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SERVICE DATE – APRIL 14, 2026

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 782

PETITION FOR RULEMAKING—AMENDMENTS TO REGULATIONS GOVERNING EX  
PARTE COMMUNICATIONS

Decided: April 10, 2026

AGENCY: Surface Transportation Board.

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: The Surface Transportation Board has received a petition asking it to revise and streamline the rules governing ex parte communications set forth in 49 CFR part 1102. The Board is considering several changes to its ex parte regulations and seeks comment from interested persons on the changes being considered. The Board also invites commenters to identify additional options for revisions to the Board's ex parte communications rules.

DATES: Comments are due by May 29, 2026.

ADDRESSES: Comments and replies may be filed with the Board either via e-filing or in writing addressed to: Surface Transportation Board, Attn: Docket No. EP 782, 395 E Street S.W., Washington, DC 20423-0001. Comments and replies will also be posted to the Board's website.

FOR FURTHER INFORMATION CONTACT: Jonathon Binet at (202) 915-4348. If you require accommodation under the Americans with Disabilities Act, please call (202) 245-0245.

SUPPLEMENTARY INFORMATION: On May 16, 2025, the Association of American Railroads (AAR) filed a petition to institute a proceeding under 49 CFR 1110.2(b) to revise and streamline the rules governing ex parte communications set forth in 49 CFR part 1102. The Private Railcar Food and Beverage Association (PRFBA) and the Freight Rail Customer Alliance (FRCA) submitted replies in opposition to the petition on June 5, 2025. The Board issued a decision on September 11, 2025, instituting a proceeding to consider changes to the existing rules. Pet. for Rulemaking—Amendments to Reguls. Governing Ex Parte Commc'ns, EP 782, slip op. at 1 (STB served Sept. 11, 2025). Notice of this decision was published in the Federal Register on September 11, 2025. (90 Fed. Reg. 44140). The Board is seeking comment on several possible changes to its rules governing ex parte communications and soliciting additional ideas regarding potential modifications.

## BACKGROUND

### Current Rules and Policies on Ex Parte Communications

The Board's existing regulations define an "ex parte communication" as "an oral or written communication that concerns the merits or substantive outcome of a pending proceeding; is made without notice to all parties and without an opportunity for all parties to be present; and could or is intended to influence anyone who participates or could reasonably be expected to participate in the decision." 49 CFR 1102.2(a)(5). The definition of "ex parte communication" covers communications made by nonparties to a proceeding as well as communications by parties, as any communications concerning the merits or the substantive outcome of a case have the potential to influence decisions. See Ex Parte Commc's in Informal Rulemaking Proc., EP 739, slip op. at 6 (STB served Feb. 28, 2018). The Board's regulations provide that in a proceeding before the Board, a "party" is a complainant, defendant, applicant, respondent, protestant, intervener, petitioner, or other person permitted or directed by the Board to participate in a proceeding. 49 CFR 1101.2(d). Persons on the docket service list merely for the purpose of receiving copies of Board releases are not considered parties, and persons who are merely signing certificates of support or witnesses at oral hearings or modified procedure proceedings are not considered parties unless they are otherwise a party to the proceeding. Id.

Ex parte communications with Board members and staff are generally prohibited, and violations are subject to sanctions. 49 CFR 1102.2(c) & (f). However, the Board's rules except some ex parte communications from this general prohibition. Section 1102.2(b) identifies several categories of communication that are not prohibited and do not need to be disclosed on the public record. As relevant here, these exceptions cover any communications that occur during informal rulemaking proceedings prior to the issuance of a notice of proposed rulemaking (NPRM) and any communications that the Board formally determines may be made on an ex parte basis. 49 CFR 1102.2(b)(1)-(2).

Additionally, section 1102.2(g) allows Board members to participate in ex parte meetings during prescribed periods after the issuance of an NPRM. Section 1102.2(g)(1) permits ex parte meetings from the date an NPRM is served until a cutoff date 20 days before the deadline for reply comments set forth in the NPRM. These meetings are subject to the disclosure requirements of section 1102.2(g)(4), which require prompt written, public disclosure of the substance of the ex parte communications. Although each meeting must be scheduled with a Board member's office, members may delegate their participation in these meetings to Board staff. See 49 CFR 1102.2(g)(1)-(2).

