingly burdensome interpretations" that judges imposed on the APA's statutory notice-and-comment requirements).

⁸ See Epstein, *supra* note 7, at 51; see also Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 ADMIN L. REV. 371, 375 (2008) (noting that "[a]gencies have expanded their use of guidance documents" as a "response to the inordinate time and expense required for conventional notice and comment rulemaking").

⁹ McKee, *supra* note 8, at 375.

which permit ex parte communications during informal rulemaking proceedings.¹⁰ In addition, the STB's proposal is in line with 2014 recommendations by the Administrative Conference of the United States (ACUS) for best practices regarding the incorporation of ex parte communications into informal rulemaking proceedings.¹¹ In preparing this proposed regulatory change, the STB has presented evidence indicating that the ability to engage in ex parte meetings with experts will help the agency formulate and disclose to the public higher-quality, better-informed policies.¹² For all of these reasons, the Clinic supports the STB's proposed changes to its ex parte communications policies.

II. The Board has the statutory authority to change its ex parte communications in the context of notice-and-comment rulemaking, and it has supported this proposal with considered reasoning.

Congress has not restricted the use of ex parte communications in the STB's informal rulemaking proceedings.¹³ Where Congress has wanted to restrict ex parte communications, it has clearly done so.¹⁴ For example, the APA defines "ex parte communication"¹⁵ and explicitly forbids its use in communicating with agency personnel involved in formal adjudication or formal rulemaking proceedings.¹⁶ But Congress imposed no such restriction on informal rulemaking proceedings under the APA. In fact, when Congress amended the APA through enactment of the Government in the Sunshine Act in 1976, it considered and declined to extend the prohibition on ex parte communications to informal rulemaking proceedings.¹⁷

Similarly, the Board's organic statute does not restrict ex parte communications during informal rulemaking proceedings.¹⁸ As with the APA generally, Congress has evinced no intent to prohibit or restrict the Board from engaging in ex parte communications. Hence, the STB is free

¹⁰ See 5 U.S.C. §§ 553, 555 (containing no mention of ex parte communications); *id.* at § 553(c) (applying the provisions of §§ 556-557, including the prohibition on ex parte communications, to rulemaking only "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing"); 49 U.S.C. § 1321(a).

¹¹ See Adoption of Recommendations, 79 Fed. Reg. 35,988, 35,993-95 (June 25, 2014).

¹² See 82 Fed. Reg. at 45,773 (discussing two recent proceedings in which the Board experimented with waiving its ex parte prohibition and then publicly docketing summaries of the information gathered from the ex parte meetings).

¹³ See 5 U.S.C. § 553(c) (requiring only on-the-record proceedings to comply with 5 U.S.C. § 557, which contains ex parte communications restrictions); *see also* 49 U.S.C. § 1321(a).

¹⁴ See *Action for Children's Television v. FCC*, 564 F.2d 458, 474 n. 28 (D.C. Cir. 1977).

¹⁵ See 5 U.S.C. § 551(14) (2015).

¹⁶ Compare 5 U.S.C. §§ 553(c), 554(a) (applying certain procedural requirements to only on-the-record proceedings), with §§ 556(a), 557(a), (d)(1).

¹⁷ See *Action for Children's Television*, 564 F.2d at 474 n. 28 ("That [Congress] did not extend the ex parte contact provisions of amended section 557 to section 553 even though such an extension was urged upon it during the [Sunshine Act] hearings is a sound indication that Congress still does not favor a per se prohibition or even a 'logging' requirement in all such proceedings.").

¹⁸ See 49 U.S.C. § 1321(a) (granting the Board general rulemaking authority within the sphere of influence delineated for it by Congress, unencumbered by any additional procedural requirements); *but see* 49 U.S.C. § 1303(a)(2) (2015) (requiring the Board to disclose certain information about nonpublic Board meetings).

to change its procedures regarding the permissibility of ex parte communications in the manner that it concludes will produce reasoned and transparent informal rulemaking.¹⁹

In keeping with the freedom the APA affords it to enact procedural requirements above the statutory minima, the Board previously has chosen to prohibit ex parte communications during informal rulemaking proceedings.²⁰ With this proposed rule change, the STB would be making sensible (and relatively modest) alterations to these policies.

Indeed, the Board has given thoughtful reasons supporting these changes. For example, the Board has indicated that ex parte meetings will help it gather information that is essential to propose better rules. In two recent rulemaking proceedings, the Board tested this hypothesis by “waiv[ing] its ex parte prohibitions to permit stakeholder meetings.”²¹ In at least one of these cases, the Board reports that it “issued a supplemental NPRM significantly revising its proposed rules” based in part on the information gathered in ex parte meetings.²² That information was summarized, docketed, and disclosed to the public.²³

At the conclusion of this process, the public thus received more information regarding the proposed rule than it would have if the STB had prohibited ex parte communications; as a result, the public benefited from the outcome of a more thoroughly vetted rule.²⁴ It is no surprise, then, that in the aftermath of this experience the Board’s Vice Chairman testified before Congress that these types of meetings “are extremely important. They allow members to delve more deeply into the issues than reading pleadings will ever allow for. The ability to ask questions and resolve misunderstandings is so vital.”²⁵ Another Board member offered similar testimony: “We really need to hear from all interested stakeholders so that we know what we are doing. I value the ability to hear ideas, thoughts, concerns, red flags.”²⁶

