

**SUMMARY SHEET**  
**Airworthiness Directive Implementation Aviation Rulemaking Committee**  
*AD Development Working Group*

<b>Primary Report and Recommendation</b>	AD Compliance Review Team (Task 2), Recommendation 3, Bullet 5
<b>Secondary Report and Recommendation</b>	None
<b>Assigned Members</b>	Holly Thorson (AIR) (POC) Tim Dowling (Boeing) (POC) Tammy Anderson (AIR) Elizabeth Bumann (AIR) Jim Orchard (AFS) Harry Hoffman (AFS) Eric Blancaneaux (Airbus) Marco Capaccio (EASA) Ross Stewart (ABX) Rafael Marques (Embraer) Oswaldo de Oliveira (ANAC) Craig Fabian (ARSA) Plamen Stoyanov (Alaska) Barry Baker (Pinnacle)
<b>Links to Other Working Groups</b>	None
<b>Date Sent to AD Development WG</b>	27 May 2010
<b>Date Sent to other WGs for Review</b>	22 July 2010
<b>Date Submitted to ARC</b>	27 October 2010
<b>Date Approved by ARC</b>	9 February 2011

**WORKING GROUP REVIEW OF ISSUE/PROBLEM**

As stated below, this recommendation is to clarify to the industry and FAA that ex parte communications can take place if the communications are fully documented and placed in the rulemaking docket for public review.

As stated in appendix 1 to 14 CFR part 11, “[a]n ex parte contact involving rulemaking is any communication between FAA and someone outside the government regarding a specific rulemaking proceeding, before that proceeding closes.” An AD rulemaking begins when the AD worksheet is signed and closes when the final rule is published or the Notice of Proposed Rulemaking (NPRM) is withdrawn.

14 CFR part 11, appendix 1 specifies the requirements for ex parte contact with the public during any rulemaking process. In particular, ex parte contacts are improper if they affect the basic openness and fairness of the rulemaking process. Therefore, if such a communication is made, the FAA is directed to place a summary of the discussion in the docket to ensure the public is

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aware of the contact and its outcome. The Specification 111, Appendix B, was reviewed and determined to describe this same philosophy.

**REGULATIONS AND GUIDANCE IDENTIFIED FOR REVIEW**

- 14 CFR part 11, Appendix 1
- DOT Order 2100.2, *Policies for Public Contacts in Rulemaking*
- AD Manual, FAA-IR-M-8040.1B
- Specification 111, *Airworthiness Concern Coordination Process*, Revision 2000.2, Appendix B

**WORKING GROUP PROPOSAL TO ADDRESS THE RECOMMENDATION(S)/FINDING(S)**

The proposal includes clarifying the meaning of an ex parte contact and when it is improper, identifying where to record ex parte communication, and providing helpful precautions and practices during the rulemaking process (i.e., prior to issuance of notice, during the comment period, after the comment period closes, and after a meeting is announced to the general public).

**ALTERNATIVES CONSIDERED**

N/A

**IMPLEMENTATION PLAN**

A recent revision to the AD Manual, FAA-IR-M-8040.1C, Chapter 3, provides the information specified in the “Working Group Proposal to Address the Recommendation(s)/Finding(s)” – see appendix A. Although this document is available to both the FAA and general public through the Regulatory and Guidance Library website, UUUU<http://rgl.faa.gov>, the FAA is the primary audience for the AD Manual. As such, we plan to include a section on ex parte communications in a new Advisory Circular (AC) that is being developed to provide “best practices” to Design Approval Holders (DAH) on several AD ARC issues. This new AC is scheduled to be issued by June 30, 2011. Within this AC we will direct everyone to follow 14 CFR part 11, appendix 1, with respect to ex parte communication and provide a reference to the AD Manual for additional clarifications.

**ASSUMPTIONS/CONSTRAINTS**

The working group assumes that the recommendation does not intend to revise the regulatory requirements governing ex parte communication under 14 CFR part 11, appendix 1.

**FAA AND INDUSTRY TRAINING IDENTIFIED**

N/A

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**ISSUES FOR WORKING GROUP CONSIDERATION**

N/A

**ISSUES FOR ARC CONSIDERATION**

N/A

**FINDING No. 3**

The Team also observed that the ex parte policy may not be well understood by the FAA and air carriers. Many in the FAA and the industry believe that ex parte communications are restricted to data requests from the FAA after an NPRM is published in the *Federal Register*. The Team noted that the FAA can communicate with the lead airline after NPRM publication; however, the FAA must document all communications and place them in the rulemaking docket.

**RECOMMENDATION No. 3, BULLET 5**

The ATA, in coordination with the FAA, should take steps to clarify to the industry and FAA personnel that ex parte communications can take place if the communications are fully documented and placed in the rulemaking docket for public review.

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**APPENDIXES**

Appendix A. Excerpt from AD Manual, FAA-IR-M-8040.1C, regarding ex parte contact.

**Chapter 3. Ex Parte Contacts**

**1. General.**

An ex parte contact occurs when not all parties to an issue are present when the issue is discussed. In the context of AD rulemaking, which begins when the AD worksheet is signed, an ex parte contact is any oral or written communication between the FAA (this does not include FAA designees) and someone outside the government regarding the substance of a specific rulemaking that excludes other interested parties and takes place before the final rule is published or the NPRM is withdrawn.<sup>1</sup>

**2. DOT Policy.<sup>2</sup>**

**a. Obtaining Information.** Notwithstanding the general restrictions placed on ex parte communication, DOT policy encourages agencies to contact the public directly when there is a need for factual information to resolve questions of substance and justification. This type of contact can be especially important in the development of ADs where there is a specific need to obtain a thorough understanding of the products involved and relevant information can be obtained only from the design approval holder (DAH) or affected operators.

