STATUTORY FOUNDATION FOR FEDERAL REGISTER PUBLICATION

Prior to 1935, much of the internal documentation of federal agencies, as well as regulations promulgated by federal agencies to administer and enforce a variety of federal statutes, was not published and generally made available to the American public, notwithstanding the fact that such documentation and regulations purported to impose mandatory obligations. The first act which commanded the publication of agency requirements which affected the public was the Act of July 26, 1935, 49 Stat. 500, ch. 417; this act created the Federal Register and compelled federal agencies to publish therein agency orders and regulations (see §§ 4 and 5 of the act). To insure agency compliance with the act's requirements, § 7 provided as follows:

> "No document required under section 5(a) to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof."

An expansion of items required to be published in the Federal Register occurred as a result of the enactment of the Administrative Procedure Act; see Act of June 11, 1946, 60 Stat. 237, ch 324. An important definition within this act was the following contained in § 2:

> "(c) Rule and rule making. -- 'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency...."

Section 3 of the act commanded that the following types of agency "rules" be published within the Federal Register:

> "(a) Rules. Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to

> the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published."

Further, the act established a certain method whereby agencies were to publish in the Federal Register proposed and final agency rules and were to accord public hearings in reference thereto. The well known requirements that federal agencies provide adjudication of certain contested matters, subject to judicial review, was established for the first time in this act. Section 9 of the act provided as follows:

> "No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

The benefits to the American public derived from the adoption of this act are many. For example, without the requirement to publish statements of the agency's organization, a party would not know, as a matter of law, what part of an agency was the proper unit or division responsible for the resolution of a particular problem, what part of an agency had enforcement authority, or what part of an agency was designated to receive "submittals" required of the public. While it is obvious that social security benefits applications are not submitted to the Securities and Exchange Commission, it might be entirely improper to submit such an application to the office secretary for Social Security's data processing unit. Without the requirement to publish agency "delegation orders," the American public and its members are deprived, and possibly detrimentally so, of the knowledge of which officers and agents within a vast federal agency are authorized to act on behalf of the agency. The submission of a tort claim to either the proper officer designated to receive the same or to the office janitor is of critical importance if the claim is one year and 364 days old. Finally, without notice to the American public via publication of the substantive requirements of a federal agency having delegated authority to administer and enforce federal laws, nobody, excluding possibly agency personnel, judges and lawyers, would have any knowledge of what was required to avoid the imposition of civil or criminal sanctions.

As amended, the above noted statutes continue their existence today,

codified within 5 U.S.C. §§ 551 through 558. These sections within Title 5 require that federal agencies must publish in the Federal Register a variety of information which affects the rights, duties and obligations of members of the public. In 5 U.S.C. § 551, a "rule" is defined:

> "(4) 'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency ...."

Section 552 describes in particular detail various items which must be published by federal agencies in the Federal Register:

> "(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--
>
> > (A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
> >
> > (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
> >
> > (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and content of all papers, reports, or examinations;
> >
> > (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
> >
> > (E) each amendment, revision or repeal of the foregoing.
>
> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to,

> or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register."

Further, § 552a directs that all federal agencies which maintain "systems of records" containing data and other information regarding individual citizens or residents, must publish descriptions of those systems in the Federal Register; see § 552a(e)(4). And when any federal agency engages in the collection of information from an individual, § 552a(e)(3) commands that the individual concerned be informed of the authority for the collection of the information, the purpose for which the information is intended to be used, the routine uses made of the information, and the effect of not providing such information.

Finally, § 558(b) prohibits an agency from issuing any substantive rule or order, or imposing any sanctions, outside the jurisdiction delegated to the agency.

As seen from above, § 552 permits "incorporation by reference", a process governed by 1 C.F.R., part 51. However, matters which should be published in the Federal Register but which are deemed included therein "by reference" must be approved by the Director of the Federal Register and "proper language" so noting the "incorporation by reference" must appear within agency rules which are published in the Federal Register. Items which cannot be published either in the Federal Register or by incorporation by reference are described at 1 C.F.R. § 5.4. This latter prohibition first appeared in the August 27, 1941, edition of the Federal Register, at page 4398, et seq.

Thus, current statutes impose stringent requirements upon federal agencies to publish in the Federal Register descriptions of the agency's organizational structure as well as those substantive rules of general applicability duly promulgated by the agency. Any matter required by law to be published, but which is not, cannot be the basis for the imposition of any sanction or penalty against anyone.

