# **Rules and Regulations**

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# **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