At bottom, the STB has the statutory authority to incorporate information gleaned from ex parte meetings into the rules that it publicly proposes. The STB should feel free to utilize this

¹⁹ *Perez*, 135 S. Ct. at 1206 (criticizing courts for “improperly impos[ing] on agencies an obligation beyond the ‘maximum procedural requirements’ specified in the APA (quoting *Vermont Yankee Nuclear Power Corp. v. Nat’l Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978)); see *Perez*, 135 S.Ct. at 1207 (“Beyond the APA’s minimum requirements, courts lack authority to impose upon [an] agency its own notion of which procedures are ‘best’ or most likely to further some vague, undefined public good.” (internal quotation omitted) (alteration in original))).

²⁰ See 49 C.F.R. § 1102.2; Revised Rules of Practice, 358 I.C.C. 323, 345 (1977) (rules of practice from the Interstate Commerce Commission, the Board’s predecessor agency, interpreting its prohibition of ex parte communications to apply to informal rulemaking proceedings).

²¹ 82 Fed. Reg. at 45,772.

²² *Id.* at 45,773.

²³ See *id.*

²⁴ *Id.* (“Because the ex parte meetings in that proceeding better informed the agency about the often highly technical service reporting issues that were most important to commenters, the Board believes that the ultimate final rule was a better reflection of the needs and concerns of all stakeholders.”).

²⁵ *Freight Rail Reform: Implementation of the Surface Transportation Board Reauthorization Act of 2015: Hearing before the S. Comm. on Commerce, Science, and Transportation*, 114th Cong. (Aug. 11, 2016), at 32 (testimony of Hon. Deb Miller, then-Vice Chairman, Surface Transportation Board).

²⁶ See *id.* at 46 (testimony of Hon. Ann D. Begeman, then-Board Member, Surface Transportation Board).

authority to develop well-informed rules, and courts should not impose any procedural obstacles to the contrary.²⁷ The due process considerations under modern case law that justify restrictions on ex parte communications exist only in adjudicative proceedings intended to settle “conflicting private claims to a valuable privilege.”²⁸ Outside of that context, and in the absence of statutory provisions requiring that an agency base its decisions solely on the contents of its rulemaking docket, agencies may not be subjected to additional procedural burdens that the agency itself has not chosen to grant.²⁹

III. The Board’s proposed procedural changes are relatively modest and are in keeping with recent ACUS recommendations on rulemaking proceedings.

Current STB policy broadly prohibits ex parte communications in any proceeding defined as “on-the-record,” which the Board has interpreted to include informal rulemaking proceedings.³⁰ The proposed rule loosens these restrictions, bringing STB policies on ex parte communications more closely in line with recent ACUS recommendations suggesting that, in some circumstances, ex parte communications improve the quality of rules and comport with the flexible nature of the APA’s procedural guidelines for informal proceedings.

As an initial matter, the Board’s proposed rule clarifies that ex parte communications in informal rulemaking proceedings will be entirely permissible “prior to the issuance of a notice of proposed rulemaking.”³¹ This policy appropriately encourages “free-flowing communications with stakeholders” during the Board’s information-gathering efforts prior to any issuance of an NPRM.³² As the Board notes in its proposal, any such information that the Board relies on to engage in rulemaking would “be evident in the NPRM”³³—enabling the public to study and comment on that information during the notice-and-comment proceeding itself.

The Board’s proposed rule then permits a continuation of the ex parte communications once the NPRM has been published—subject to strict disclosure requirements. Specifically, any ex parte communication regarding a pending rulemaking proceeding that occurs after issuance of the NPRM must take place at least twenty days before the deadline for submitting reply comments.³⁴ Further, the proposed rule requires that anyone engaging in ex parte communications following the issuance of the NPRM must submit a written summary of the communication for inclusion in the public rulemaking docket.³⁵ These summaries must be “sufficiently detailed to

²⁷ *Perez*, 135 S. Ct. at 1207 (explaining that courts should not “violate the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure” (internal quotation omitted)).

²⁸ See *Sierra Club v. Costle*, 657 F.2d 298, 400 (1981) (internal quotation omitted); *Action for Children’s Television*, 564 F.2d at 477.

²⁹ *Sierra Club*, 657 F.2d at 392 (observing that courts are “not free to impose additional procedural rights if the agency did not choose to grant them”).

³⁰ See 49 C.F.R. § 1102.2(c); Revised Rules of Practice, 358 I.C.C. at 345.

³¹ See 82 Fed. Reg. at 45,778 (proposed 49 C.F.R. § 1102.2(b)(2)).

³² See *id.* at 45,775.

³³ *Id.*

³⁴ See *id.* at 45,778-79 (proposed 49 C.F.R. § 1102.2(g)(1)).