REQUIREMENT FOR PUBLICATION OF AGENCY ORGANIZATION

Section 552 expressly requires an agency to publish statements or descriptions of the central and field organization of the agency and the established

places where the public is required to make submittals. The reasons for such a requirement are obvious and readily apparent. Almost without exception, Congressional enactments designate a particular executive branch officer as the official statutorily authorized to administer and enforce the act in question. Such an officer further will have similar statutory duties arising not from one but invariably many acts. Since one such executive officer is physically incapable of performing the acts required of him by the law, such officials must create large agencies and delegate statutory responsibilities to subordinates. Additionally, agencies are subdivided into a variety of branches, divisions, units, districts and other minor offices, all of which have different duties and responsibilities. Federal agencies which employ tens of thousands of people have administrative, regulatory, data processing and other branches, and the functions of one branch simply cannot be performed by any other branch. The purpose of this requirement in § 552 is to insure that the members of the American public have the requisite information as to the authorities and responsibilities of any branch, division or unit of an agency, and are informed of the proper agency unit with which such parties must deal.

A quick perusal of the Code of Federal Regulations reveals that many federal agencies meet the requirements of § 552. For example, Congress has enacted numerous acts which vest statutory duties in the hands of the Secretary of Agriculture. Title 7 C.F.R., part 2, contains approximately 92 pages which describe both the organizational structure of the Department of Agriculture and the delegation orders issued by that Secretary to his subordinates. The Commissioner of the Immigration and Naturalization Service complies with § 552; see 8 C.F.R. § 2.1, and parts 100 and 103. The following list identifies other executive officials and departments that similarly comply and cites the corresponding and applicable portions of the Code of Federal Regulations wherein statements of organizational structure and delegation orders may be found:

1. Nuclear Regulatory Commission: 10 C.F.R., part 1.
2. Comptroller of the Currency: 12 C.F.R., part 4.
3. Small Business Administration: 13 C.F.R., part 101.
4. Civil Aeronautics Board: 14 C.F.R., part 384.
5. Federal Trade Commission: 16 C.F.R., part 0
6. Consumer Product Safety Commission: 16 C.F.R., part 1000.
7. Commodity Futures Trading Commission: 17 C.F.R., part 140.
8. Securities and Exchange Commission: 17 C.F.R., part 200.
9. Federal Energy Regulatory Commission: 18 C.F.R., part 375.
10. Water Resources Council: 18 C.F.R., part 701.

11. Office of Workers' Compensation: 20 C.F.R., part 1.
12. Railroad Retirement Board: 20 C.F.R., part 200.
13. Benefits Review Board: 20 C.F.R., part 801.
14. Commissioner of Food and Drugs: 21 C.F.R., part 5.
15. Peace Corps: 22 C.F.R., part 302.
16. U.S. Information Agency: 22 C.F.R., part 504.
17. U.S. Arms Control and Disarmament Agency: 22 C.F.R., part 601.
18. Secretary of H.U.D.: 24 C.F.R., part 3.
19. Inspector General, H.U.D.: 24 C.F.R., part 2000.
20. Department of Justice: 28 C.F.R., part 0.
21. Environmental Protection Agency: 40 C.F.R., part 1.

The above list is by no means exclusive. Nonetheless, it is clear that many federal agencies do comply with the statutory requirement to publish in the Federal Register statements of organization and staffing, in addition to departmental delegation orders.

The consequence of an agency's failure to comply with this specific publication requirement is the prohibition that nobody may be adversely affected by the lack of publication, and further that nobody can be forced to resort to an agency's organizational structure which is not published. In essence, an agency's published organizational structure is "legally visible" while an unpublished structure is, for all intents and purposes, "legally invisible." For example, the American public has duly published notice of the organizational structure of the Department of Agriculture and it is through that published structure that this agency will engage in activities involving domestic enforcement of the acts within its jurisdiction. In contrast, the Secretary and Department of State have not published in the Federal Register the organizational structure of that agency, and the obvious reason relates to the fact that the State Department has "international responsibilities" as opposed to domestic; it is chiefly concerned with treaty responsibilities and thus is precluded from so publishing its organizational structure and delegation orders in the Federal Register; see 1 C.F.R. § 5.4.

