

Department of the Interior Departmental Manual

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Series: Administrative Procedure

Part 318: Federal Register Documents

Chapter 5: Public Participation in the Rulemaking Process

Originating Office: Executive Secretariat and Office of Regulatory Affairs

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5.1 What does this chapter do? This chapter describes the steps you must take to ensure the opportunity for full public participation in the development of a rule. Appendix 1 to this chapter provides guidance on ex parte communications in informal rulemaking.

5.2 What public participation does the Administrative Procedure Act require?

A. When you develop, amend, or repeal a rule, the Administrative Procedure Act (APA)(5 U.S.C. 551 et seq.) requires you to:

- (1) Publish a notice of proposed rulemaking (a proposed rule) in the Federal Register; and
- (2) Allow the public a chance to comment on the rule before final adoption.

B. You must publish a proposed rule in all cases, unless the exemption in 5.3 applies.

5.3 When may I skip the proposed rule stage? You do not have to publish a proposed rule if you determine that notice and public comment are impractical, unnecessary, or contrary to the public interest (5 U.S.C. 553(b)(B)). In this case, you must explain the reasons for your determination in the preamble to the rule. (Note: Although section 553(a)(2) of the APA exempts rules relating to agency management or personnel, or public property, loans, grants, benefits, or contracts from this requirement, the Department discourages using this exemption.)

5.4 How long must I allow for public comment? You should allow the public a minimum of 60 calendar days after a proposed rule is published in the Federal Register to comment, unless a statute requires a longer comment period.

A. You may use a shorter period only in special cases requiring more timely action; in these cases, you must explain in the preamble the reasons for the shorter comment period.

B. For rules involving complex issues, or where the affected public is likely to have limited access to the Federal Register, you should consider allowing a longer comment period.

5.5 Can I provide confidentiality to commenters who request it? To the extent permitted by law (FOIA), you may withhold names and home addresses from the rulemaking record. Make certain that you use the statement provided in Appendix 2 to Chapter 4. Consult with your FOIA attorneys to determine whether you can withhold names and home addresses.

5.6 Can I accept late comments? The safest approach is to reject any comments on the substance of the rule, whether oral or written, that you receive after the close of the comment period.

A. If you do accept comments after the close of the comment period, you must enter them promptly into the public record and consider reopening the comment period.

(1) If the comments are critical to the rulemaking and you are likely to give them substantial weight in formulating the final rule, you should reopen the comment period.

(2) If the comments only provide background information or data on which you are not likely to rely, you may not need to reopen the comment period.

B. In deciding whether or not to accept late comments, the important consideration is whether all interested parties have been given a full and fair opportunity to comment on all significant issues in the rulemaking.

C. If you receive critical information near the end of the comment period, consider extending the comment period to allow the public an opportunity to comment on the information.

5.7 What is ex parte communication? An ex parte communication is oral or written communication:

A. Between an interested outside party and an agency official with authority to make decisions or recommendations about a rulemaking; and

B. Not reflected in the written record, and thus outside the knowledge of other interested parties.

5.8 Is ex parte communication forbidden? The APA does not prohibit ex parte communications. However, in a judicial challenge to a rulemaking, a court may find that an ex parte communication has fatally tainted the agency decision making on the rule. Therefore, you should avoid them wherever possible. If ex parte communications occur, you must use caution in accepting and relying on them.

5.9 How can I decide whether to accept an ex parte communication? Consider two principles in deciding whether to accept an ex parte communication:

A. You must have a complete administrative record reflecting the factual and policy bases for the rule adopted; and

B. Other parties must have a full opportunity to review and comment on material you use to develop the final rule.

5.10 If I accept an ex parte communication during the public comment period, what should I do? If you accept comments (either written documents or summaries of oral communications) and they contain significant information and argument that is not already part of the public rulemaking record, you should enter them promptly into the record. The administrative record must reflect all of the information upon which rulemaking decisions are made. There can be no distinction between the record relied on by decision makers and the written public administrative record.

5.11 What risk do I run by accepting an ex parte communication after the public comment period has closed? If you accept a comment after the public comment period has closed, there is a risk that you will receive significant new information. Such information should be made part of the rulemaking record, and fairness to other participants may make reopening the comment period advisable. For further guidance, see the June 1, 1994, memorandum from the Solicitor, which is attached as Appendix 1 to this chapter.

5.12 When should I publish a notice of intent or an advance notice? If a proposed rule is likely to be complex or controversial or to make major changes in an existing rule, it may be helpful to publish a notice of intent to propose rules or an advance notice of proposed rulemaking (ANPRM). A notice of intent or ANPRM must:

- A. State the need for and subject of the rule;
- B. Summarize the key issues related to the anticipated rulemaking; and
- C. Tell the public where to get further information and send comments.

5.13 What additional actions should I consider before publishing a rule? Additional actions that you should consider taking include:

- A. Holding public meetings or hearings (see 455 DM 1); note that some of these meetings may require you to follow the Federal Advisory Committee Act (5 U.S.C. App. 1)
- B. Sending press releases to newspapers of general circulation and other publications likely to be read by those affected;
- C. Directly notifying interested parties, including State, local, and tribal governments and small entities; and
- D. Placing paid advertisements in publications likely to be read by those affected.

5.14 What additional actions should I take if a rulemaking affects small entities? Under the Regulatory Flexibility Act, if a rule will have a significant economic effect on a substantial

number of small entities (see Appendix 2 to Chapter 3), you should make special efforts to involve interested small entities in developing the rule. You may adopt special procedures for soliciting public comment on a rule to help small entities participate in the rulemaking process.

