

October 22, 2024

Original Delivered by Electronic Mail: michael.whitaker@faa.gov

The Honorable Michael G. Whitaker
Administrator
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20553-0002

RE: Support of FAA-sanctioned Committees

Dear Administrator Whitaker,

The undersigned organizations request a meeting to discuss support for the Aviation Rulemaking Advisory Committee (ARAC) organized under the Federal Advisory Committee Act (FACA) and the Aviation Rulemaking Committees (ARCs) assigned tasks by the agency.

There are three areas of concern—

- Support from the Office of Chief Counsel when legal parameters and requirements are discussed.
- The knowledge of agency personnel appointed to ARAC and ARCs in complying with the Administrative Procedure Act (APA).
- Lack of direct personal acknowledgement from agency executive management personnel responsible for review and implementation, if appropriate, when a committee makes a recommendation.

Aviation safety depends on open and transparent communications between the government and public. Whether perception or reality, the industry does not view the agency as open or transparent. Its actions supporting rulemaking activities need attention. The agency has tasked the industry to recommend solutions to many issues through the ARAC and ARCs. Although the agency has developed guidelines for supporting those efforts, they are not being honored to the extent necessary to ensure the best possible result.

A recent exchange with the Office of Chief Counsel regarding *ex parte* communications and support of ARAC and ARCs provides an example of the deep divide between industry-provided support of FAA-sanctioned committees and the agency's involvement. By the attached letters, an active trade association attempted to resolve issues related to external communications during informal rulemaking and the role the FAA's Office of Chief Counsel previously played during sanctioned FACA and ARC deliberations.

Rather than taking the information provided seriously and addressing the issues raised, the Chief Counsel's responses merely affirmed the agency's reluctance to engage when involvement is needed to obtain the best regulations in the interest of aviation safety. When reminded that representatives of the Office of Chief Counsel used to actively engage in FACA committees and ARCs down to the working group level, the office

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admonished that attorneys are merely “observers.” Since the agency has many “observers” on its sanctioned committees that actively engage in presenting the agency’s perspective and knowledge, the Chief Counsel’s response is an obfuscation.

As the request to the Office of Chief Counsel was ignored, we ask you to support obtaining the best recommendations from FACAs and ARCs by ensuring a knowledgeable representative from the Office of Chief Counsel’s Regulations or Aviation Litigation practice areas is fully engaged in the work the agency has tasked the industry to accomplish. Legal parameters are essential to the development of the best recommendations. Industry looks to the agency to ascertain those limitations when necessary to accomplish the agency’s tasks. The agency’s lawyers need to be subject matter experts in those parameters as they are certainly more than observers regarding legal requirements and processes. Refusing to engage in knowledgeable discussions of legal sufficiency during a FACA committee or ARC’s deliberations results in unusable recommendations and a waste of industry and agency time.

To further strengthen the results of FAA-sanctioned committees, the undersigned ask that FAA members and “observers” on FACA committees and ARCs and their working groups receive formal training on rulemaking, *i.e.*, drafting rules, supporting materials, and guidance under the APA. While individuals appointed by the Office of Primary Responsibility to draft informal rulemaking documents are given such training, FAA personnel appointed to its committees are not. When neither the industry nor FAA personnel understand the APA’s parameters, the agency is less likely to obtain the best possible recommendations.

Finally, by ensuring appropriate executive management personnel are present at agency-sanctioned committee meetings when recommendations are being considered, the FAA will bolster the committee and members of working and task groups that have devoted thousands of man-hours attempting to fulfill assigned tasks.

Many of the undersigned are members of numerous FACA committees, working groups, and ARCs, with considerable experience in finding solutions for the agency or the industry. The knowledge and skills gained through formal education, on-the-job training, and experience have always been available to the agency when it was needed. Although neither you nor the Chief Counsel asked, the information provided is needed; therefore, we humbly request you listen.

Please let us know if you wish further illustrations of our concerns or more information about potential solutions.

Sincerely,

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Attachments: Letter to Chief Counsel's Office – August 22, 2024
Assistant Chief Counsel for Regulations' Response – August 28, 2024
Letter to Chief Counsel (w/out enclosures) – September 19, 2024
Chief Counsel Response – September 26, 2024

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RE: Support of FAA-sanctioned Committees
Attachment 1 – Letter to Chief Counsel’s Office

Attachment 1



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August 22, 2024

Original Delivered by Electronic Mail: kostas.a.poulakidas@faa.gov

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Chief of Staff
Office of the Chief Counsel
Federal Aviation Administration
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Washington, D.C. 20553-0002

RE: *Ex Parte* During Informal Rulemaking

Dear Mr. Poulakidas,

The Aeronautical Repair Station Association ([ARSA](#)) represents the worldwide civil aviation maintenance industry—from global corporations to small, independent businesses. Its representatives have been appointed to numerous rulemaking committees and the undersigned has been a member of the Aviation Rulemaking Advisory Committee since its inception.

