

Rules and Regulations

Federal Register

Vol. 60, No. 110

Thursday, June 8, 1995

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 19

[Docket No. 95-09]

RIN 1557-AB15

Uniform Rules of Practice and Procedure

AGENCY: The Office of the Comptroller of the Currency, Treasury.

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is amending a provision of the Uniform Rules of Practice and Procedure adopted by the OCC (Uniform Rules). The final rule is intended to clarify that the Uniform Rules' provisions relating to ex parte communications conform to the requirements of the Administrative Procedure Act (APA). The final rule is needed to clarify that the Uniform Rules' ex parte provisions do not apply to intra-agency communications, which are governed by a separate provision of the APA.

EFFECTIVE DATE: July 10, 1995.

FOR FURTHER INFORMATION CONTACT: Daniel Stipano, Director, Enforcement and Compliance (202-874-4800), or Daniel Cooke, Attorney, Legislative and Regulatory Activities Division (202-874-5090).

SUPPLEMENTARY INFORMATION:

Background

Section 916 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. 73, 103 Stat. 183 (1989) required the OCC, Board of Governors of the Federal Reserve System (Board of Governors), Federal Deposit Insurance Corporation (FDIC), Office of Thrift Supervision (OTS), and National Credit Union

Administration (NCUA) (collectively, the "agencies") to develop uniform rules and procedures for administrative hearings. The agencies issued a joint notice of proposed rulemaking on June 17, 1991 (56 FR 27790) and issued their final Uniform Rules in August 1991 (OCC, 56 FR 38024, August 9, 1991; Board of Governors, 56 FR 38052, August 9, 1991; FDIC, 56 FR 37975, August 9, 1991; OTS, 56 FR 38317, August 12, 1991; and NCUA, 56 FR 37767, August 8, 1991).

On November 22, 1994 (59 FR 60094), the Board of Governors proposed to amend its Uniform Rules relating to ex parte communications to clarify that the Uniform Rules parallel the requirements of the APA. The OCC issued a similar notice of proposed rulemaking (proposal) on December 12, 1994 (59 FR 63936). The OTS, FDIC, and NCUA also proposed the amendment (FDIC, 59 FR 60921, November 29, 1994; OTS, 59 FR 62354, December 5, 1994; NCUA, 59 FR 67655, December 30, 1994).

The Board of Governors issued a final rule on December 19, 1994 (59 FR 65244).

As adopted in 1991, § 19.9 of the Uniform Rules prohibited a party, the party's counsel, or another interested person from making an ex parte communication to the Comptroller or other decisional official concerning the merits of an adjudicatory proceeding. When the agencies proposed the Uniform Rules in 1991, they explained that the section on ex parte communications would adopt the rules and procedures set forth in the APA (5 U.S.C. 551(14) and 557(d)) regarding ex parte communications. The OCC did not intend at that time to impose a rule more restrictive than that imposed by the APA.

Scope of the APA

The APA contains two provisions relating to communications with agency decisionmakers. The first, the ex parte communication provision, restricts communications between an interested person *outside* the agency, on the one hand, and the agency head, the administrative law judge (ALJ), or an agency decisional employee, on the other. 5 U.S.C. 557(d).

The second, the intra-agency communications provision, governs the separation of functions *within* an agency. 5 U.S.C. 554(d). That section prohibits agency investigative or

prosecutorial staff from participating or advising in the decision, recommended decision, or agency review of an adjudicatory matter pursuant to 5 U.S.C. 557 except as witness or counsel. The provision provides that the ALJ in an adjudicatory matter may not consult any party on a fact in issue unless the other parties have an opportunity to participate. 5 U.S.C. 554(d)(1). The separation of functions provision does not prohibit agency investigatory or prosecutorial staff from seeking the amendment of a notice or the settlement or termination of a proceeding.

The Uniform Rules as proposed and adopted in 1991, however, do not mention the separation of functions concept explicitly. Consequently, the Uniform Rules could have been interpreted to apply the ex parte communication prohibition to all communications concerning the merits of an adjudicatory proceeding between the agency head, ALJ, or decisional employee, on one hand, and any party, the party's counsel, or another person interested in the proceeding on the other hand.

This interpretation of § 19.9 would limit an agency's investigatory or prosecutorial staff's ability to seek approval of amendments to, or terminations of, existing enforcement actions. Thus, as adopted in 1991, § 19.9 could be interpreted to expand the ex parte communication prohibition beyond the scope of the APA. The OCC did not and does not intend that interpretation. The final rule, therefore, makes clear that § 19.9 is no broader than the APA.