**b. Draft Regulatory Document or Text.** It is contrary to DOT and FAA policies to disclose to any private party outside the agency the proposed preamble or regulatory text prior to publication. The purpose of the policy is to prevent an unfair advantage to any one party or appear that the agency is seeking approval from an outside party. Be aware that no group or individual should be given special access to any information regarding rulemaking that is not available to all groups or individuals.

**3. Improper Ex Parte Contacts.**

**a. Inappropriate Contacts.** The standard for determining if an ex parte contact is improper is whether the communication affects the basic openness and fairness of the agency's decision-making process, or if the communication influences the agency's position. Prior to engaging in ex parte contact, consider whether the communication provides an unfair advantage to a party or creates the appearance of impropriety. As a general rule, if a person attempts to inappropriately

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<sup>1</sup> 14 C.F.R. § 11, App. 1

<sup>2</sup> DOT Order 2100.2, *Policies for Public Contacts in Rulemaking*

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influence your decision on a rulemaking, the communication should be immediately terminated. An inappropriate ex parte contact could involve implied rewards for changing the rule.

**b. Disclosing Rulemaking Document or Text.** Both DOT and FAA policy prohibit disclosing any part of the rulemaking document, which includes the NPRM, Interim AD actions, Supplemental NPRM or Final Rule before they are made public. Disclosing unpublished text can give the appearance that we are seeking approval from an outside party before issuing the AD. It also can give an advantage to some parties over other members of the public. For example, it can give some parties the advantage of knowing what the issues will be when the NPRM is published, thereby giving more time for them to prepare their comments. For this reason, the public (including DAHs and operators) must not have access to the rulemaking text before it is published in the *Federal Register* or put on display at the OFR.

**c. Proprietary Information.** This type of information should be held strictly confidential. Any questions concerning possible exceptions to allowing disclosure should be coordinated with your Regional Airworthiness Counsel.

#### **4. Procedures for Ex Parte Contacts.**

**a. Recording of Contact.** For cases where communication involves a substantive issue related to a rulemaking, place a record of the contact, including any documents discussed or handed out, in the AD docket at Web site <http://www.regulations.gov>. An ex parte communication that takes place by telephone or email is still “ex parte communication” and a record of the contact must be placed in the AD docket. If you have any questions whether the contact was ex parte, contact your Regional Airworthiness Counsel.

(1) For ex parte communication that occurs prior to submittal of the AD worksheet to the appropriate directorate, record the contact on the AD worksheet.

(2) For ex parte communication that involve a substantive issue and occurs after submittal of the AD worksheet to the appropriate directorate, record the following information at a minimum:

(a) The date and time that the meeting or conversation takes place;

(b) A list of the participants;

(c) A statement of the topics discussed and what was said about each topic. This statement must be more than a list of the topics discussed. The purpose of the statement is to supply a record of the information relied upon during the rulemaking process so the FAA can provide a complete and thorough record for later judicial review. The thoroughness of the statement also will foster public trust for agency actions. And;

(d) Any commitments made by DOT/FAA personnel.

**b. Referencing Contact in an AD Action.** Reference ex parte contacts that takes place after

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the AD worksheet has been signed that influenced the agency's position by doing one of the following:

(1) Identify each ex parte contact along with a short discussion of the communication in the AD preamble, unless it is unreasonable to do so. For example, when we make a large number of ex parte contacts to get information from several DAHs and operators, identify the circumstances giving rise to the discussion, and just give a general reference in the AD preamble about how we gathered the information. You don't have to discuss each individual contact; or

(2) Include the following statement in the AD preamble:

<p>In preparation of Notices and immediately adopted final rules without Notice, it is the practice of the FAA to obtain technical information and information on operational and economic impacts from design approval holders and aircraft operators. A discussion of each contact or series of contacts influencing the agency's position can be found in the rulemaking docket.</p>
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**5. Precautions and Practices.**

**a. Prior to Issuance of Notice.** Ex parte contacts that take place closer to the date that rulemaking will be published have a higher likelihood of being considered inappropriate than those that take place early in the process. If you have questions about specific contacts during this time, discuss them with your Regional Airworthiness Counsel.

**b. During the Comment Period.** Ex parte contacts during the comment period are discouraged because interested parties can still submit a written comment to the AD docket or present their concern at a public meeting announced in the *Federal Register*. If you discuss the NPRM with an outside party, limit the information to only that contained in the proposed rule and information made generally available during a public meeting. Do not discuss other information or the factors the agency is considering as it prepares to issue the final rule.

**c. After Comment Period Closes.** Ex parte contacts after the comment period closes must also be recorded in the AD docket and, if the comment is significant, consider reopening the comment period. If you determine it would be helpful to meet with a person or group after the comment period closes, announce the meeting in the *Federal Register*.

**d. After Announced Meeting.** Ex parte contacts after a meeting that was announced to the general public are particularly vulnerable to suspicion. If a contact occurs outside of the meeting (as in stepping out in the hall to discuss the rule with one or more, but not all, participants), or after the meeting, you must place a record of the contact in the AD docket.

**e. International Airworthiness Authorities.** Contacts with international authorities are vulnerable because these people represent the official interests of their governments, and they often represent the interests of DAHs and operators in their countries. Limit your communications with them to exchanging facts or to gaining mutual understanding or

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“harmonization” during any phase of the rulemaking process. To ensure harmonization, ask the representative not to distribute information or documents about the proposed rules to private individuals.