In contrast to the vast number of cases where litigation has occurred concerning the lack of publication of such things as agency regulations, there appear to be few cases wherein an issue has been created regarding the lack of publication of an agency's organizational structure. The first case involving this point was Pinkus v. Reilly, 157 F.Supp. 548 (D.N.J. 1957). Here, Pinkus was engaged in advertising and selling his weight gain program through the U.S. Mails. The U.S. Post Office contended that his advertisements were fraudulent and issued

an administrative "fraud order" which in essence precluded Pinkus' use of the mails. Suffering poorly before the agency, Pinkus sought judicial review of the fraud order and asserted that the agency had through unpublished statements of organization in essence commingled the agency's prosecutorial and adjudicating authority in the hands of one official, this latter commingling also being unlawful. The Court held the agency's action of issuing the fraud order void:

> "The last above point raised by Pinkus seems to be directly and clearly covered by the terms of the Administrative Procedure Act itself, which provides that 'no person shall in any manner be required to resort to organization or procedure not so published'," Id., at 549.
>
> "The question thus is whether at the time Pinkus was proceeded against by the Department, as above, the Department had complied with this publication requirement. The prosecution of Pinkus by the Department, as above, was initiated February 7, 1955, so the specific question is whether at that time there existed in the Federal Register the published 'central and field organization' of the Post Office Department, its 'delegation of final authority', and its 'procedures' to which Pinkus was 'required to resort'," Id., at 550.
>
> "It is thus clear that Pinkus was 'required to resort to organization ... not so published' - in the Federal Register. This obviously violates the above provision of the statute that 'no person shall in any manner be required to resort to organization or procedure not so published'. Thus the Department's present proceedings against Pinkus are invalid," Id., at 551.

While Pinkus was chiefly complaining that there was an unlawful commingling of the agency's prosecutorial and adjudicatory functions and this relationship was unpublished, it must be remembered that a deciding factor in this case concerned the fact that the entire organizational structure of the Post Office was unpublished. While the Post Office had several years earlier complied with the publication requirement, some six months prior to the agency proceedings against Pinkus, the agency had published a notice in the Register which in essence declared that the last published statement of organization was no longer in effect. Thus, at the time of the agency proceedings against Pinkus, the then existing organizational structure of the Post Office was not described in anything published in the Federal Register, hence the decision.

Shortly after the decision in Pinkus, the same question was presented to the Second Circuit in Columbia Research Corp. v. Schaffer, 256 F.2d 677 (2nd Cir. 1958), and Vibra Brush Corp. v. Schaffer, 256 F.2d 681 (2nd Cir. 1958). In both of these cases, the facts concerned "fraud orders" issued by the Post Office, just like Pinkus; further, these two cases also concerned the unlawful commingling of prosecutorial and judicial functions as in Pinkus. In the Court's initial decisions in both of these cases, it was held, based on the authority of Pinkus, that the administrative actions of the Post Office were void for failure of the agency to publish its organizational structure in the Register. It must be noted, however, that these decisions were reversed upon petition for rehearing, the problem being that involving substitution of parties because the Postmaster involved, Schaffer, had resigned prior to the appeals. But, both cases still demonstrate the legal necessity for an agency to publish its organizational structure.

Prior to rehearing in Columbia, a decision in G. J. Howard Company v. Cassidy, 162 F.Supp. 568 (E.D.N.Y. 1958), was rendered. This case also involved a fraud order issued by the Post Office regarding a weight loss device named the "Magic Button," marketed by the Howard Company. Upon the authority of Columbia, the agency's fraud order was held void. A similar decision was made in Low v. Thomas, 163 F.Supp. 945 (E.D.Pa. 1958).

The statute in question unequivocally requires that federal agencies must publish in the Register descriptions of the current organizational structures of the same, and the few cases regarding this issue more than adequately demonstrate the consequences of a failure to do so. Potential problems regarding the deficiency of agencies to so publish are created when an agency changes or modifies its organizational structure in some partial way, but fails to place the American public on notice by publication. However, a far more serious problem ensues when an agency fails to publish statements of the most important parts of its organizational structure and has been remiss in its duty to do so for many years.

NECESSITY TO PUBLISH SUBSTANTIVE RULES

As previously mentioned, a "rule" for publication purposes is certainly an agency requirement imposed on the public which implements or prescribes law. Pursuant to § 552(a)(1)(D), "substantive rules of general applicability" must be published in the Federal Register; an omission in this respect means that the unpublished rule is unenforceable against one without notice.