Finally, in the ICC Termination Act of 1995, Pub. L. No. 104-33 88, 109 Stat. 803 (ICCTA), Congress permitted, but did not require, the Board to entertain ex parte communications in proceedings related to the consolidation, merger, or acquisition of control of a railroad where at least one Class I railroad is involved in the transaction. 49 U.S.C. 11324(f). Consistent with this congressional grant of discretion, the Board adopted a policy of not entertaining ex parte communications in railroad merger proceedings. See Pet. of Fieldston Co. to Establish Procs. Regarding Ex Parte Commc's in R.R. Merger Proc. (Fieldston), 1 S.T.B. 1083, 1085-86 (1996).

### AAR's Petition

AAR's petition seeks six changes to the Board's ex parte rules. AAR describes its first three requests as seeking clarifications to the ex parte rules and argues that the proposed regulatory amendments would be consistent with practices at other agencies. (Pet. 6-9.) AAR first asks the Board to add language to clarify that the ban on ex parte communications does not prohibit communications occurring in any proceeding regarding routine, procedural matters. (*Id.* at 6.) AAR argues that explicitly permitting these communications will "provide clear guideposts to all stakeholders." (*Id.*) AAR next asks the Board to revise the existing regulatory language to clarify that communications with Board staff concerning submitted evidence and compliance with orders seeking additional information are permissible, subject to the disclosure requirements in 49 CFR 1102.2(g)(4). (Pet. 6-7.) AAR argues that identifying an explicit mechanism to address clarifying questions would allow both parties and Board staff to quickly resolve questions about orders requesting supplemental evidence, or evidence submitted by parties, without the need for time-consuming decisions, motions, or responsive filings. (*Id.* at 7.) In its third request, AAR asks the Board to revise section 1102.2(b) to explicitly permit ex parte communications in uncontested proceedings involving only one party, such as petitions for exemption or petitions for declaratory order. (Pet. 7-9.) AAR argues that this revision would provide "much needed clarity." (*Id.* at 8.)

AAR's petition next requests a regulatory amendment related to the Board's Fieldston policy. AAR asks the Board to change the regulatory text to state that ex parte communications are permissible in transactions involving Class I railroads, subject to the disclosure requirements in 49 CFR 1102.2(g)(4). (Pet. 9.) In support of this request, AAR argues that the efficiency concerns underpinning the Board's current policy are no longer valid because the section 1102.2(g)(4) disclosure process requires stakeholders, rather than the Board, to draft and submit documentation of ex parte communications. (Pet. 9-10.) AAR argues that the Board can further address efficiency concerns by using the discretion afforded by 49 U.S.C. 11324(f) to entertain only those ex parte communications that "would be useful for efficient and timely decision-making." (Pet. 10.) AAR contends that the disclosure process in section 1102.2(g)(4) will effectively address fairness and transparency concerns for any ex parte communications that the Board opts to entertain, without complicating judicial review, and notes that other agencies employ similar methods of documenting ex parte communications. (Pet. 10 & n.36.)

Finally, AAR's petition seeks two changes to the ex parte meeting rules for informal rulemaking proceedings set forth in section 1102.2(g). (Pet. 11-15.) AAR contends that the existing processes inhibit potentially useful communications between parties and the agency and argues that both of the requested changes are consistent with practices at other agencies. (*Id.*) AAR first asks the Board to revise 49 C.F.R. 1102.2(g)(1) to allow ex parte communications between the public and Board staff, subject to the same disclosure requirements that govern communications with Board Members. (Pet. 11.) AAR asserts that obtaining a formal delegation is unnecessarily time-consuming and further argues that allowing the public to meet directly with Board staff without involving a Board member would promote efficiency and improve decision making. (Pet. 11-12.) AAR also asks the Board to revise the existing regulations to extend the cutoff date for ex parte communications in informal rulemakings for a

prescribed period of time after reply comments are filed, (*id.* at 12), and provide a “modest opportunity” for written comments on the meeting summaries, (*id.* at 15). AAR argues that the existing cutoff functionally limits the time window for ex parte meetings to a short and, depending on the length of the reply period, sometimes nonexistent timespan beginning after opening comments are due and ending 20 days before replies are due. (Pet. 12.) AAR asserts that this compressed schedule burdens both the Board and its stakeholders by making it “difficult” to discuss ideas raised in other parties’ opening comments with Board members in ex parte meetings, and “utterly impossible” to discuss arguments or evidence presented in reply comments. (Pet. 13-14.) AAR notes that the Board has waived this deadline in the past to permit ex parte discussions with stakeholders after the end of the comment period and suggests that doing so permanently would give the Board flexibility in future proceedings. (Pet. 14-15.)

