

(e) *Parties with access to OTS information; restriction on dissemination*—(1) *Current and former employees*. Except as authorized by this section or as otherwise authorized by the Director or his delegate, no current or former employee, officer or agent of the OTS or a predecessor agency shall disclose or permit the disclosure of any unpublished information of the OTS to anyone (other than an employee, officer or agent of the OTS properly entitled to such information for the performance of their official duties), whether by giving out or furnishing such information or a copy thereof or by allowing any person to inspect, examine, or copy such information or copy thereof, or otherwise.

(2) *Duty of person served*. If any person, whether or not a current or former employee, officer or agent of the OTS, has information of the OTS that may not be disclosed under the regulations of the OTS or other applicable law, and in connection therewith is served with a subpoena, order, or other process requiring personal attendance as a witness or production of records or information in any proceeding, that person shall promptly advise the OTS of such service or request for information. Upon such notice the OTS will take appropriate action to advise the court or tribunal that issued the process and the attorney for the party at whose instance the process was issued, if known, of the substance of this section. Such notice to the OTS shall be made by contacting the Litigation Division, Office of Chief Counsel, Office of Thrift Supervision, 1700 G Street NW., Washington, DC 20552. As provided in paragraph (e)(3) of this section, a person so served with process may not disclose OTS information without OTS authorization. To obtain OTS authorization, a request must be sent to the OTS in Washington, DC, in accordance with paragraph (c) of this section.

(3) *Appearance by person served*. Except as the OTS has authorized disclosure of the relevant information, or except as authorized by law, any person who has information of the OTS that may not be disclosed under this section and is required to respond to a subpoena or other legal process shall attend at the time and place therein mentioned and respectfully decline to produce such records or give any testimony with respect thereto, basing such refusal on this part. If, notwithstanding, the court or other body orders the disclosure of such records or the giving of such testimony, the person having such information of the OTS shall continue respectfully to decline to

produce such information and shall promptly advise the Litigation Division of the Chief Counsel's Office, Office of Thrift Supervision. Upon such notice the OTS will take appropriate action to advise the court or tribunal which issued the order, of the substance of this section.

(4) *Non-waiver of privilege*. The possession by any entity or individual described in paragraph (c)(4) of this section of OTS records covered by this section shall not waive any privilege of the OTS or the OTS's right to supervise the further dissemination of these records.

(f) *Orders and agreements protecting the confidentiality of unpublished OTS information*—(1) *Records*. Unless otherwise permitted by the OTS, release of records authorized pursuant to this section will be conditioned by the OTS upon entry of an acceptable protective order by the court or administrative tribunal presiding in the particular case, or, in non-litigated matters, upon execution of an acceptable confidentiality agreement. In cases where protective orders have already been entered, the OTS reserves the right to condition approval for release of information upon the inclusion of additional or amended provisions.

(2) *Testimony*. The OTS may condition its authorization of deposition testimony on an agreement of the parties that the transcript of the testimony will be kept under seal, or will be made available only to the parties, the court and the jury, except to the extent that the OTS may allow use of the transcript in related litigation. The party who requested the testimony shall, at its expense, furnish to the OTS a copy of the transcript of testimony of the OTS employee or former employee.

(g) *Limitation of burden on the OTS in connection with released records*—(1) *Authentication for use as evidence*. The OTS will authenticate released records to facilitate their use as evidence. Requesters who require authenticated records should request certified copies at least 30 days prior to the date they will be needed. The request should be sent to the OTS Public Disclosure Branch and shall identify the records, giving the office or record depository where they are located (if known) and include copies of the records and payment of the certification fee.

(2) *Responsibility of litigants to share released records*. The party who has sought and obtained OTS records has the responsibility of:

(i) Notifying other parties to the case of the release and, after entry of a protective order, providing copies of the

records to the other parties who are subject to the protective order; and

(ii) Retrieving any records from the court's file as soon as the records are no longer required by the court and returning them to the OTS. Where a party may be involved in related litigation, the OTS may, upon a request made to it pursuant to this section, authorize such party to transfer the records for use in that related case.

(h) *Fees*—(1) *Fees for records searches, copying and certifications*. Requesters shall be charged fees in accordance with Treasury Department regulations, 31 CFR 1.7. With certain exceptions, the regulations in 31 CFR 1.7 provide for recovery of the full direct costs of searching, reviewing, certifying and duplicating the records sought. An estimate of the statement of charges will be sent to requesters, and fees shall be remitted by check payable to the OTS prior to release of the requested records. Where it deems appropriate, the OTS may contract with commercial copying concerns to copy the records, with the cost billed to the requester.

