

UNITED STATES DEPARTMENT OF AGRICULTURE  
AMS INSTRUCTION

**FEDERAL GRAIN INSPECTION SERVICE  
FGIS DIRECTIVE 1521.1**

ACTION BY: Office of the Administrator and  
Division Directors, AMS, FGIS, and P&SA

Prohibitions on Ex Parte Communications

I PURPOSE

This Instruction, provides guidelines for the Agricultural Marketing Service (AMS), the Federal Grain Inspection Service (FGIS), and the Packers and Stockyards Administration (P&SA) for the handling of situations in which ex parte communications are prohibited.

II AUTHORITY

Public Law 94-409 (the "Government in the Sunshine Act") amended the Administrative Procedure Act by placing additional restrictions on ex parte communications. A copy of the Government in the Sunshine Act is attached as Exhibit A. AMS regulations concerning ex parte communications are attached as Exhibit B.

III DEFINITIONS

A An ex parte communication, as defined in the Act, is "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given."

1 The ex parte restrictions in the Government in the Sunshine Act apply to the merits of formal rulemaking processes (those in which formal hearings are required) and adjudicatory processes, conducted in accordance with the Administrative Procedure Act, in which a decision is based upon evidence from a public hearing record. Ex parte restrictions covered in this Instruction do not apply to informal rulemaking.

2 The prohibition against ex parte communications commences no later than at the time a hearing is announced and continues until a final decision is issued. Prior to the announcement of hearing, to gain information and perspective to determine the need for a formal hearing or adjudication, employees are free to discuss issues through correspondence, public meetings, special briefings, conferences, etc. Records of such prehearing actions may be made part of the formal hearing record.

3 A communication is not ex parte if:

a The person making it placed it on the public record at the time it was made; or

b All parties to the proceeding had adequate advance notice allowing them to be present and to respond when the communication is made.

B Reasonable advance notice implies a period of time adequate to permit other parties to be present and to respond when the communication is made.

C Public record of a proceeding means the public docket, transcript of proceedings, or equivalent file containing all materials relevant to the case and avail to the parties and the public generally.

D Interested party means any individual or other person with an interest in the Agency proceeding that is greater than the general interest of the public as a whole. The term includes, but is not limited to, parties involved in the proceeding, competitors, public officials, and nonprofit or public interest organizations and associations with a special interest in the matter regulated. A member of the public at large who expresses a casual or general opinion about a pending proceeding would not necessarily be an "interested party."

E Decisional line means the Agency employees or other individuals who are, or who may reasonably be expected to be, involved in the Agency's deliberations. If the Agency Administrator or a Division Director is the decisionmaker, the decisional line normally would be the Agency employees involved in the deliberations preceding the decision. If an administrative law judge is the decisionmaker, the Agency employees involved in the proceeding would be "interested parties." The more extended a decisional line becomes, the more difficult it will be to avoid ex parte communications.

F Merits of a case, broadly construed, means any discussion or communication concerning the substance of a proceeding which could affect an Agency's decision.

1 Individuals initiating communication with Agency employees in the decisional line concerning the merits of a case should be advised of the prohibition on ex parte communications (see Exhibit C, attached).

2 Inquiries about procedure or requests for status reports are not considered discussions of merit or substance. A general background discussion about an entire industry, not directly related to a specific agency proceeding involving a member of that industry, would not necessarily constitute an ex parte discussion of merit. However, because such a discussion could be a subtle attempt to influence a decision, a Judgment will have to be made whether a particular communication could affect the decision. In doubtful cases, it should be treated as an ex parte communication.

#### IV RESPONSIBILITIES

A Division Directors, AMS and FGIS, and the Executive Assistant to the Administrator, P&SA, shall:

1 Identify all hearing and adjudicatory processes subject to ex parte communication restrictions.

2 Determine when to apply ex parte restrictions. Restrictions on ex parte communications must begin no later than the time the notice of hearing or adjudication is announced. However, ex parte restrictions may begin at an earlier date, such as when a hearing or adjudication is contemplated.

3 Specify decisional lines and, when the notice of hearing is published in the Federal Register, also publish the list of Agency, Division, and other Departmental officials or organizational units in the decisional line. If the decisional line changes, announce the changes in an amendment to the notice of hearing, to be published in the Federal Register.

4 Prepare for timely distribution to identifiable interested parties a statement of the Agency's position which respect to ex parte communications. (See example of such a statement in Exhibit C, attached.)

5 Train all decisional line employees in the recognition of ex parte communications and appropriate remedial action.

B Employees in the decisional line shall:

1 Avoid participating in any ex parte communications.

2 Advise any interested party attempting to initiate an ex parte communication of the prohibitions against such communications.

3 Place ex parte communications on the public record by submitting to the hearing clerk:

a A copy of any written ex parte communication.

b A memorandum stating the substance of any oral ex parte communication.

c Copies of oral or written statements made in response to such communications.

#### V PENALTIES AND SANCTIONS

Knowingly engaging in ex parte communication is, to the extent consistent with the interests of justice, sufficient grounds for a decision on the merits adverse to the party who committed the violation. Other sanctions are:

A Censure of an offending party or dismissal from the proceedings.

B Barring an attorney from practicing before the Agency.

#### VI COORDINATION WITH OFFICE OF THE GENERAL COUNSEL

Close coordination must be maintained with the Office of the General Counsel in all matters and questions concerning prohibitions on ex parte communications. Interpretation of the Government in the Sunshine Act is not yet well developed; ex parte restrictions will continue to be clarified by court actions and precedent.

/s/Irving W. Thomas  
Deputy Administrator

Attachments

PLEASE CONTACT THE ISSUANCE STAFF ON 301-734-5359 FOR COPIES OF THE ATTACHMENTS