

BEFORE THE POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

EX PARTE COMMUNICATIONS

Docket No. RM2016-4

**JOINT COMMENTS OF THE
ASSOCIATION OF MAIL ELECTRONIC ENHANCEMENT, THE AMERICAN
CATALOG MAILERS ASSOCIATION, INC., THE ASSOCIATION OF POSTAL
COMMERCE, THE DIRECT MARKETING ASSOCIATION, ENVELOPE
MANUFACTURES ASSOCIATION, EPICOMM, IDEALLIANCE, THE MAJOR
MAILERS ASSOCIATION, NATIONAL POSTAL POLICY COUNCIL, NEWS PAPER
ASSOCIATION OF AMERICA, PARCEL SHIPPERS ASSOCIATION, SATURATION
MAILERS COALITION, THE AMERICAN FOREST & PAPER ASSOCIATION, AND
THE NATIONAL ASSOCIATION OF PRESORT MAILERS**
(February 29, 2016)

The Association of Mail Electronic Enhancement (AMEE),¹ the American Catalog Mailers Association, Inc. (ACMA),² the Association of Postal Commerce (PostCom),³ the Direct Marketing Association (DMA), the Envelope Manufacturers Association

¹ AMEE's member companies represent mailers, associations, and supporting vendors who have a primary interest in increasing the value and utility of First Class Mail and are engaged in developing and/or promoting technology in the area of mail electronic enhancement.

² ACMA is a nonprofit corporation organized under the laws of the District of Columbia, and has its principal place of business in Providence, Rhode Island. ACMA is a membership organization of entities with significant interests in the catalog mailing industry, including catalog mailers, printers, paper companies, consultants, database marketing, and other service providers.

³ The Association for Postal Commerce is made up of direct marketing firms, printers, letter-shops, suppliers, logistic companies, parcel delivery firms and others who either use or support the use of mail and parcels for business communication and commerce.

(EMA),⁴ Epicomm,⁵ IDEAlliance,⁶ the Major Mailers Association (MMA),⁷ the National Postal Policy Council (NPPC),⁸ the News Paper Association of America (NAA),⁹ the Parcel Shippers Association (PSA)¹⁰ the Saturation Mailers Coalition¹¹, the American

⁴ EMA and GEA are a global organization of manufacturers of packaging, envelopes, forms and printing primarily used in physical commerce applications. The organization represents 60 percent of packaging and envelopes produced across 38 nations.

⁵ Epicomm—the Association for Leaders in Print, Mail, Fulfillment, and Marketing Services—is a not-for-profit business management association representing companies in the \$80+ billion graphic communications industry in North America. It provides industry advocacy, management training, and a comprehensive slate of business-building solutions for companies in an evolving market environment. It was created in 2014 through the merger of the Association of Marketing Service Providers (AMSP) and the National Association for Printing Leadership (NAPL)/National Association of Quick Printers (NAQP). Its founding associations have some 200 years of combined experience serving graphic communications companies of every size and specialty.

⁶ Idealliance® is a global community of more than 1,600 brand owners, agencies, publishers, premedia and print service provider companies, and their material suppliers and technology partners. A not-for-profit industry association, Idealliance provides media creators and technology communities the opportunity to collaborate to craft best practices, advance standards, and certify people, processes, and systems to achieve the highest performance in the creation, production and delivery of graphic communications – both digitally and in print. On July 1, 2016, Idealliance will merge with Epicomm, an association of more than 1,600 companies offering print, mail, fulfillment, and marketing services, under the name Idealliance, combining the building business solutions of Epicomm with the innovations in workflow processes and technologies of Idealliance.

⁷ MMA membership is comprised of companies that serve the communications, utilities, insurance, banking, financial services, healthcare, government and cable/satellite industries. Although there has been diversion to electronic channels, these industries still rely primarily on the USPS for the delivery of the statements, invoices, remittance payments and other business communications.

⁸ The National Postal Policy Council is an association of large business users of letter mail, primarily Bulk First-Class Mail using the Automation rate category, with member companies from the telecommunications, banking and financial services, insurance, and mail services industries. Comprised of 39 of the largest customers of the Postal Service with aggregated mailings of nearly 30 billion pieces and pivotal suppliers, NPPC supports a robust postal system as a key to its members' business success and to the health of the economy generally.