(2) *Witness fees and allowances*. (i) Litigants whose requests for testimony of current OTS employees are approved shall, upon completion of the testimonial appearance, promptly tender a check payable to the OTS for witness fees and allowances in accordance with 28 U.S.C. 1821.

(ii) All litigants whose requests for testimony of former OTS employees are approved, shall also promptly tender witness fees and allowances to the witness in accordance with 28 U.S.C. 1821.

Dated: May 22, 1995.

By the Office of Thrift Supervision.

**Jonathan L. Fiechter,**

*Acting Director.*

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## 12 CFR Part 509

[No. 95-102]

RIN 1550-AA80

### Rules of Practice and Procedure in Adjudicatory Proceedings

**AGENCY:** Office of Thrift Supervision, Treasury.

**ACTION:** Final rule.

**SUMMARY:** The Office of Thrift Supervision (OTS) is amending its Rules

of Practice and Procedure in Adjudicatory Proceedings. The final rule is intended to clarify provisions relating to *ex parte* communications to conform to the requirements of the Administrative Procedure Act (APA). In particular, the amendment clarifies that the *ex parte* provisions do not apply to intra-agency communications, which are governed by a separate provision of the APA.

**EFFECTIVE DATE:** July 1, 1995.

**FOR FURTHER INFORMATION CONTACT:** Karen Osterloh, Counsel, Banking and Finance, Regulations and Legislation Division, Chief Counsel's Office (202/906-6639), Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

In August, 1991, the Office of Thrift Supervision (OTS), the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board of Governors), the Federal Deposit Insurance Corporation (FDIC), and the National Credit Union Administration (NCUA) adopted Uniform Rules of Practice and Procedure for agency adjudicatory proceedings.<sup>1</sup> The OTS codified these uniform rules in its Rules of Practice and Procedure in Adjudicatory Proceedings at 12 CFR Part 509, Subpart A.

By notice published December 5, 1994 (59 FR 62354), the OTS proposed to amend one aspect of its rules on *ex parte* communications to clarify that the rules parallel the requirements of the Administrative Procedure Act (APA). The other banking agencies have issued identical proposals.<sup>2</sup> The Board of Governors has published a final rule on this matter.<sup>3</sup>

Currently, section 509.9 prohibits "a party, his or her counsel, or another interested person" from making an *ex parte* communication to the Director 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 explained that the proposed rule regarding *ex parte* communications "adopts the rules and procedures set forth in the APA

regarding *ex parte* communications."<sup>4</sup> There was no intention to impose a rule more restrictive than that imposed by the APA.

The APA contains two provisions relating to communications with agency decision-makers. The APA's *ex parte* communication provision, 5 U.S.C. 557(d), restricts communications between "interested person[s] outside the agency" and the agency head, the administrative law judge (ALJ), or the agency decisional employees. *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. The same separation-of-functions 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.<sup>5</sup> It 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 Director, 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 OTS and the other banking agencies have never interpreted 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 OTS and the other banking agencies 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 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.

The OTS received two comments on the proposed rule. One commenter argued that the separation-of-functions provision of the APA prohibits agency investigatory or prosecutorial staff from seeking the amendment of a notice or termination of a proceeding, without notice and opportunity for other parties to be heard. The commenter further suggests that the separation-of-functions provision prohibits the Director from acting on such a request. The case law, however, does not support the commenter's assertions. Prosecuting staff may advise agency heads *ex parte* with respect to initiating a new action against a party in a pending proceeding, adding new parties to an ongoing case, enlarging or clarifying issues in a pending case, and reopening a closed proceeding.<sup>6</sup>

Another commenter suggested that the OTS explain the so-called "Chinese wall" between staff members who prosecute an administrative proceeding and staff members who advise the Director on disposition of that matter. The amended rule specifically sets out the APA separation-of-functions provision that prohibits agency prosecutorial personnel in one case from participating in the Director'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 Director on the final decision in the case. It is unnecessary to set out internal procedures implementing this statutory prohibition in a formal rulemaking. To do so may limit the OTS's flexibility with regard to its internal operations.

**II. Regulatory Flexibility Act**

Pursuant to section 605(b) of the Regulatory Flexibility Act, the OTS 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 conform an existing rule of procedure to current intra-agency practices. Because the change affects intra-agency procedures only, 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.