³⁵ See *id.* at 45,779 (proposed 49 C.F.R. § 1102.2(g)(4)).

describe the substance of the ex parte communication,” including all information, data, and arguments submitted to the Board in the meeting.³⁶ The communicating party has two business days after the ex parte meeting to submit a summary, and the Board must post the summary memorandum on its Web site in the rulemaking docket within seven days of the memorandum’s submission.³⁷ As a result of this process, the public interested in the rule—as well as the agency itself—undoubtedly will have access to more data on which to evaluate proposed legislative rules.

Moreover, numerous aspects of the Board’s proposed rule are in keeping with ACUS’s 2014 recommendations for how to handle ex parte communications during informal rulemaking proceedings. As ACUS has recognized, “[i]nformal 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.”³⁸ ACUS therefore recommended a set of “best practices for managing ex parte communications received in connection with informal rulemakings” to enable agencies and the public to reap the benefits of information gleaned from ex parte communications while minimizing any of its “potential or perceived harm[s].”³⁹ ACUS suggested, for example, that agencies “not impose restrictions on ex parte communications before an NPRM is issued.”⁴⁰ As ACUS observed, ex parte communications before the issuance of an NPRM are unlikely to impose fairness concerns and “can help an agency gather essential information, craft better regulatory proposals, and promote consensus building among interested persons.”⁴¹ And, to address potential “real and perceived” harms from ex parte communications in general, ACUS recommended, among other proposals, that agencies disclose both the occurrence and the substantive content of ex parte communications via the relevant rulemaking docket.⁴² As described above, the STB’s proposed procedures adopt this suggestion.

Finally, the Board’s proposed rule changes do not just liberalize aspects of the Board’s ex parte communications policies, they also give more teeth to the Board’s ex parte communications prohibitions in at least two respects. First, the proposal eliminates the current stipulation that communications will be classified as “ex parte” only if they are made “by or on behalf of a party.”⁴³ If promulgated, the Board’s proposed ex parte restrictions now will apply to communications regarding “the merits or substantive outcome of a proceeding” regardless of whether they are “made by a formal party to the proceeding or on behalf of such a party.”⁴⁴ Second, the Board’s

³⁶ See *id.* at 45,776, 45,779 (proposed 49 C.F.R. § 1102.2(g)(4)).

³⁷ See *id.* at 45,779 (proposed 49 C.F.R. § 1102.2(g)(4)(v)-(vi)).

³⁸ 79 Fed. Reg. at 35,993.

³⁹ *Id.* at 35,994.

⁴⁰ *Id.* at 35,995 (Recommended Policy 4).

⁴¹ See *id.* at 35,994 (noting that ex parte communications prior to an NPRM “are less likely to pose” the several potential “real and perceived” harms that generally arise from such communications, including (i) any perceived disparity in the amount of “access to agency personnel” enjoyed by various groups, (ii) a fear “that agency decisionmakers may be influenced by information that is not in the public rulemaking docket,” and (iii) the potential concern that “reviewing courts may be deprived of information that is necessary to fully and meaningfully evaluate the agency’s final action”).

⁴² See *id.* (Recommended Policy 2(c)-(d)).

⁴³ 82 Fed. Reg. at 45,775 (internal quotation omitted).

⁴⁴ *Id.*

proposed rule would no longer permit regulated parties to consent to waiver of the STB’s ex parte communications restrictions.⁴⁵ Thus, while the Board has relaxed some restrictions applicable to *informal rulemaking* to permit ex parte communications that are publicly docketed, the proposal expands in two ways the scope of communications it treats as “ex parte” in both *on-the-record* and informal rulemaking proceedings. In other words, the Board’s proposal is toughening its ex parte communications policies for the types of agency proceedings where such restrictions typically have been considered most appropriate—adjudications.⁴⁶

* * *

In its proposal to alter its ex parte communications procedures, the STB engages in a thoughtful effort to “balance the benefits of allowing ex parte communications with institutional concerns regarding transparency and fairness.”⁴⁷ The ability to engage in “face-to-face meetings” regarding its proposed rules will enable the STB to enjoy the benefits of “a more candid and potentially interactive dialogue of key issues and may satisfy the natural desire of interested persons to feel heard.”⁴⁸ By removing procedural hurdles to an efficient notice-and-comment process, this proposed rule will promote and support the Board’s efforts to conduct well-informed substantive rulemaking via the notice-and-comment procedures of the APA.

Respectfully submitted,

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⁴⁵ See *id.* at 45,778 (printing the Board’s proposed new 49 C.F.R. § 1102.2(a)(5), which omits the language regarding party consent included in the version of § 1102.2(a)(3) that is currently on the books).

⁴⁶ Cf. ANDREW F. POPPER ET AL., ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH 146 (2d ed. 2010) (“As a general rule, the prohibitions against ex parte communications that are in place for Article III courts do not apply in rulemaking pursuant to section 553(c). In fact, there is an expectation that such contacts will take place.”).

⁴⁷ 82 Fed. Reg. at 45,774.

⁴⁸ 79 Fed. Reg. at 35,994 (from the 2014 ACUS recommendations on ex parte communications).