⁹ NAA is a nonprofit organization representing nearly 2,000 newspapers and their multiplatform businesses in the United States and Canada. NAA members include daily newspapers, as well as community weeklies, other print publications and online products. NAA's daily newspaper members use the U.S. Postal Service to distribute Total Market Coverage products (ad inserts to non-subscribers) at Standard Mail rates. The association's weekly newspaper members use the mail system for the delivery of their editorial product at Periodical rates.

¹⁰ PSA founded in 1953, PSA represents companies that sell and ship goods to consumers, and companies that support the parcel shipping industry. A list of PSA members is available on its website, www.parcelshippers.org. PSA's mission is to foster competition in the parcel delivery market. It creates value for its members by promoting the best possible service at the lowest possible costs. For competition to succeed it must be fair and PSA has consistently argued for a "level playing field" for the package delivery market.

¹¹ SATURATION MAILERS COALITION represents business that do shared mail programs, free papers that distribute by mail and coupon magazines. Our members so saturation mail programs that combine local, regional and national advertisers together in a regularly mailed advertising program that goes to all households in a specific market area. Most of our programs are weekly, but in some areas the mailings are monthly or bi-monthly. Our members are users of ECR Saturation mail and represent a combined circulation of more than 100 million homes throughout the United States

Forest and Paper Association (AF&PA),¹² and the National Association of Presort Mailers (NAPM)¹³ (collectively Joint Commenters) respectfully submit these comments on the proposed amendments to the Commission's rules concerning *ex parte* communications.¹⁴

I. Introduction

The Joint Commenters support the goal of promoting the transparency and integrity of proceedings before the Commission. The Joint Commenters are concerned, however, that the proposed amendments to the Commission's *ex parte* rules fail to recognize the value of informal communications between the Commission, the Postal Service, and other stakeholders in the context of informal rulemakings. In the leading case on *ex parte* communications the U.S. Court of Appeals for the District of Columbia circuit stated:

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 . . . the importance to 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 anticipate and share their plans for the future, and spur the provision of information which the agency needs.¹⁵

The introductory comments of the Order cite to the recommendations of the Administrative Conference of the United States and related academic literature and

¹² The American Forest & Paper Association (AF&PA) serves to advance a sustainable U.S. pulp, paper, packaging, tissue and wood products manufacturing industry through fact-based public policy and marketplace advocacy. The forest products industry accounts for approximately 4 percent of the total U.S. manufacturing GDP, manufactures over \$200 billion in products annually, and employs approximately 900,000 men and women.

¹³ NAPM is a nonprofit organization that represents mailers, both mail owners and mailing service providers who commingle, sort and prepare quality mailings inducted and compliant with work share requirements. Representing over 100 member companies mailing in 36 states, that collectively provide approximately 40% of the total First Class mail revenue and over 60% of the Full Service volume. NAPM member mail service provider companies interact with and perform mailing services for tens of thousands of clients and businesses that use postal mailing products.

¹⁴ See Docket No. RM2016-4, Notice of Proposed Rulemaking Regarding Ex Parte Communications, Order No. 3005 (Jan. 8, 2016)(Order).

¹⁵ *Sierra Club v. Costle*, 657 F.2d 298, 401 (D.C. Cir. 1981).

state that the proposed amendments are intended to bring the Commission's existing *ex parte* rules "up to date to be consistent with the recommended approach to agency treatment of *ex parte* communications."¹⁶ See Order at 2. As discussed below, however, in several important respects the proposed rules are inconsistent with the recommendations of the Administrative Conference, the controlling decisional law, and prevailing agency practice. That is because the proposed rules ignore the fundamental differences between adjudicatory, quasi-judicial proceedings and informal, legislative rulemakings. As a result, the proposed rules may inadvertently deprive the Commission of the opportunity for meaningful and needed interaction with the Postal Service and mailing industry stakeholders.

II. Discussion

A. The Proposed Rules Fail to Recognize Important Distinctions between Formal Adjudicatory Proceedings and Informal Rulemaking Proceedings

The Commission acknowledges that the Administrative Procedure Act only prohibits *ex parte* contacts in formal adjudications and formal rulemakings. Order at 2. It further acknowledges that the PAEA only requires such formality in nature of postal service cases under 39 U.S.C. 3661, and that the Commission has historically extended the same protection only to other adjudicatory proceedings, post office appeals and complaint cases, because of the nature of those proceedings. *Id.*

Nevertheless, the proposed rules would adopt a uniform policy for formal and informal proceedings before the Commission. The perceived advantage of applying a uniform policy to all docket types is that it will be the "simplest to understand and the most efficient to administer." Order at 3. The goals of simplicity and administrative efficiency should not work to the exclusion of the types of communications in informal rulemakings that enhance the quality of the Commission's decisions.