Perhaps one of the best examples of the consequence of an agency's failure

to publish a substantive rule is Hotch v. United States, 212 F.2d 280, 283 (9th Cir. 1954). Here, a federal agency implemented an unpublished regulation which banned commercial fishing in Taku Inlet on the Alaskan coast. Hotch was prosecuted and convicted for violating this regulation and his conviction was at first affirmed on appeal. He filed a petition for rehearing and asserted for the first time on appeal the issue of the non-publication of this substantive rule, and this directly caused a reversal of his conviction. Referring to the Administrative Procedure Act, the court held:

> "The Acts set up the procedure which must be followed in order for agency rulings to be given the force of law. Unless the prescribed procedures are complied with, the agency (or administrative) rule has not been legally issued, and consequently is ineffective."

The situation was somewhat different in Gonzalez v. Freeman, 334 F.2d 570 (D.C.Cir. 1964), where there were no regulations, published or unpublished, which disposed of the controversy. Here the Gonzalez Corporation, whose officers were several Gonzalez brothers, was debarred from conducting business with the Commodity Credit Corporation, the operative circumstances involving misuse of official inspection certificates by Thomas Gonzalez, who was indicted and plead guilty to a misdemeanor. The corporation and the other Gonzalez brothers filed an action challenging the validity of the agency's order imposing a 5 year debarment. The Court held the agency's action void:

> "The command of the Administrative Procedure Act is not a mere formality. Those who are called upon by the government for a countless variety of goods and services are entitled to have notice of the standards and procedures which regulate these relationships. Neither appellants nor others similarly situated can turn to any official source for guidance as to what acts will precipitate a complaint of misconduct, how charges will be made, met or refuted, and what consequences will flow from misconduct if found," Id., at 578.
>
> "Considerations of basic fairness require administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made," Id., at 578.
>
> "[W]e cannot agree that Congress intended to authorize such

> consequences without regulations establishing standards and procedures and without notice of charges, hearings, and findings pursuant thereto. Absent such procedural regulations and absent notice, hearing and findings in this case, the debarment is invalid," Id., at 579.

An unpublished regulation was at issue in Berends v. Butz, 357 F.Supp. 144 (D.Minn. 1973). As a result of severe and excessive rainfall in 15 counties in Minnesota in early 1972, the Secretary of Agriculture declared that such counties were "natural disaster areas" and declared that emergency farm loans would be available until June 30, 1973; this notice was published in the Federal Register. But, Secretary Butz terminated the emergency loan program by an unpublished order issued December 27, 1972. In a suit instituted by several farmers complaining about the failure of the Department of Agriculture to accept loan applications, the court held that the loan program could not be terminated by an unpublished order of the Secretary:

> "In adopting the directive of December 27, 1972, defendants did not comply with even one of these mandatory requirements, despite the fact that the directive would have a substantial impact on those regulated, and hence is a 'rule' as contemplated in the statute," Id., at 154.

> "Inherent in these provisions is the concept that the public is entitled to be informed as to the procedures and practices of a government agency, so as to be able to govern their actions accordingly. The termination of the emergency loan program was without any notice, and was in violation of the provisions of the statute," Id., at 155.

The curtailment of a welfare program's benefits via an unpublished agency manual was the subject of Morton v. Ruiz, 415 U.S. 199, 94 S.Ct. 1055 (1974). In this case, an Indian named Ruiz, being otherwise eligible for Indian welfare benefits available through a Congressional appropriation, was denied such benefits on the basis of an unpublished agency manual which denied benefits to all Indians but those living "on" Indian reservations. The Court here construed the appropriations act as extending benefits to Indians who lived "on or near" a reservation, and held that the agency manual which limited benefits to only those Indians "on" reservations was void and unenforceable:

> "The Administrative Procedure Act was adopted to provide, inter alia,

that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations," Id., at 232.

"The conscious choice of the Secretary not to treat this extremely significant eligibility requirement, affecting rights of needy Indians, as a legislative-type rule, renders it ineffective so far as extinguishing rights of those otherwise within the class of beneficiaries," Id., at 236.

In Northern California Power Agency v. Morton, 396 F.Supp. 1187 (D.D.C. 1975), at issue was whether an agency could make informal, ad hoc and unpublished rules of procedure to govern proceedings in which the public had an interest. Here, the Department of Interior operated a hydroelectric power generation project and sold such power to 54 electrical power companies. Interior proposed a substantial rate increase to which its customers objected; an informal and constantly changing procedural plan was devised by which the complaints so made would be decided by the agency. The Court held, however, that the failure to conduct agency hearings pursuant to published rules of procedure violated § 552.