It has come to the association’s attention that an attorney from the Office of Chief Counsel publicly reprimanded an agency representative for stepping over the line of the supposed *ex parte* communication prohibition during informal rulemaking.¹ Attendees at the public forum report that the FAA was merely updating the audience on the proposed rule’s status and basic content. The agency did not accept substantive comments or information from the audience. Even if such was the case the Department of Transportation General Counsel’s guidance on external communications² makes clear that a contemporaneous memorandum to the docket would have removed any stigma.

This is not the first time the agency has used *ex parte* as a reason for refusing to engage with stakeholders.³ Nor is ARSA the only one concerned about the agency’s use of *ex parte* as an excuse for not engaging with stakeholders. Sec. [302](#) of the recent FAA Reauthorization Act expressed Congress’ sense that the agency should engage with

¹ Title 5 U.S.C. § [553](#) does not prohibit *ex parte* communications.

² U.S. Department of Transportation, General Counsel, “Guidance on Communication with Parties Outside of the Federal Executive Branch ([Ex Parte Communications](#))”, Memorandum for Secretarial Officers and Heads of Operating Administrations, April 19, 2022, Informal Rulemaking, page 5..

³ See, Aviation Rulemaking Advisory Committee (ARAC) minutes from meeting package for March [2022](#), wherein the Office of Chief Counsel noted that contrary to the DOT’s *ex parte* communications memorandum such “communications are discouraged more from a policy perspective than from a legal perspective.” See, also, minutes from July [2023](#), September [2023](#), and December [2023](#) minutes in which *ex parte* was used as the reason for not meeting with a working group on a task assigned by the agency. Finally, the subject was raised but not clarified by the Administrator during the 2024 FAA-EASA International Aviation Safety Conference.

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Kostas A. Poulakidas, Esq.
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aviation stakeholder groups to the greatest extent practicable, properly docketed *ex parte* discussions during rulemaking activities in order to inform and assist the Administrator in developing the scope of a rule; thus help reduce the timeline for issuance of proposed and final rules. The sense of Congress is fully consistent with the *Ex Parte* Communications memorandum issued by the DOT.

While agency "personnel cannot discuss or negotiate, the substance of a rulemaking while engaging in [*ex parte*] contacts" (emphasis added), if such an exchange takes place, it must be memorialized in the docket. The memorandum, made by either the agency or the public, would include a "summary of the issues discussed in addition to [the] basic meeting information." The agency would then add the "substance of material information submitted by the public as part of an *ex parte* communication (with appropriate protections for confidential information)" (emphasis added) to the docket.⁴

Attorneys in the Office of Chief Counsel must clearly understand, communicate, and support the standards contained in the cited *Ex Parte* Communications memorandum. That document clearly encourages open and continued dialogue with the public throughout the informal rulemaking process.

The undersigned would like to provide a workshop to the Office of Chief Counsel’s attorneys on the subject with an open dialogue on the types of communication that would trigger the need for a memorandum. Otherwise, a meeting is requested with the Chief Counsel to discuss this issue and receive his office’s full support for the DOT’s *Ex Parte* Communications memorandum.

Your Servant,



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cc: Laura J. Megan-Posch

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⁴ *Supra*, at footnote 2, **Informal Rulemaking**, page 5.

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RE: Support of FAA-sanctioned Committees
Attachment 2 – Assistant Chief Counsel for Regulations' Response

Attachment 2



U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Chief Counsel

800 Independence Ave., S.W.
Washington, D.C. 20591

Sarah MacLeod, Esq.
Executive Director
Aeronautical Repair Station Association
121 North Henry Street
Alexandria, VA 22314-2903

Dear Ms. MacLeod:

This letter responds to your letter dated August 22, 2024. In your letter you state “[i]t has come to [Aeronautical Repair Station Association (ARSA)’s] attention that an attorney from the Office of Chief Counsel publicly reprimanded an agency representative for stepping over the line of the supposed *ex parte* communication prohibition during informal rulemaking.” The letter goes on to state “[a]ttendees at the public forum report that the FAA was merely updating the audience on the proposed rule’s status and basic content.”

The Office of the Chief Counsel is unaware of any of its attorneys engaging in the action alleged. If you can provide us with additional details, such as the name or date of the event or the name of either the attorney or the agency representative at issue, it would assist our ability to conduct a review.