As stated by the court in *Sierra Club*:

¹⁶ See Esa L. Sferra-Bonistalli, *Ex Parte Communications in Informal Rulemaking* (May 1, 2014) (prepared for the Administrative Conference of the United States) (Final Report); Administrative Conference of the United States, Administrative Conference Recommendation 2014-4 (June 6, 2014)(Recommendation 2014-4).

Where agency action resembles judicial action, where it involves formal rulemaking, adjudication, or quasi-adjudication among “conflicting private claims to a valuable privilege,” the insulation of the decision maker 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.¹⁷

The proposal to treat all proceedings before the Commission the same ignores the fundamental differences among adjudicatory, quasi-judicial proceedings and informal, legislative rulemakings. Accordingly, the proposed rules fail to achieve a proper balance between the actual and perceived benefits and the actual and perceived harms of *ex parte* communications in the context of informal rulemakings. The proposed rules discount the benefits of *ex parte* communications and highlight the risks of harm (actual and perceived). As a result, the proposed rules may inadvertently deprive the Commission of the opportunity for meaningful and needed interaction with the Postal Service and mailing industry stakeholders.

B. The Definition of a “Matter Before the Commission” is Overbroad

The proposed rules prohibit all *ex parte* communications regarding matters before the Commission, subject to limited exceptions. Under proposed rule 3008.3(a), the Commission has the discretion to designate when a matter is before it, but “in no event later than the earlier of the filing of a request to initiate a proceeding or the Commission noticing a proceeding.” Order at 13. This is a reasonable approach that is consistent with the recommendations of the Administrative Conference and the prevailing agency practice.

Proposed rule 3008.3(b) states that “a matter is also before the Commission at such time as the person responsible for the communication has knowledge that a request to initiate a proceeding is expected to be filed.” Order at 13. Proposed rule 3008.3(b) is overbroad. It is inconsistent with the recommendations of the Administrative Conference and with prevailing agency practice. The Administrative Conference report and recommendations are clear that a careful balancing of the

¹⁷ 657 F.2d at 400.

benefits versus the harm of *ex parte* communications in informal rulemakings requires an examination of the stage of the rulemaking when the communication is made. Final Report at 69-77.

Communications prior to the filing of a notice of proposed rulemaking (NPRM) are deemed the most beneficial and least suspect. Pre-NPRM communications are beneficial because they allow the agency to gather information as it is formulating the NPRM proposal. Pre-NPRM communications are the least suspect because the agency has the opportunity to disclose such communications, to the extent it relies on them, in the NPRM. *Id.*, at 69-72. Accordingly, the Administrative Conference specifically recommends that “[a]gencies should not impose restrictions on *ex parte* communications before the NPRM is issued.” Recommendation 2014-4 at 6. Rather, the preferred approach is for the agency to permit pre-NPRM *ex parte* communications, but disclose them, as appropriate. *Id.*

As noted in Recommendation 2014-4, the restriction on communications prior to the publication of the proposed rule is also inconsistent with the prevailing guidance directing federal agencies “to review all . . . administrative *ex parte* rules and eliminate any that restrict communication prior to the publication of a proposed rule.”¹⁸

The Administrative Conference recommendation also reflects the consensus view of federal agencies. A survey of federal agency *ex parte* communications policies confirms that proposed rule 3008.3(b) is an outlier. The Joint Commenters have been unable to find any other federal agency that has adopted such an expansive and subjective definition of a matter before the agency. No other agency that the Joint Commenters are aware of has adopted a policy where the *ex parte* rules apply to pre-NPRM communications based on the subjective intent of a party to make a future filing.

Proposed rule 3008.3(c)(4) attempts to mitigate the obvious concerns with the subjectivity and indefiniteness of proposed rule 3008.3(b). Order at 14. But terms such as “mere potential,” “actively preparing,” “reasonable period of time” are undefined and ambiguous. And uncertainty in the face of the potentially draconian penalties that could apply to a pre-NPRM *ex parte* communication in an informal rulemaking will likely have

¹⁸ Recommendation 2014-4 at 3, n.7 (citing Memorandum for Heads of Departments and Agencies, Regulatory Reinvention Initiative (May 4, 1995)).

a chilling effect on beneficial information exchanges among the Commission, the Postal Service, and interested parties. Joint Commenters therefore submit that the Commission should delete proposed rule 3008.3(b).