A variety of issues based upon the provisions of the Clean Air Act were at issue in Maryland v. Environmental Protection Agency, 530 F.2d 215 (4th Cir. 1975). In this case, Maryland complained that certain regulations of the EPA which allegedly applied to it had not been subjected pre-promulgation publication in the Federal Register. Finding that the challenged regulations were published in final form in the Federal Register but had not been published therein in the notice and comment phase of the process of regulation promulgation, the same were found void and unenforceable. See also Rowell v. Andrus, 631 F.2d 699 (10th Cir. 1980).

At issue in Appalachian Power Company v. Train, 566 F.2d 451, 455 (4th Cir. 1977), was the failure of the EPA to publish a very lengthy document named "Development Document" in the Federal Register. This document (described in Virginia Electric and Power Company v. Costle, 566 F.2d 446, 448 (4th Cir. 1977)) was 263 pages long and purported to establish standards for effluent emissions. Because the document itself constituted a substantive agency regulation which was not published, it was held invalid:

"[T]he Development Document is not a validly issued part of the regulations, because it has not been published in the Federal Register,

> nor have the procedural requisites for incorporation by reference been complied with. With this position we agree, and hold that 40 C.F.R., section 402.12 is not enforceable for want of proper publication.
>
> "Any agency regulation that so directly affects pre-existing legal rights or obligations ..., indeed that is 'of such a nature that knowledge of it is needed to keep the outside interests informed of the agency's requirements in respect to any subject within its competence,' is within the publication requirement.... As the substance of a regulation imposing specific obligations upon outside interests in mandatory terms ..., the information in the Development Document is required to be published in the Federal Register in its entirety, or, in the alternative, to be both reasonably available and incorporated by reference with the approval of the Director of the Federal Register."

See also PPG Industries, Inc. v. Costle, 659 F.2d 1239 (D.C.Cir. 1981).

An unpublished policy statement was at issue in Dean v. Butz, 428 F.Supp. 477, 480 (D.Hawaii 1977). This case involved an agency determination that security deposits for rental housing paid by a government agency should be considered as "income" for food stamp purposes, this determination being made by an unpublished letter. In holding this agency policy void for lack of publication, the Court held:

> "The Mellinger letter does not involve housekeeping operations nor adjudicatory opinions. It is a clarification of existing regulations. It, however, does have a significant impact upon a segment of the public, the members of the class here. If the monies for security deposits are counted as income to the members of the class, the class members must pay more for food stamps.... The effect of an increased cost for food stamps has a substantial impact upon their limited budgets. Therefore, under the Ninth Circuit's test, the regulation is of general applicability. Since the Mellinger letter was not published in the Federal Register, as required by 5 U.S.C. section 552(a)(1)(D), it is invalid."

The question before the court in Vigil v. Andrus, 667 F.2d 931, 938 (10th Cir. 1982), was the validity of the curtailment of a school lunch program for Indian children. Here, the Bureau of Indian Affairs administered a program whereby such lunches were provided to all Indian children regardless of need. This program was

transferred to the Department of Agriculture, which provided free lunches only to the needy. The challenge made regarding the non-publication of the transfer of the program to the Department of Agriculture and consequent elimination of certain children from the program was upheld and the unpublished transfer was declared void:

> "If a substantive rule or general policy is not published, parties without actual notice cannot be adversely affected by it.
>
> "Therefore, we find the BIA's policy changes invalid for want of publication. If the BIA wishes to eliminate nonneedy Indian school children from the free lunch program, it must comply with its current rulemaking procedures."

An unpublished Social Security claims manual which directly affected entitlement to Social Security benefits was found void in Herron v. Heckler, 576 F.Supp. 218 (N.D.Cal. 1983). The manual in question in this case provided for the reduction or elimination of Social Security benefits in the event the beneficiary owned property valued in excess of a certain amount. The claimant's argument that the manual's provision thus limiting benefits was void for want of publication in the Federal Register met with the approval of the District Court in this case:

> "The claims manual provisions clearly fall within the definition of 'rule' quoted above: they are an agency statement; they are applicable prospectively to a class of SSI beneficiaries generally and to the named plaintiff particularly; and by defendants' own admission in their memoranda, they are designed to implement, interpret and/or prescribe law. Moreover, the claims manual provisions are 'rules' as the term generally has been construed by the courts: they declare policies generally binding on the affected public; they provide specific standards to regulate future actions of the affected public; and they make a substantive impact on the rights and duties of persons subject to their limitations," Id., at 230.
>
> "In sum, the Secretary was required, by the express terms of the APA and the 'substantial impact' principle, to notify the public and to solicit comments before she promulgated the claims manual limitations at issue here. Her failure to comply with the notice and comment provisions of the APA renders the challenged limitations void and unenforceable," Id., at 232.