### Comments on AAR’s Petition

The Board received replies to AAR’s petition from FRCA and PRFBA. FRCA and PRFBA oppose AAR’s petition, arguing that the regulatory changes AAR requests are unnecessary and likely to reduce transparency in Board proceedings. (FRCA Reply 1-2; PRFBA Reply 1.) FRCA and PRFBA both argue that Board regulations already allow status and procedural inquiries because 49 CFR 1102.2(a)(5) defines “ex parte communications” as “an oral or written communication that concerns the merits or substantive outcome of a pending proceeding.” (FRCA Reply 1; PRFBA Reply 1.)

FRCA further argues that the other clarifications requested in AAR’s petition are unnecessary. (FRCA Reply 1.) FRCA asserts that the Board’s Office of Public Assistance, Government Affairs, and Compliance (OPAGAC) staff already accommodates parties’ needs for clarifying communications regarding submitted evidence and Board orders, and questions the need for ex parte communications in proceedings involving only one party because such proceedings are typically adjudications that must take into account the interest of the public. (*Id.* at 1-2.) FRCA further argues that direct access to Board staff in uncontested proceedings may reveal information that proves beneficial (to certain parties) in contested matters, thereby “creating or exacerbating an already unlevel playing field.” (*Id.* at 2.) FRCA raises similar concerns about AAR’s request to allow ex parte communications in merger transactions involving Class I railroads, arguing that the suggested change would be inappropriate due to the inherently larger impact on shippers, competitors, and the public interest. (*Id.*) Finally, FRCA argues that extending deadlines and expanding staff roles for ex parte communications in informal rulemaking proceedings would encourage more well-resourced participants to save their strongest arguments and responses for direct communications with the agency, rather than presenting them in written comments that the public can review and respond to. (*Id.* at 2.)

PRFBA also argues that AAR’s petition is inconsistent with the policy reasons underlying the existing limitations on ex parte communications. (PRFBA Reply 1.) PRFBA asserts that the Board’s ex parte communication rules are intended to promote impartial decision-making, ensure due process in Board proceedings, and maintain public trust in the Board’s adjudicatory system. (*Id.* at 2.) PRFBA contends that because ex parte communications allow one party to discuss issues or present information without giving the opposing party an opportunity to respond, and because engaging in ex parte communications creates an appearance

of impropriety, AAR's petition is inconsistent with the Board's policy goals and will erode public trust in the Board. (*Id.*)

## DISCUSSION

Consistent with its authority in 49 U.S.C. 1321 to prescribe regulations, the Board is exploring whether and how best to modify its regulations to better leverage the benefits of ex parte communications while minimizing or eliminating the potential harms. AAR's request for modifications to the ex parte rules raises issues that the agency began to explore in May 2025. Vice Chairman Schultz led a series of informal listening sessions with practitioners as part of an effort to streamline the Board's processes, and the recommendations generated during these meetings included action items focused on ex parte communications.<sup>1</sup>

The Board has considered AAR's petition and the comments submitted by FRCA and PRFBA. At this time, the Board does not intend to move forward with two of the requested modifications in AAR's petition. Specifically, AAR's request to revise section 1102.2(b) to explicitly permit ex parte communications in uncontested one-party proceedings is not necessary. AAR's examples in support of this modification all involve communications between the agency and the single party before it. (Pet. 7-8.) But these communications do not fit the definition of ex parte communications. To be ex parte, a communication must be made "without notice to all parties and without an opportunity for all parties to be present." 49 CFR 1102.2(a)(5). When the sole party in a proceeding communicates with the Board, there is no other party without an opportunity to be present. Although AAR notes that the Board does not engage in these communications during petition for exemption and declaratory order proceedings, (Pet. 7-8), there is oftentimes reason to be cautious when another party is likely to join the case, but has not yet filed pleadings. For example, in declaratory order proceedings, it is often clear from the petition that another party will join the matter and reply in opposition. In this setting, entertaining substantive communications beyond the written comments from the original filer before the reply period ends could raise fairness concerns, even if the early communication does not technically qualify as ex parte. In light of the clarifications in this decision, the Board will consider comments as to whether amending the existing regulatory language would provide further clarification and guidance to stakeholders.