APPENDIX 1 to Chapter 5

June 1, 1994

Memorandum

To: Secretary
Assistant Secretaries
Bureau Directors

From: Solicitor [s/ John D. Leshy]

Subject: Guidance on Ex Parte Communications in Informal Rulemaking

Ex parte communications are those written or oral communications between an interested outside party and an agency official that are not reflected in the written record. An outside party for this purpose includes anyone outside the agency, such as members of Congress, congressional staff, other federal agencies, state and local governments and the public. Ex parte communications do not include purely informational inquiries from outside about the status or substance of a proposed rule, but rather refer to information or opinions offered from outside the agency on matters relevant to the rule.

The Administrative Procedure Act (APA) does not address the subject of ex parte communications in **informal** rulemaking. The APA explicitly prohibits ex parte communications in **formal adjudicatory** proceedings (such as those involving FCC licenses), but this Department almost never engages in such proceedings.

Concern about ex parte communications in informal rulemakings came to the fore in the late 1970s when a few decisions by the federal court of appeals for the D.C. Circuit set aside final agency rules because of ex parte communications with agency decisionmakers. Subsequently, however, the D.C. Circuit limited these earlier decisions to situations where the rulemaking involved resolving competing claims for a valuable privilege, and thus resembled an "adjudication" even though it remained an informal rulemaking. The U.S. Supreme Court has never addressed this precise issue, but has said that courts should not subject agencies to procedural requirements not specified in the APA.

Under current law, then, ex parte contacts are not flatly barred during an informal rulemaking. Moreover, before an agency formally solicits public comment in a rulemaking (by publishing an advance notice of proposed rulemaking or proposed regulations where no ANPR is published),

there are no limits on ex parte communications. (But note that the Federal Advisory Committee Act - FACA - may be applicable to consultations with outsiders during the time the rulemaking is being conceived and drafted.)

Nevertheless, the legal principles applicable to this area suggest two reasons why some caution should be exercised in receiving ex parte contacts. The first is that the administrative record should reflect the factual and policy bases for the decision on a final rule. That is, the most important question asked by reviewing courts in cases challenging informal rulemakings is whether the record provides a rational basis for the rule. The second is the idea of fairness - that all outside participants/commenters in a rulemaking be afforded an opportunity to review and comment on important material relied on by the agency in developing the final rule.

In practical terms, these reasons for caution translate into the following principles:

1. The most foolproof course is never to accept ex parte communications during the time between the notice and the final rule. This is usually impractical.
2. The next safest course is to ensure that ex parte communications are received **only** during the formal comment period on the rule, **and** that they always be reduced to writing (either by the outsider offering it, or by the agency official receiving it) and made part of the rulemaking record. This too is often difficult.
3. The next safest course (and still, in my judgment, very safe) is to accept ex parte communications only during the formal comment period on the rule, but not reduce them to writing and make them part of the rulemaking record unless they contain significant information and argument that is not already part of the rulemaking record. Often, of course, you have no way of knowing during a comment period what information has been made part of the rulemaking record. Moreover, there is no talisman for determining "significance" in this context. The question to ask is whether the information received might, standing alone, influence the outcome of the final rule. If you think it might, then have it reduced to writing and made part of the record. In doubtful cases, erring on the side of placing the communication in the record is preferable.
4. A more problematic course is to accept ex parte communications **at any time** between the notice and the final rule, but not reduce them to writing and make them part of the rulemaking record unless they contain significant information and argument not already made part of the rulemaking record. A risk is that if significant new information (which is usually not known until the information is received and digested) is communicated after the comment period closes, fairness to other participants may make reopening the comment period advisable. Therefore a willingness to accept ex parte communications after the close of the comment period could result in significant delays in the rulemaking process.
5. The least safe course is to place no restrictions on ex parte communications. This is **not plainly illegal** under current legal interpretations. But it runs a risk of adverse court action, if it is learned that ex parte communications were a significant factor in the rulemaking outcome.

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Circumstances may vary from rulemaking to rulemaking, making general guidance difficult,¹ but number 3 above is the best place to start.

Two final cautions:

First, it is good practice to see to it that all written ex parte communications you receive are promptly placed in the agency's public rulemaking file. If the communication is received after the comment period closes, you should either return it with an explanation that it will not be included in the record, or treat it in the same manner as described for an oral communication in #4 above.

Second, if ex parte communications are accepted at some stage in the process, it is important to ensure that the agency decisionmakers are not just hearing from one side or narrow interest. The more the courts believe that an agency has not acted in a balanced or fair way in its process, the closer the judicial scrutiny of the agency rule. Thus holding a series of meetings with parties having only one interest in a rule, and not meeting with those with other interests, invites adverse judicial action. (Such meetings may also be subject to the Federal Advisory Committee Act.)

Finally, if you would like a fuller explanation, with legal citations, [the] Associate Solicitor for General Law [...] and [...] staff have prepared a written memorandum on the subject they can make available to you. They are also available to answer more specific questions on this subject or related ones, like FACA.

¹A (former) law professor can't write a memo without at least one footnote, so here goes: Particular statutes may create special rules; for example, some statutes in the area of Indian affairs require the Department to consult with Indian tribes. You should consult with the Solicitor's Office for guidance on whether such statutes modify the general principles expressed here.

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