It is thus clear from the above cited and quoted cases, representative samples of the multitude of similar cases, that an agency's failure to publish any document (regardless of how named by the agency) which is designed to implement or prescribe law is a "rule" which is void and unenforceable.

NECESSITY TO PUBLISH INSTRUCTIONS

Within an agency, "instructions" may be promulgated and distributed to agency officers and employees informing them as to the manner and method of implementing and enforcing any particular law. If by chance these "instructions" likewise meet the definition of a "rule" as defined by § 551, and if the same be "substantive" as prescribed by § 552, they must be published in the Federal Register. Several cases have found such "instructions" to agency employees void for non-publication.

It appears that one of the first cases to deal with this issue was United States v. Morelock, 124 F.Supp. 932 (D.Md. 1954). This case concerned an act to regulate the production of wheat, which of necessity required agriculture officials to measure the amount of acreage devoted to wheat production. To accomplish this purpose, agency "instructions" given to agency employees outlined measurement procedures and the same required some affirmative acts on the part of farmers. When suit was instituted to force some dissenting farmers to permit measurement of their wheat crops, the farmers replied that their supposed duties under the act as set forth within the unpublished "instructions" were void. The District Court agreed:

> "But there is no provision in the Act or the Regulations imposing any duty on farm operators in connection with the visits of the reporters or other representatives of the county committee. The only obligation on farm operators in that connection is set out in Paragraph II D of Instruction No. 1006.... This instruction was not published in the Federal Register or otherwise brought to the attention of defendants before suit. It was, therefore, not binding on them," Id., at 944.
>
> "As we have seen, those Instructions were not published in the Federal Register, and therefore cannot impose any affirmative duty on defendants," Id., at 945.

During the height of the Viet Nam war, certain draft law regulations outlined a procedure whereby conscientious objectors would be inducted for civilian

service. But, the operation of this procedure concerning conscientious objectors was substantially varied by the issuance of a "Letter to All State Directors" and a temporary "instruction", both of which were not published in the Federal Register notwithstanding the fact that the same had an adverse impact upon such objectors. In Gardiner v. Tarr, 341 F.Supp. 422, 434 (D.D.C. 1972), upon challenge, these documents were found void as unpublished substantive rules:

> "While the pre-publication and publication sections of the Act and the implementing Executive Order do not further define what are considered to be 'Rules' and 'Regulations', it is inconceivable that policies intended to have the force and effect of the policies purporting to effect the Plaintiffs in this proceeding, may be considered anything other than 'Rules and Regulations', notwithstanding the label attached by Defendant, and may be applied to Plaintiffs or any affected registrant without having been published in a manner in accordance with the Act. Whatever Defendant has entitled these unpublished but written policies, they 'purport[s] to be an authoritative declaration of policy issued for the guidance of the [Selective Service] System's line officers....' Therefore, the letters and Temporary Instruction in question are as much 'regulations' as any administrative agency's standardized, enforced, and broad policy directives."

The same issue was raised in Piercy v. Tarr, 343 F.Supp. 1120 (N.D.Cal. 1972), which resulted in a similar holding.

The validity of an unpublished instruction affecting the food stamp program was at issue in Aiken v. Obledo, 442 F.Supp. 628 (E.D.Cal. 1977). While the food stamp program is federally funded and state administered, federal regulations establish the standards for eligibility. But, in this case, an indigent and eligible family was denied such assistance because of an unpublished "FNS (FS) Instruction 732-1, section 2313," which limited eligibility by a "collateral contact requirement and a 6 month rule." These limitations upon food stamp entitlement contained in "instruction" to employees administering the program were held void for want of publication:

> "Interpretative rules '... consist of administrative construction of a statutory provision on a question of law reviewable in the courts'.... They do not have the force of law....