The Board also does not intend to modify the regulation to affirmatively allow ex parte communications in merger transactions involving Class I railroads. AAR's request would require the Board to reverse its longstanding policy of not entertaining ex parte communications in railroad merger proceedings. See *Fieldston*, 1 S.T.B. 1085-86. While the option for parties to seek a waiver of the ex parte prohibition in *Fieldston* remains available, the Board is unpersuaded that a wholesale reversal of *Fieldston* is appropriate.

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<sup>1</sup> See STB Press Release No. 25-22, STB Gathers More Than 100 Ideas From Legal Practitioners to Streamline Board Processes, <https://www.stb.gov/wp-content/uploads/PR-25-22.pdf> (identifying "ex parte communications and the use of staff liaisons" as action item for Board consideration).

First, as a practical matter, allowing ex parte communications subject to the section 1102.2(g)(4) disclosure process in all Class I transactions, especially across all issues and without a specified timeframe, is likely to complicate such proceedings, which are subject to specific statutory timelines. See 49 U.S.C. 11325(a), (b)(3), (c)(3), & (d)(2); Fieldston, 1 STB at 1085. Although section 1102.2(g)(4) requires stakeholders to summarize ex parte communications, Board members and staff must still review each summary as well as the responses it generates, which may be numerous in light of the high level of public interest in merger proceedings involving Class I railroads. Whether such an efficiency tradeoff is appropriate is best left to a case-by-case waiver determination, where the Board can consider the complexity of the case and other factors, such as the scope of the waiver request, in considering whether to allow ex parte meetings.

AAR suggests that the Board can manage these potential impacts by entertaining only those ex parte communications that would increase efficiency and declining the rest, consistent with the discretion afforded by 49 U.S.C. 11324(f). AAR does not explain how the Board should determine which ex parte communications within a proceeding would increase efficiency before the communications are made. Moreover, given that the record does not suggest a workable, appropriate mechanism the Board could apply in this context, differentiating between communications within a rail merger proceeding also risks undermining fairness in the Board's procedures by giving the appearance of unequal access. For example, it is not clear if the differentiation here would involve some parties being denied meetings and others being granted, which is generally not the case today in the context of informal rulemaking ex parte meetings and may not arise if the Board were to adopt other changes suggested by the petition. In Fieldston, the Board observed that allowing any ex parte proceedings in merger proceedings "would likely lead to entertaining ex parte communications from all interested parties." 1 S.T.B. at 1084-85.

The disclosure process outlined in section 1102.2(g)(4) is certainly helpful but may not always fully remedy the transparency and fairness concerns outlined in Fieldston. See 1 S.T.B. at 1085 (stressing the importance of public confidence in the fairness of the merger process). Transactions involving Class I railroads carry significant, wide-ranging public interest implications, resulting in increased public scrutiny of the Board's proceedings. In this context, there are transparency, fairness, and other benefits from existing ex parte limitations. The Board is better able to consider any implications for the benefits of existing limitations against any efficiency gains and other potential benefits of allowing ex parte communications in the context of waiver requests in individual proceedings.

Thus, the Board is not persuaded that ex parte communications are broadly appropriate in merger proceedings involving Class I railroads. However, the Board recognizes that circumstances may arise in merger proceedings where ex parte communications may have particular value or address a specific need. Should this occur, the option to seek a waiver of the ex parte prohibition in Fieldston remains available, as noted above. The Board also clarifies that the Fieldston prohibition would not apply to the potential exception for technical and clarifying communications outlined below. Additionally, as discussed in more detail below, Office of Chief Counsel staff liaison communications under section 1180.4(c)(6)(iii) regarding merger application information and format, routine procedural communications, and

communications with OPAGAC's Rail Customer and Public Assistance (RCPA) service, are not ex parte communications and are therefore permitted.

