

SUMMARY OF FCC EX PARTE RULES GOVERNING CONGRESSIONAL COMMUNICATIONS

In some types of FCC proceedings, Congressional communications with the Commission or any FCC staff are prohibited unless the communication is served on the parties or the parties are invited to be present. In other proceedings, communications may need to be placed on the public record. Basic information about such "ex parte presentations" and the Commission's rules is discussed below.

I. What is an ex parte presentation?

Under FCC rules, an ex parte presentation is any communication (oral or written) that concerns the merits or outcome of a proceeding or any issue in the proceeding **and** is not served on the parties, or if oral, is made without an opportunity for them to be present.

Constituent correspondence. A letter to the Commission from a member of Congress that attaches or forwards constituent correspondence concerning the merits of a proceeding, and that is not served on the parties to the proceeding, is an ex parte presentation.

Status inquiries. An unserved letter or call from a member of Congress or staff that is only a status inquiry (and has no attachments or content addressing the merits) is **not** an ex parte presentation and is **not** prohibited by the FCC's ex parte rules. It is permissible for a status inquiry to express concern that a proceeding be resolved expeditiously to avoid administrative delay. However, such an inquiry **will** be considered an ex parte presentation if it: 1) expresses a view as to a date by which the proceeding should be resolved; or 2) gives reasons other than administrative delay as to why the proceeding should be resolved expeditiously. Depending on the type of proceeding involved, it may be necessary to serve the parties with copies of the presentation.

Examples:

- Member X writes to the Commission about a pending application and does not serve the parties. The Member asks to be informed of the status of the application and expresses concern that the application has been pending for an excessive period of time. The Member's letter is a status inquiry and not a presentation.
- The Member requests that the application be acted on by the end of the year or states that expeditious action is needed because the applicant has business arrangements that require prompt action. The Member's letter is a prohibited presentation.
- The Member asks about the status of the application and attaches a "fact sheet" directed to the Member and prepared by the applicant. The "fact sheet" argues that the Commission should grant the application. The Member's letter is a prohibited presentation.

II. When are ex parte presentations prohibited?

The FCC's ex parte prohibitions affecting Congress generally apply only in adjudicatory-type proceedings and are based on provisions of the Administrative Procedure Act and court decisions concerning due process rights. In such proceedings, written presentations to the Commission should be served on the parties and oral communications should not be made unless the parties are invited to be present. If an oral or written ex parte communication by Congress is made without following these procedures, the communication violates the Commission's rules. When such violations occur, all parties are notified of the communication, the substance of the communication is not considered in the proceeding, and sanctions may be imposed on any parties who solicited such presentations.

Examples:

- Member X writes to the Mass Media Bureau addressing the issues concerning a pending application. The application has been opposed by a petitioner-to-deny, but the Member does not serve the letter on the petitioner. The letter will be referred to the Office of General Counsel, which will notify the Member, the applicant, and the petitioner that the letter is a prohibited ex parte presentation that will be put in a file associated with but not part of the record in the application proceeding.
- If the Member makes a phone call discussing the merits of the application, the FCC staff must prepare a memorandum summarizing the communications, which will be referred to the office of General Counsel and treated in the same manner as prohibited written ex parte presentations.

Adjudicatory proceedings. The specific types of proceedings in which ex parte communications are generally prohibited include radio and television licensing and other application proceedings, license transfer proceedings, broadcast allotment proceedings, waiver proceedings, complaint proceedings and enforcement proceedings against particular parties. In such proceedings, called "restricted proceedings," written presentations may not be made unless they are served on all the parties and oral presentations may not be made unless the parties are afforded an opportunity to be present. On occasion, the Commission may determine that adjudicatory proceedings should be subject to the more relaxed ex parte procedures described below for rulemaking proceedings. You should check with the Commission to determine the status of the proceeding under the rules. (Telephone numbers of FCC contacts are provided below.)

III. What ex parte procedures apply in general rulemakings?

Congressional communications concerning the merits of rulemaking proceedings of general applicability are permissible; the communications need not be served on the parties and oral communications may also be made. However, if the presentations are of substantial significance and are clearly intended to affect the ultimate outcome, the **FCC staff must place written contacts (and a summary of oral contacts) in the public record.**

Examples:

- Member X writes to the Chairman or the other Commissioners about a pending rulemaking. The Member expresses the view that the proposed rule would be contrary to Congress' intent in enacting the Telecom Act. The staff will place two copies of the letter in the record of the rulemaking.
- Member X calls the Chairman and orally states the same views. The staff will place an original and a copy of a memorandum summarizing the contents of the call in the record.

IV. Does the FCC's "Sunshine Rule" apply to Congress?

In the week before an open Commission meeting, the Commission's "Sunshine Rule" prohibits **all** contacts with the Commission concerning the matters to be decided at the meeting, until the text of the Commission's decision is publicly released. Except when a proceeding involves a restricted matter, Congress is **not** subject to the FCC's Sunshine Rule.

However, even when the contact is permissible, the Commission will still disclose the contact under its normal procedures. For example, as discussed above, if the Congressional contacts are of substantial significance and are clearly intended to affect the ultimate outcome of the rulemaking, the **FCC staff must place written contacts (and a summary of oral contacts) in the public record.**

Example:

- At an open Commission meeting, the Commission adopts a Report and Order in a rulemaking. Before the Report and Order is publicly released, Member X calls the Chairman or another Commissioner to confirm that language opposed by the Member will not be included in the released version of the rule. The staff will place an original and one copy of a memorandum summarizing the phone call in the record of the rulemaking.

V. Whom can I contact for assistance?

To determine when ex parte presentations are prohibited in any particular proceeding, you may contact the **FCC's Office of General Counsel at (202) 418-1720 or the FCC's Office of Legislative Affairs at (202) 418-1900.**