

Rules and Regulations

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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 308

RIN 3064-AB52

Uniform Rules of Practice and Procedure

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The FDIC is amending a provision of the Uniform Rules of Practice and Procedure (Rules) adopted by the Board of Directors. The final rule is intended to clarify that the Rules' provisions relating to ex parte communications conform to the requirements of the Administrative Procedure Act (APA). The Board of Governors of the Federal Reserve System (FRB) has adopted such an amendment, the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS), and the National Credit Union Administration (NCUA) have proposed similar amendments. In particular, the amendment would clarify that the ex parte provisions do not apply to intra-agency communications, which are governed by a separate provision of the APA.

EFFECTIVE DATE: June 9, 1995.

FOR FURTHER INFORMATION CONTACT: Andrea Winkler (202/898-3764) or Grovetta Gardineer (202/898-3905), Counsel, Legal Division, Compliance and Enforcement Section.

SUPPLEMENTARY INFORMATION:

I. Background

In August 1991, the FDIC adopted the Uniform Rules of Practice and Procedure (Rules) (56 FR 37975, Aug. 9, 1991). The Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Board of Governors), Office of Thrift Supervision

(OTS) and National Credit Union Administration (NCUA) have also adopted the Rules (OCC, 56 FR 38024, Aug. 9, 1991; Board of Governors, 56 FR 38048, Aug. 9, 1991; OTS, 56 FR 38302, Aug. 12, 1991; and NCUA, 56 FR 37762, Aug. 8, 1991). The FDIC is amending one aspect of the Rules relating to ex parte communications to ensure that the Rules conform to the requirements of the APA. The Board of Governors has adopted such an amendment (59 FR 65244, Dec. 19, 1994), and the other agencies have proposed a similar amendment (OCC, 59 FR 63936, Dec. 12, 1994; OTS, 59 FR 62354, Dec. 5, 1994; NCUA, 59 FR 67655, Dec. 30, 1994). The FDIC issued this amendment as a proposed rule on November 29, 1994 (59 FR 60921, Nov. 29, 1994). It is now adopting the rule in the form proposed.

Currently, § 308.9 of the FDIC's Rules of Practice and Procedure (which was adopted as part of the Uniform Rules) prohibits "a party, his or her counsel, or another person interested in the proceeding" from making an ex parte communication to any member of the Board of Directors (Board) or other decisional official concerning the merits of an adjudicatory proceeding. When the Uniform Rules were proposed and adopted in 1991, the joint notice of proposed rulemaking (56 FR 27790, 27793) explained that the proposed rule regarding ex parte communications "adopts the rules and procedures set forth in the APA regarding ex parte communications". There was no intention at that time to impose a rule more restrictive than that imposed by the APA itself.

The APA contains two provisions relating to communications with agency decision-makers. The APA's ex parte communication provision restricts communications between "interested person[s] outside the agency" and the agency head, the administrative law judge (ALJ), or the agency decisional employees. 5 U.S.C. 557(d) (emphasis added). Intra-agency communications are governed by the APA's separation of functions provision, 5 U.S.C. 554(d). That section prohibits investigative or prosecutorial personnel at an agency from "participat[ing] or advis[ing] in the decision, recommended decision, or agency review" of an adjudicatory matter pursuant to section 557 of the APA except as witness or counsel.

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The same separation of function 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 rule as proposed and adopted in 1991, however, neglected to mention the separation of functions concept explicitly, and appeared to apply the ex parte communication prohibition to all communications concerning the merits of an adjudicatory proceeding between the agency head, ALJ or decisional personnel on the one hand, and any "party, his or her counsel, or another person interested in the proceeding" on the other. The FDIC does not interpret this provision as limiting agency enforcement staff's ability to seek approval of amendments to or terminations of existing enforcement actions. As drafted, however, the provision could be misinterpreted to expand the ex parte communication prohibition beyond the scope of the APA. The FDIC did not intend this result.

The amendment clarifies that the regulation is intended to conform to the provisions of the APA by limiting the prohibition on ex parte communications to communications to or from "interested persons outside the agency", 5 U.S.C. 557(d), and by incorporating explicitly the APA's separation of functions provisions, 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.