Notwithstanding the general policy of prohibiting ex parte communications in merger proceedings involving Class I railroads, the Board recognizes the potential for ex parte communications to enhance other Board proceedings. Where appropriate and when safeguards are in place to protect against abuse and ensure fairness and transparency, ex parte communications can aid the Board in producing timely, well-informed, and effective decisions. Ex parte communications can assist in the Board's decision-making process by helping the Board obtain and understand important information, and the success of the section 1102.2(g)(4) documentation process shows that these communications can be conducted in a transparent and fair manner. Explicitly allowing certain communications that the Board's regulations currently prohibit or appear to prohibit could also improve stakeholder engagement and make agency processes more efficient, and in certain instances these benefits may outweigh potential risks or drawbacks associated with ex parte communications. Additionally, to the extent that changes have the effect of clarifying the Board's regulations, they can help stakeholders better understand their opportunities and obligations related to communication with the Board. Thus, many of the remaining ideas outlined in the petition warrant further exploration.

Based on the petition and responsive comments, as well as feedback provided in the informal listening sessions and the Board's experiences with ex parte communications, the Board is exploring several potential amendments to the rules governing ex parte communications. The potential changes to the regulations are intended to improve stakeholder engagement, facilitate well-informed decision-making, and make agency processes more efficient. The Board seeks comments on the merits of adopting the following regulatory changes.

#### Status Requests and Procedural Issues

In its petition, AAR requests that the Board add language to clarify that the ban on ex parte communications does not prohibit communications occurring in any proceeding regarding routine, procedural matters. (Pet. 6.) The Board has previously stated that communications about purely procedural issues and communications that solely concern the status of a proceeding are permissible because they naturally do not concern the merits or substantive outcome of pending proceedings. Ex Parte Commc'ns in Informal Rulemaking Proc., EP 739, slip op. at 6 (STB served Feb. 28, 2018). This generally accepted principle is also reflected in the Board's regulations governing mergers, which permit a designated Board staff liaison to provide informal, non-binding opinions and interpretations regarding the format of or information to be included in a merger application. 49 CFR 1180.4(c)(6)(iii). However, status requests and procedural communications are not explicitly permitted in part 1102.

Stating this principle directly in the regulatory text could benefit stakeholders by helping them determine what does and does not constitute an ex parte communication without the need for additional research. Clear guidelines could also promote the expeditious handling and resolution of proceedings before the Board by helping Board employees quickly and easily determine whether it is appropriate for them to respond to stakeholder questions. The Board is therefore considering amending the existing regulatory text to clarify that routine, procedural

communications are permitted. The Board is also considering adding language to the regulatory text that would explain what “routine” and “procedural” mean and seeks ideas regarding such definitions.

### Technical and Clarifying Communications

AAR suggests that the Board revise its rules to clarify that communications with Board staff concerning submitted evidence and compliance with orders seeking additional information are permissible, subject to the disclosure requirements in 49 CFR 1102.2(g)(4). (Pet. at 7.) During Board proceedings, it is sometimes necessary for the parties and the Board to resolve technical and clarifying questions about Board orders or evidence. RCPA is available to provide stakeholders with informal, nonbinding guidance on complying with Board decisions.<sup>2</sup> The Board has also held technical conferences, with appropriate procedural safeguards, in matters that required extensive technical discussions. E.g., BNSF Ry.—Terminal Trackage Rts.—Kan. City S. Ry., FD 32760 (Sub-No. 46) (STB served Jan. 10, 2024); Application of the Nat’l Passenger R.R. Under 49 U.S.C. 24308(a)—Canadian Nat’l Ry., FD 35743 (STB served Feb. 19, 2025). The Board also intends to increase its use of this tool. See STB Press Release No. 25-22, STB Gathers More Than 100 Ideas From Legal Practitioners to Streamline Board Processes, <https://www.stb.gov/wp-content/uploads/PR-25-22.pdf>. But questions that may be too case-specific for RCPA or too limited to warrant a technical conference are currently resolved via motions and Board decisions. Although Board staff working directly on the proceeding may be in the best position to resolve technical questions related to evidence submitted in a proceeding or compliance with an order to supplement the record, the Board’s ex parte rules generally prohibit direct communication between a party and such Board staff. See 49 CFR 1102.2(a)(5). Allowing these employees to resolve technical and clarifying questions via a brief ex parte discussion could save time and conserve Board resources by reducing the need for motions requesting clarification and subsequent written decisions.