C. The Proposed Rules Would Unnecessarily Impair Agency Decision Making

The permit but disclose model recommended by the Administrative Conference and embraced by most other federal agencies allows agencies to obtain the maximum benefit of stakeholder input, while ensuring that informal rulemaking proceedings are not tainted by the appearance of or actual improper influence.

In contrast, proposed rule 3008.5(b) prohibits the Commission from “rely[ing] upon any information obtained through *ex parte* communications” in both informal rulemakings and formal proceedings before the Commission. Order at 16. Even assuming a categorical prohibition is appropriate in the context of a formal, quasi-judicial proceeding, the rules as proposed are too blunt an instrument for informal rulemakings.

As noted by the Commission, neither the APA nor the controlling decisional law establishes a ban on *ex parte* communications in the context of informal rulemakings. See Order at 2. The proposed prohibition on *ex parte* communications in informal rulemakings is inconsistent with the long-standing recommendation of the Administrative Conference and the prevailing practice among other federal agencies. Recommendation 2014-4 at 2 (“general prohibitions 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 framework established by 5 U.S.C. 553” (citing Admin. Conf. of the United States, Recommendation 77-3, Ex Parte Communications in Informal Rulemaking Proceedings, 42 Fed. Reg. 54,253 (Oct. 5, 1977))).

As detailed in the Final Report many agencies welcome *ex parte* communications in informal rulemakings and have adopted policies that explicitly recognize their value. See *e.g.*, Final Report at 43 (Federal Communication Commission’s (FCC) *ex parte* rules do not apply to pre-NPRM communications in informal rulemakings (47 C.F.R. § 1.415); “[a]gency personnel expressed the view that

ex parte communications help focus the Commission on issues that remain unresolved . . . and help produce a focused solution.”), 46 (Consumer Financial Protection Board’s (CFPB) *ex parte* rules do not apply to pre-NPRM communications in informal rulemakings; “as a general matter, CFPB wants to hear from consumers and listens to all who communicate with it.”), 48 (Environmental Protection Agency (EPA) *ex parte* rules do not apply to pre-NPRM communications in informal rulemakings; “[r]obust dialogue with the public enhances the quality of [EPA] decisions.”) and 61 (Food and Drug Administration (FDA) *ex parte* rules do not apply to pre-NPRM communications in informal rulemakings; the agency “welcomes assistance in developing ideas for, and in gathering the information to support, notices and regulations.”). Nothing in the Order explains why informal rulemaking proceedings before the Commission should be treated differently.

The practical effect of the proposed rules will be to limit the Commission’s access to important and timely information that may inform complex legal, economic, and technical issues. For example, under the proposed rules, even if the Commission disclosed a pre-NPRM *ex parte* communication and other interested parties were afforded the opportunity to respond, the Commission would be barred from relying on the information in formulating a policy position. That result does not serve the interests of the Commission, the Postal Service, industry stakeholders, or the public. The Commission’s proposed rules should be revised, consistent with APA requirements for reasoned decision making, to allow the Commission to permit and disclose any *ex parte* communications that it relies on in the context of an informal rulemaking proceeding.

D. The Proposed Penalty Provisions Are Punitive as Applied to Informal Rulemakings

The penalty provisions highlight the practical limitations of a one-size-fits-all policy. The proposed rules effectively ban all *ex parte* communications in all proceedings before the Commission. See Order at 3. Under proposed rule 3008.7(a), knowing violations of the *ex parte* rules may result in a party having to show cause why their claim should not be dismissed. See Order at 17. Proposed rule 3008.7(b) states that the Commission may treat a violation of the *ex parte* rules as “sufficient grounds for

a decision adverse to a party.” Id. These penalties may be appropriate in the context of an improper *ex parte* contact in an adjudicatory proceeding, but they are excessive in the context of an informal rulemaking. The penalties would be especially punitive in the case of a pre-NPRM communication where the Commission has the opportunity to disclose the substance of the communication and give other interested parties the opportunity to respond.

As discussed above, the penalty provisions are also out of step with the recommendations of the Administrative Conference and the prevailing practice among other federal agencies. The Commission should revise its rules to adopt a permit but disclose approach for informal rulemakings. The broad restrictions and severe penalties set out in the proposed rules should be reserved for more formal proceedings before the Commission.

III. Conclusion

The Joint Commenters appreciate the Commission’s consideration of these comments, and urge the Commission to revise its proposal consistent with the recommendations provided in this submission for the reasons stated.

Respectfully submitted,

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