Your letter also raises concerns that the Agency is “us[ing] *ex parte* as a reason for refusing to engage with stakeholders,” contrary to DOT *ex parte* guidance and section 209¹ of the 2024 Reauthorization Act. Although our office agrees DOT’s *ex parte* guidance encourages contact with the public during informal rulemaking, we note it does place guideposts on such contacts, particularly when discussing deliberative, non-public information to the public after the initiation of a rulemaking.

For example, in your letter, you paraphrase the DOT *ex parte* guidance stating: “While agency ‘personnel cannot discuss or negotiate...the substance of a rulemaking while engaging in [ex parte] contacts’ (emphasis added), if such an exchange takes place, it must be memorialized in the docket.” This partial paraphrase of the guidance erroneously suggests the guidance allows agency employees to engage in substantive discussions or negotiations regarding rulemaking so long as such discussions or negotiations are memorialized and docketed. That is incorrect.

¹ Although your letter cites section 302 of the 2024 Reauthorization Act, I believe you meant to reference section 209, *Sense of Congress on FAA engagement during rulemaking activities*.

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*Office of the Chief Counsel
Federal Aviation Administration*

Rather, the DOT guidance leads with several explicit prohibitions applicable to Agency personnel engaging in *ex parte* contacts: “DOT personnel shall not: (1) release non-public information to outside parties; (2) give an advantage to one party over another; or (3) prematurely disclose the Department’s decisions...”²

In sum, although the guidance encourages open and transparent public participation in the rulemaking process, the guidance limits Agency participation in such contacts regarding a petition for rulemaking or after the initiation of a rulemaking:

“DOT must: (A) Act as the receiver of information. DOT personnel shall not engage in negotiation or provide any substantive, non-public information during any *ex parte* communication, including substantive aspects of any forthcoming rulemaking documents. DOT personnel will listen to and may ask clarifying questions of an outside party. DOT personnel may also answer factual questions about public documents, such as the intended meaning of a provision in a proposed rule that has already been published.”

We note the advice we provide to Agency personnel regarding *ex parte* contacts adheres to these guidelines. We hope this helps to clarify DOT guidance on the issue and responds to your concerns.

Sincerely,

LAURA JANE

MEGAN-POSCH

Laura Megan-Posch

Assistant Chief Counsel for Regulations

Digitally signed by LAURA
JANE MEGAN-POSCH
Date: 2024.08.28 06:44:50
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² Memorandum for Secretarial Officers and Heads of Operating Administrations (April 19, 2022), DOT Deputy General Counsel, page 4.

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Attachment 3 – Letter to Chief Counsel

Attachment 3



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September 19, 2024

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Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20553-0002

RE: *Ex Parte* Communications During Informal Rulemaking

Dear Chief Counsel Nichols,

The Aeronautical Repair Station Association ([ARSA](#)) represents the worldwide civil aviation maintenance industry – from global corporations to small, independent businesses. Its representatives have been appointed to many rulemaking committees, and the undersigned has been a member of the Aviation Rulemaking Advisory Committee (ARAC).

By letter included as [Attachment 1](#), the association brought issues associated with the Department of Transportation General Counsel's guidance on external communications to your office's attention.¹ The response from the assistant chief counsel for regulations ([Attachment 2](#)), followed by an email reply ([Attachment 3](#)), and extensive discussions with industry representatives led to an editorial ([Attachment 4](#)) and this appeal to you.

To obtain the *best* regulatory result an agency should not use or even appear to use *ex parte* as a shield from public engagement. During my tenure, I have enjoyed the ability to communicate with the agency before, during, and after informal rulemaking without creating *ex parte* issues. In fact, during the 1999 rewrite of [14](#) CFR part [145](#), I met with AVS-1 *after the comment period closed*. A representative of AGC was present, made an appropriate record of the session, and no challenge resulted.

Similarly, when the ARAC was initiated, the membership was carefully chosen to represent all potential perspectives of directly impacted parties and international civil aviation agencies, and the public interest. All members were required to attend training on rulemaking at the agency's expense. The committee *and* its working groups were assigned lawyers and economists to participate in the discussions that supported the best and most efficient recommendations. In several cases, the ARAC was asked to review and help disposition comments received on informal rulemaking projects to ensure the interested parties were fully engaged in the process from start to finish.

¹ U.S. Department of Transportation, General Counsel, "Guidance on Communication with Parties Outside of the Federal Executive Branch ([Ex Parte Communications](#))", Memorandum for Secretarial Officers and Heads of Operating Administrations, April 19, 2022, Informal Rulemaking, page 5.