The Board recognizes concerns related to fairness, due process, and impartiality, and acknowledges that even where questions are strictly technical and clarifying in nature, the answer might have implications for the outcome of the case. However, the risks posed by ex parte conversations may not be as significant in the context of technical and clarifying inquiries, such that the benefits of quickly resolving these questions may outweigh the associated risks. Furthermore, it may be possible to mitigate the associated fairness and transparency concerns with prompt, thorough documentation of the ex parte contacts. The documentation procedures set forth in 49 CFR 1102.2(g)(4) have worked well in the context of ex parte meetings conducted during informal rulemaking proceedings, and they may also be suitable for this application.

In order to realize the potential benefits of allowing Board staff to resolve technical and clarifying questions, the Board is exploring amending the existing regulatory language to permit technical and clarifying communications with Board staff concerning submitted evidence and compliance with orders seeking additional information, subject to the disclosure requirements in

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<sup>2</sup> Because matters brought to RCPA are handled by Board staff who do not participate in Board decisions, contacts with RCPA are not considered ex parte communications. See Ex Parte Commc’ns in Informal Rulemaking Proc., EP 739, slip op. at 6.

49 CFR 1102.2(g)(4), as well as any statutory limitations applicable to the proceeding.<sup>3</sup> The Board is also considering developing a definition of “technical and clarifying” that precludes using these inquiries for significant substantive advocacy and seeks ideas regarding such potential language.

#### Ex Parte Meetings in Informal Rulemakings—Role of Board Staff

In its petition, AAR requests that the Board revise 49 CFR 1102.2(g)(1) to authorize ex parte communications between the public and Board staff in informal rulemaking proceedings, subject to the same requirements that govern communications with Board Members. (Pet. 12.) Under the Board’s current rules, the ex parte meetings permitted during informal rulemakings can only be scheduled with Board Members. Board Members may invite Board staff to attend these meetings, but stakeholders cannot meet with Board staff without a Board Member present, unless the entire Board formally delegates its participation to Board staff. See 49 CFR 1102.2(g)(1); Ex Parte Commc’ns in Informal Rulemaking Proc., EP 739, slip op. at 19. As AAR notes, no such delegation has occurred since the Board adopted this rule. (Pet. 11.) However, Board staff are regularly invited to attend Board Member meetings to leverage their knowledge and experience. Staff participation often facilitates helpful conversations that enhance the value of ex parte meetings, particularly where the meetings concern specialized or technical topics. The Board’s experience suggests that allowing direct meetings with Board staff could further enhance the informal rulemaking proceedings, promote efficiency, and improve decision-making.

While it offers several potential benefits, allowing ex parte meetings with Board staff during informal rulemaking proceedings also raises several concerns. Expanding the available options for ex parte meetings during these proceedings could increase the number of opportunities available for stakeholders and members of the public to discuss pending rulemakings with the Board, but it may raise risks or drawbacks regarding fairness during the rulemaking process. Subjecting meetings with Board staff to the same disclosure requirements as meetings with Board Members, see 49 CFR 1102.2(g)(4), may mitigate these issues. However, the Board denied a similar request in a previous proceeding based on concerns that stakeholders would attempt to meet individually with multiple staff members during each rulemaking proceeding, thereby drastically increasing the number of ex parte contacts and complicating the disclosure process. Ex Parte Commc’ns in Informal Rulemaking Proc., EP 739, slip op. at 20.

Considering the pros and cons, the Board is exploring amending the existing regulations to allow stakeholders to request meeting with Board staff in informal rulemaking proceedings during the same period that meetings with Board Members are permitted and subject to the same disclosure requirements in 49 CFR 1102.2(g)(4). This change has the potential to promote efficiency and improve decision-making. In order to manage the number of ex parte meetings and facilitate coordination between staff offices, the Board is considering amending the

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<sup>3</sup> For example, the Administrative Procedure Act (APA), 5 U.S.C. 551-559, imposes a strict ex parte prohibition in formal rulemakings and on-the-record adjudications. See 5 U.S.C. 556-57.

regulatory text to allow office directors to delegate Board staff to participate in ex parte meetings and to specify the manner in which such meetings may be requested.