The FDIC received one comment on the proposed rule, which supported it. The commenter suggested that the FDIC explain the so-called "Chinese wall" that prevents those staff members involved in the prosecutorial function from communicating with those who advise the Board on a particular matter. The amended rule specifically sets out the APA's separation of function provision, which prohibits agency prosecutorial personnel in one case from participating in the Board's decision on that or a factually-related case. This provision clearly prevents prosecutorial staff from communicating

about the merits of a case with those staff members who advise the Board regarding a final decision in the case. It is unnecessary to set out internal procedures implementing this statutory prohibition in a formal rulemaking, and to do so could limit the Board's flexibility with respect to internal organization.

II. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, the FDIC hereby certifies that the 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 intra-agency procedure exclusively. Thus, it should not result in additional burden for regulated institutions. The purpose of the revised regulation is to conform the provisions of the regulation to those imposed by statute.

List of Subjects in 12 CFR Part 308

Administrative practice and procedure, Claims, Equal access to justice, Lawyers, Penalties.

Authority and Issuance

For the reasons set out in the preamble, 12 CFR part 308 is amended as set forth below:

PART 308—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 308 is revised to read as follows:

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 1815(e), 1817(a), 1818(j), 1818, 1820, 1828(j), 1829, 1831i, 1831o; 15 U.S.C. 781(h), 78m, 78n(a), 78n(c), 78n(d), 78n(f), 78o, 78o–4(c)(5), 78p, 78q, 78q–1, 78s.

2. In § 308.9, paragraphs (a) and (b) are revised and a new paragraph (e) is added to read as follows:

§ 308.9 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 FDIC (including such person's counsel); and

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

(2) **Exception.** A request for status of the proceeding does not constitute an ex parte communication.

(b) **Prohibition of ex parte communications.** From the time the notice is issued by the FDIC until the date that the Board of Directors issues its final decision pursuant to § 308.40(c):

(1) No interested person outside the FDIC shall make or knowingly cause to be made an ex parte communication to any member of the Board of Directors, the administrative law judge, or a decisional employee; and

(2) No member of the Board of Directors, no administrative law judge, or decisional employee shall make or knowingly cause to be made to any interested person outside the FDIC 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 FDIC 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 § 308.40 except as witness or counsel in public proceedings.

By Order of the Board of Directors.

Dated at Washington, DC, this 24th day of April, 1995.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Acting Executive Secretary.

[FR Doc. 95-11481 Filed 5-9-95; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 94-ANE-45; Amendment 39-9221; AD 95-10-04]

Airworthiness Directives; AlliedSignal Inc. (Formerly Textron Lycoming and Avco Lycoming) Model T5313B and T5317 Series Turboshaft Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to AlliedSignal Inc. (formerly

Textron Lycoming and Avco Lycoming) Model T5313B and T5317 series turboshaft engines, that currently requires initial and repetitive dye penetrant inspections of the centrifugal compressor impeller for cracks, and if necessary, removal from service. This amendment requires the use of a new, more conservative minor cycle counting factors table, introduces a method for prorating past centrifugal compressor impeller usage based on the new cycle counting factors, provides an enhanced centrifugal compressor impeller inspection procedure, and eliminates flyback criteria based on crack size. For those centrifugal compressor impellers that exceed their published life limit, this amendment implements a schedule for safe removal of time-expired parts. This amendment is prompted by a report of an uncontained centrifugal compressor impeller failure and subsequent rotorcraft accident. The actions specified by this AD are intended to prevent centrifugal compressor impeller failure, which can result in an uncontained engine failure, inflight engine shutdown, or damage to the rotorcraft.

DATES: Effective May 25, 1995.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of May 25, 1995.

Comments for inclusion in the Rules Docket must be received on or before July 10, 1995.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 94-ANE-45, 12 New England Executive Park, Burlington, MA 01803-5299.

The service information referenced in this AD may be obtained from AlliedSignal Inc., 550 Main St., Stratford, CT 06497; telephone (203) 385-5452. This information may be examined at the FAA, New England Region, Office of the Assistant Chief Counsel, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Daniel Kerman, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803-5299; telephone (617) 238-7130, fax (617) 238-7199.

SUPPLEMENTARY INFORMATION: On April 14, 1986, the Federal Aviation Administration (FAA) issued airworthiness directive (AD) 86-09-05,