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RE: Support of FAA-sanctioned Committees
Attachment 3 – Letter to Chief Counsel

September 19, 2024
Marc Nichols, Esq.
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RE: *Ex Parte* Communications During Informal Rulemaking

Today, representatives from the Chief Counsel's office seem to believe that communications with the public, even during ARAC or Aviation Rulemaking Committees (ARCs) meetings, are forbidden.² Such a position shows a woeful disregard for administrative procedures. The FAA is a required member of any [Federal Advisory Committee Act](#) (FACA) group or aviation rulemaking committee. Its participation ensures all parties impacted by any *potential* rulemaking activity are heard. If opinions differ, recording of any distinctions, reasons, and safety justifications is required. Rulemaking is not an adversarial process; it is meant to elicit all views. Rulemaking committees are designed to do so in public and non-public manners;³ all results will still go through the Administrative Procedures Act notice and comment requirements.

While the FAA's response to ARSA's original letter denied any misconduct by or miscommunication from the Chief Counsel's representatives, facts belie that knee-jerk reaction. Putting the public reprimand situation aside, the ARAC meeting minutes provide numerous examples of the Chief Counsel's Office refusal to meet with working groups before, during, and even after official rulemaking activities. Further investigation will reveal other examples of refusals to engage with committees or their working groups during information gathering activities *the agency requested in its task before any rulemaking activity was taken by the agency.*

Finally, any *suspected* one-sided exchange that *may* influence the agency's decision can be cured. The remedies range from memoranda to the docket to delayed or withdrawn rules. Any treatment for the ills of bona fide *ex parte* exchanges that result in better rulemaking is worth the delay.

I appreciate the agency has fewer experienced staff and that rulemaking is an excruciating process, but I believe in prophylactic lawyering. There is no better place to prevent ugly results than before and during rulemaking activities. Please take this matter seriously – at the very least, provide directed and comprehensive training on the informal rulemaking process to the lawyers assigned to regulations. Teach them to put their prosecutorial and adversarial tendencies aside; these proceedings may be heated but must lead to the best result.

A more affirming approach would be for you to make a personal appearance before the active agency committees with a commitment to assist the FAA in making the best regulations possible without any cloaking of the process. When the government encourages full and active participation in the rulemaking process, all parties are made aware of the proceedings and have an opportunity to provide opposing or additional information. If the agency more effectively and consistently obtained the perspectives of all interested parties, a claim of *ex parte* would be impossible because all relevant communications would be appropriately docketed.

² The Aviation Rulemaking Committee on Instructions for Continued Airworthiness was told the lawyer could not participate in discussions because she "represent[ed] the FAA, not the committee."

³ FACA groups must have public meetings, while ARCs may meet without public notice or participation.

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Your Servant,



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Attachments ARSA letter to Chief Counsel's Office – August 22, 2024
Response from Assistant Chief Counsel for Regulations
Editorial: First, Kill All the Lawyers

cc: Kostas A. Poulakidas
Laura J. Megan-Posch

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RE: Support of FAA-sanctioned Committees
Attachment 4 – Chief Counsel's Response

Attachment 4



U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Chief Counsel

800 Independence Ave., S.W.
Washington, D.C. 20591

September 26, 2024

Sarah MacLeod, Esq.
Executive Director
Aeronautical Repair Station Association
121 North Henry Street
Alexandria, VA 22314-2903

Dear Sarah,

Thank you, kindly, for your correspondence dated September 19, 2024, on behalf of the Aeronautical Repair Station Association (ARSA). After reviewing your correspondence related to the conversation observed between an AGC attorney and FAA staff at a recent Instructions for Continued Airworthiness (ICA) Aviation Rulemaking Committee (ARC) meeting, I took the initiative to inquire with my legal department colleagues about what transpired. While I am not at liberty to divulge the topic of the discussion, I am happy to share I have confirmed the interaction at issue did not involve *ex parte* communications. I appreciate you bringing this matter to my attention, as the FAA endeavors to follow all laws, rules, and regulations. I now consider this particular point closed.

Regarding the presence of FAA attorneys at ICA ARC proceedings generally, it is important to understand that the FAA attorneys you have observed are there as observers, not as advocates or committee members. Observation by FAA attorneys assists the FAA in better understanding the ARC's recommendations and feedback should the FAA ultimately decide to pursue rulemaking based on the same. This helps the legal teamwork with the rulemaking team as the latter crafts the prospective rules and reminds them of concerns that may have been raised but went unaddressed in the proposed rule. FAA attorneys do not participate as subject matter experts on the committee, and they are not present to provide the committee with legal advice. I understand, and agree, the ARC has considerable participation by FAA subject matter experts from throughout the rest of the agency and they receive multiple presentations by FAA personnel in response to requests from the ARC.

I hope this response helps address any concerns you may have. I appreciate ARSA's continued role in strengthening the country's aviation safety network and ensuring adherence to all laws, rules, and regulations in the process.

Kindest regards,

Marc A. Nichols

Marc A. Nichols
Chief Counsel