### Timing for Ex Parte Meetings in Informal Rulemakings

AAR requests that the Board expand the timeframe in which it allows ex parte meetings in informal rulemaking proceedings. (Pet. 12.) The Board's current rules allow Board Members to attend ex parte meetings during informal rulemakings from the time an NPRM is issued until 20 days before the deadline for reply comments. See 49 CFR 1102.2(g)(1). Since this rule was adopted, and consistent with the observations in AAR's petition, the Board has observed a tendency among stakeholders to request ex parte meetings during the brief period between the close of comments and the date 20 days before the reply deadline. (Pet. 12.) Accommodating ex parte meetings within a compressed time frame has taxed Board resources during informal rulemaking proceedings, as Board Members endeavor to accommodate all requested meetings. Furthermore, the end date for ex parte meetings does not always align well with the needs of the Board during the informal rulemaking process. In fact, since the adoption of section 1102.2(g), the Board has already found it necessary to waive the time limit in order to obtain valuable stakeholder input in one of its informal rulemaking proceedings. See Final Offer Rate Rev., EP 755, slip op. at 1-2 (STB served May 15, 2020). Setting a different end date for ex parte meetings in informal rulemaking proceedings has the potential to improve the Board's rulemaking processes by providing needed flexibility, and by promoting more informed decision-making during rulemaking proceedings.

The Board is mindful of the concerns implicated by changing the end date in section 1102.2(g)(1). Moving the end date closer to the end of the reply period could make it more difficult for stakeholders and members of the public to reply to information presented in ex parte meetings. If the end date is extended beyond the deadline for replies, parties may attempt to have the last word in informal rulemaking proceedings by withholding information in their public comments and presenting it to the Board in an ex parte meeting after the reply period has ended.<sup>4</sup> It may be possible to remedy these concerns by reopening the comment period or otherwise providing additional opportunities for comment.<sup>5</sup> Although the Board declined to set a later end date for ex parte meetings when the rule permitting ex parte meetings was adopted (see Ex Parte Commc'ns in Informal Rulemaking Proc., EP 739, slip op. at 18), the Board now has more practical experience with ex parte communications in informal rulemaking proceedings. Moreover, the benefits of having additional time available to conduct ex parte meetings may outweigh the harm of delaying the informal rulemaking process, particularly in rulemakings involving complex technical or economic topics.

In order to promote more informed decision-making and maintain flexibility to accommodate variations in the technical complexity and procedural timelines of informal rulemaking proceedings, the Board is exploring amending the regulatory text to allow the Board

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<sup>4</sup> The Board strongly discourages this practice.

<sup>5</sup> See, e.g., U.S. Rail Serv. Issues—Performance Data Reporting, EP 724 (STB served Dec. 16, 2015) (allowing parties to reply to meeting summaries in a separate round of written comments).

to set the end date for ex parte meetings on a case-by-case basis. Under the case-by-case approach under consideration, the end date in a given case could be set before or after the deadline for reply comments, based on the particular comment/reply period lengths and the Board's assessment of the need for a longer period for ex parte meeting opportunities in each informal rulemaking proceeding. All ex parte meetings would remain subject to the disclosure requirements in section 1102.2(g)(4), and the Board could set an additional deadline for replies to the ex parte summaries if it is needed to preserve fairness or due process.

#### Request for Comments

The Board seeks comments on all aspects of the regulatory changes under consideration. The Board invites comments on the extent to which entertaining the communications discussed above could save time and resources for participants in Board proceedings, help the Board obtain and understand important information, or otherwise assist timely, well-informed, and effective decisions. Where applicable, the Board invites commenters to discuss whether and to what extent the section 1102.2(g)(4) disclosure process could address fairness and transparency concerns, as well as whether different or additional safeguards may be more effective. Additionally, where the amendment under consideration would involve defining new terms, the Board invites commenters to provide input on the appropriate scope of those definitions.

The Board also invites commenters to identify additional or alternative ways that the current regulations governing ex parte communications could be changed to benefit the public interest and improve agency processes.

#### It is ordered:

1. Notice of this decision will be published in the Federal Register.
2. Comments are due by May 29, 2026.
3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.
4. This decision is effective on its date of service.

By the Board, Board Members Fuchs, Hedlund, and Schultz.