<sup>6</sup> See *RSR Corp. v. F.T.C.*, 656 F.2d 718 (D.C. Cir. 1981); *Environmental Defense Fund v. E.P.A.*, 548 F.2d 998, 1006, n.20 (D.C. Cir. 1976), cert. denied, 431 U.S. 925 (1977); *Environmental Defense Fund v. E.P.A.*, 510 F.2d 1292, 1305 (D.C. Cir. 1975).

<sup>1</sup> OTS, 56 FR 38302, Aug. 12, 1991; OCC, 56 FR 38024, Aug. 9, 1991; Board of Governors, 56 FR 38048, Aug. 9, 1991; FDIC, 56 FR 37968, Aug. 9, 1991; and NCUA, 56 FR 37762, Aug. 8, 1991.

<sup>2</sup> Board of Governors, 59 FR 60094, Nov. 22, 1994; FDIC, 59 FR 60921, Nov. 29, 1994; OCC, 59 FR 63936, Dec. 12, 1994; and NCUA, 59 FR 67655, Dec. 30, 1994.

<sup>3</sup> 59 FR 65244, Dec. 19, 1994.

<sup>4</sup> 56 FR 27790, 27793, June 17, 1991.

<sup>5</sup> 5 U.S.C. 554(d)(1).

**III. Executive Order 12866**

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

**IV. Unfunded Mandates Reform Act of 1995**

Section 202 of the Unfunded Mandates Reform Act of 1995, 104 Pub. L. 104-4 (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 one year. If the budgetary impact statement is required, section 205 of the 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 OTS. The OTS has therefore determined that the final rule will not result in expenditure by State, local, or tribal governments or by the private sector of more than \$100 million. Accordingly, the OTS has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

**List of Subjects in 12 CFR Part 509**

Administrative practice and procedures, Penalties.

For the reasons set forth in the preamble, the Office of Thrift Supervision hereby amends part 509, chapter V, title 12, Code of Federal Regulation as set forth below:

**SUBCHAPTER A—ORGANIZATION AND PROCEDURES**

**PART 509—RULES OF PRACTICE AND PROCEDURE IN ADJUDICATORY PROCEEDINGS**

1. The authority citation for part 509 continues to read as follows:

**Authority:** 5 U.S.C. 556; 12 U.S.C. 1464, 1467, 1467a, 1813; 15 U.S.C. 78l.

2. Section 509.9 is amended by revising paragraphs (a) and (b) and by adding a new paragraph (e) to read as follows:

**§ 509.9 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 Office (including such person's counsel); and

(ii) The administrative law judge handling that proceeding, the Director, 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 Director until the date that the Director issues the final decision pursuant to § 509.40(c) of this subpart:

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

(2) The Director, administrative law judge, or decisional employee shall not make or knowingly cause to be made to any interested person outside the Office 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 Office 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 § 509.40 of this subpart, except as witness or counsel in public proceedings.

Dated: May 23, 1995.

By the Office of Thrift Supervision.

**Jonathan L. Fiechter,**

*Acting Director.*

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**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

[Docket No. 95-NM-74-AD; Amendment 39-9241; AD 95-09-03]

**Airworthiness Directives; Jetstream Model 4101 Airplanes**

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule; request for comments.

**SUMMARY:** This document publishes in the **Federal Register** an amendment adopting Airworthiness Directive (AD) 95-09-03, that was sent previously to all known U.S. owners and operators of Jetstream Model 4101 airplanes by individual letters. This AD requires inspection to determine the number of hours time-in-service on the landing gear control unit, and modification of the cable (electrical wiring circuit) of the landing gear control unit. This amendment is prompted by a report of failure of a micro-switch in the landing gear control unit. The actions specified by this AD are intended to prevent uncommanded retraction of a landing gear, which could adversely affect airplane controllability.

**DATES:** Effective June 14, 1995, to all persons except those persons to whom it was made immediately effective by priority letter AD 95-09-03, issued on April 18, 1995, which contained the requirements of this amendment.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of June 14, 1995.

Comments for inclusion in the Rules Docket must be received on or before July 31, 1995.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 95-NM-74-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

The applicable service information may be obtained from Jetstream Aircraft, Inc., P.O. Box 16029, Dulles International Airport, Washington, DC 20041-6029. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** William Schroeder, Aerospace Engineer, Standardization Branch, ANM-113, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (206) 227-2148; fax (206) 227-1320.

**SUPPLEMENTARY INFORMATION:** On April 18, 1995, the FAA issued priority letter AD 95-09-03, which is applicable to Jetstream Model 4101 airplanes. That action was prompted by a report of failure of a micro-switch in the landing gear control unit. This failure was apparently due to a manufacturing defect. Investigation revealed that the micro-switch failure caused the units to