The Final Rule

The final rule conforms the Uniform Rules to the APA by: (1) Limiting the prohibition on ex parte communications to communications to or from interested persons outside the agency and the ALJ, agency head, and agency decisional employees (5 U.S.C. 557(d)); and (2) incorporating explicitly the APA's separation of functions provision (5 U.S.C. 554(d)). This approach is also consistent with the most recent Model Adjudication Rules prepared by the Administrative Conference of the United States (ACUS). ACUS, *Model Adjudication Rules* (December, 1993).

In addition, § 19.9(a)(1) of the final rule conforms the definition of "ex parte communication" to the language of 5 U.S.C. 557(d), which prohibits ex parte

communications "relevant to the merits" of a proceeding. The final rule's definition of ex parte communications substitutes the words "relevant to the merits" of an adjudicatory proceeding for the words "concerning the merits" of an adjudicatory proceeding, which appear in the current rule.

Comment Received

The OCC received one comment on its proposal. The comment supported the proposal and suggested that the OCC explain the so-called "Chinese wall" that prevents those staff members involved in the prosecutorial function from communicating with those who advise the Comptroller on a particular matter. The final rule specifically sets out the APA's separation of functions provision, which prohibits agency prosecutorial personnel in one case from participating in the Comptroller's decision on that or a factually related case.

The final rule prohibits prosecutorial staff from communicating about the merits of a case with those staff members who advise the Comptroller regarding a final decision in the case. Therefore, the OCC believes that it is unnecessary, in a rulemaking, to set out the OCC's internal procedures for maintaining the statutorily required communication barrier. In conformance with the APA and this rule, OCC investigative and prosecutorial staff do not make communications to decisional employees that are relevant to the merits of an adjudicatory proceeding without putting the communications on the record and without giving reasonable prior notice to all parties.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, the OCC hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

The final rule makes a minor amendment to a rule of practice already in place and affects agency procedure exclusively. Thus, it will not result in additional burden for regulated institutions. The purpose of the proposal is to conform the provisions of the regulation to those imposed by statute.

Executive Order 12866

The OCC has determined that this rule is not a significant regulatory action as defined in Executive Order 12866.

Unfunded Mandates Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4 (Unfunded Mandates Act) (signed into law on March 22, 1995) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. As discussed in the preamble, this final rule is limited in application to the internal procedures of the OCC. The OCC has therefore determined that the final rule will not result in expenditures by State, local, or tribal governments or by the private sector of more than \$100 million. Accordingly, the OCC has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

List of Subjects in 12 CFR Part 19

Administrative practice and procedure, Crime, Investigations, National banks, Penalties, Securities.

Authority and Issuance

For the reasons set out in the preamble, part 19 of chapter I of title 12 of the Code of Federal Regulations is amended as follows:

PART 19—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 19 is revised to read as follows:

Authority: 5 U.S.C. 504, 554-557; 12 U.S.C. 93(b), 164, 505, 1817, 1818, 1820, 1831o, 1972, 3102, 3108(a), and 3909; 15 U.S.C. 78(h) and (i), 78o-4(c), 78o-5, 78q-1, 78u, 78u-2, 78u-3, and 78w; and 31 U.S.C. 330.

2. In § 19.9, paragraphs (a)(1) and (b) are revised and a new paragraph (e) is added to read as follows:

§ 19.9 Ex parte communications.

(a) *Definition*—(1) *Ex parte communication* means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside the OCC (including such person's counsel); and

(ii) The administrative law judge handling that proceeding, the Comptroller, or a decisional employee.

* * * * *

(b) *Prohibition of ex parte communications.* From the time the notice is issued by the Comptroller until the date that the Comptroller issues his or her final decision pursuant to § 19.40(c):

(1) No interested person outside the OCC shall make or knowingly cause to be made an ex parte communication to the Comptroller, the administrative law judge, or a decisional employee; and

(2) The Comptroller, administrative law judge, or decisional employee shall not make or knowingly cause to be made to any interested person outside the OCC any ex parte communication.

* * * * *

(e) *Separation of functions.* Except to the extent required for the disposition of ex parte matters as authorized by law, the administrative law judge may not consult a person or party on any matter relevant to the merits of the adjudication, unless on notice and opportunity for all parties to participate. An employee or agent engaged in the performance of investigative or prosecuting functions for the OCC in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision under § 19.40, except as witness or counsel in public proceedings.

Dated: June 2, 1995.
Eugene A. Ludwig,
Comptroller of the Currency.
 [FR Doc. 95-14008 Filed 6-7-95; 8:45 am]
 BILLING CODE 4810-33-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 95-SW-13-AD; Amendment 39-9252; AD 95-12-02]

Airworthiness Directives; Hiller Aircraft Corporation Model UH-12A, UH-12B, UH-12C, UH-12D, and UH-12E Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to Hiller Aircraft Corporation (Hiller) Model UH-12A, UH-12B, UH-