> "The 'collateral contact' and 'six month' rules set forth in the instruction in question have the force of law....
>
> "Procedural rules are those that relate to the method of operation of the agency, while substantive rules are those which establish standards of conduct or entitlement..." Id., at 649.
>
> "Since it is undisputed that the 'collateral contact' rule was not so published, it was adopted in violation of notice and comment provisions of the APA and must be declared void and set aside," Id., at 650.

A similar problem regarding the food stamp program was raised in Anderson v. Butz, 550 F.2d 459 (9th Cir. 1977), which considered a different aspect of the unpublished "Food and Nutrition Service (FNS), Food Stamp (FS) Instruction 732-1," before the court in Aiken, supra. Here the unpublished instructions commanded that HUD rent subsidies should be considered as "income" for food stamp purposes. Finding a substantial impact upon recipients of food stamps as a consequence of the "rule" contained in the unpublished instructions, the Court declared such rule void and unenforceable. See also United States v. Shearson Lehman Bros., Inc., 650 F. Supp. 490, 496 (E.D. Pa. 1986); and United States v. Riky, 669 F. Supp. 196, 201 (N.D. Ill. 1987).

Thus, the above case authority clearly shows that "instructions" given to agency personnel which command the performance of an act by a member of the public or which limit entitlement to statutory benefits are subject to the publication requirement. If such "rules" found in agency instructions to agency personnel must be published, then likewise similar "instructions" given directly by the agency to the public must also be published on the grounds that the same similarly are "rules."

NECESSITY TO PUBLISH FORMS

As seen from the above cases, agency "rules," especially those which are not published, can appear in a variety of documents such as manuals, letters, instructions and other things. Additionally, forms used by agencies can fall within the ambit of a "substantive rule," especially those designed to implement a law, thus necessitating publication. Several cases have considered the issue of the consequence of non-publication of such an agency form.

In United States v. Two Hundred Thousand Dollars ($200,000) in United States Currency, 590 F.Supp. 866 (S.D.Fla. 1984), at issue was the validity of Customs Form 4790 (Currency Transaction Report), used in the enforcement of the Currency and Foreign Transactions Reporting Act. In this case, a man named Palzer had suffered the seizure of $200,000 by Customs when he entered the country and failed to submit form 4790. In the resulting forfeiture proceedings, Palzer intervened and asserted the invalidity of the form because it constituted an agency "rule" which had not been published in the Federal Register. In considering Palzer's claim, the court here found that regulations required the filing of a form, although the substance and contents of the information required to be supplied was not addressed in the regulations:

> "However, the regulations are incomplete in this case without the forms, because the regulations do not set forth the information a traveler will be required to furnish on the forms, specifically Form 4790," Id., at 869.

The Court found that the form itself constituted an agency "rule":

> "Interpretative rules are 'statements as to what the administrative officer thinks the statute or regulation means', ... whereas substantive rules, such as Form 4790, are issued by an agency pursuant to statutory authority which have the force and effect of law.... It is also apparent that Form 4790 is not a 'general statement of policy' as would be exempted from the publication requirement under 5 U.S.C. section 553(b). That Form 4790 is a 'legislative' rule rather than an interpretive one or a general statement of policy is apparent from the fact that the form was clearly intended to implement the pertinent statute ... and the regulation...; section 551(4) of the APA distinguishes agency statements designed to implement a law from those designed to interpret it," Id., at 870, 871.

Finding that the form in question was a "rule" which had not been published, the Court declared:

> "Given the scope of the information which Customs Form 4790 requires a traveler to furnish, as well as the Form's role as an implementing mechanism for the reporting regulations, Form 4790 is a substantive and implementing rule which falls within none of the acceptable exemptions under the APA and should have been

published in the Federal Register," Id., at 871, 872.

Another case addressing the issue of whether an agency form is likewise a "rule" requiring publication is United States v. Reinis, 794 F.2d 506 (9th Cir. 1986). In this case, Reinis was charged with money laundering and consequent failure to file the C.T.R. Form 4789. In a short opinion, and based upon the authority of the opinion noted immediately above, it was held that this form was a substantive rule which was invalid for failure of the agency to publish the same in the Federal Register. See also United States v. Cogswell, 637 F. Supp. 295, 298 (N.D. Cal. 1985); United States v. Gimbel, 830 F.2d 621, 626 (7th Cir. 1987); United States v. Risk, 672 F. Supp. 346, 358 (S.D. Ind. 1987), affirmed at 843 F.2d 1059 (7th Cir. 1988); and United States v. Hayes, 827 F.2d 469, 471, 472 (9th Cir. 1987).